From the Constitutionality of Juvenile Curfew Ordinances to a Children's Agenda for the 1990s: Is It Really a Simple Matter of Supporting Family Values and Recognizing Fundamental Rights?

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Abstract
The analysis of the constitutionality of curfew ordinances provides a window into a process that obfuscates rather than clarifies the nature of the constitutional problem. By defining the issue as one governed by rights, we limit our ability to comprehend the larger issue of how the Supreme Court has defined the relationship between minors, the family and society. The issue of the rights of minors as they relate to curfew ordinances offers a measure of solace by reducing the number of disturbing questions which concern cultural change and public policy decisions relating to the family. An understanding of this process requires that the legal issue, as to the constitutionality of juvenile curfews defined by the courts, be more fully understood. To that end, Part I will examine those decisions and their results. Part II will follow with an examination of the Supreme Court's vision of the American Family. Part III examines the extent to which the attempt to define the issue solely as one of constitutional rights represents a natural extension of the Court's view of the family and the Court's acceptance of the political and cultural assumptions underlying the establishment of the juvenile court system. These assumptions are particularly manifest in the Supreme Court's opinion in In re Gault. Throughout this section, the Court's view of the rights of minors and the importance of the family is juxtaposed with selected views of the Commission to demonstrate that, notwithstanding the radically different origins of the two bodies, the respective conclusions are remarkably similar. Finally, there are, hopefully, some lessons to be learned from this excursion into the realm of juvenile curfews.

Keywords
Minors, curfew, Constitution, liberty, family, rights

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FROM THE CONSTITUTIONALITY OF JUVENILE CURFEW ORDINANCES TO A CHILDREN'S AGENDA FOR THE 1990s: IS IT REALLY A SIMPLE MATTER OF SUPPORTING FAMILY VALUES AND RECOGNIZING FUNDAMENTAL RIGHTS?

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INTRODUCTION

In November of 1990, Atlanta, Georgia enacted a teen curfew ordinance in response to a series of late-night, drug-related killings of 25 youngsters.1 A spokeswoman for the Atlanta Police Department characterized the ordinance as an attempt to enforce parental responsibility by allowing the police to bring criminal charges against the parents of curfew violators. Parents of violators could face up to 60 days in jail and $1,000 in fines.2 The sponsor of the ordinance emphasized

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2. Id. The Atlanta juvenile curfew ordinance provides in pertinent part:

   It is unlawful for any minor 16 years of age or younger to loiter, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds or other public grounds, public places, public buildings, places of amusement, eating places, vacant lots or any place unsupervised by an adult having the lawful authority to be at such places, between the hours of 11 p.m. on any day and 6 a.m. of the following day; provided, however, that on Fridays and Saturdays the effective hours are between 12 midnight and 6 a.m. of the following day; and provided, that the provisions of this section shall not apply in the following instances: (a) When a minor is accompanied by his or her parent, or guardian or other adult person having the lawful care and custody of the minor; (b) When the minor is upon an emergency errand directed by his or her parent or guardian or other adult person having the lawful care or custody of such minor; (c) When the minor is returning directly home from a school activity, entertainment, recreational activity or dance; (d) When the minor is returning directly home from lawful employment that makes it necessary to be in the above referenced places during the proscribed period of time; (e) When the minor is attending or travelling directly to or from an activity involving the exercise of first amendment rights of free speech, freedom of assembly or free exercise of religion; (f) When the minor is in a motor vehicle with parental consent for travel, with interstate travel through the City of Atlanta, excepted in all cases from the curfew.

its protective rather than punitive nature: “Our children face a myriad of problems, and this is just one attempt, one tool to help them. A lot of parents have responded positively to the law, but the kids have complained that they are being targeted. We want them to understand that these limits are designed to protect and not to harass them.” All, however, were not as sanguine about the ameliorative effects of the curfew. Atlanta’s Police Chief, while supporting the ordinance, viewed it as a stop-gap measure. The ordinance was necessary until social service agencies could intervene and encourage parents to voluntarily get involved in controlling their children. In his view, city officials were compelled to act, given the urgency of the problem.

One senses from these comments a belief in the community that either Atlanta or its children, perhaps both, were under a state of siege. But, were Atlanta’s teenagers being victimized by drug dealers on the streets? Or, were these youngsters simply the unfortunate victims of parental neglect? The former suggests the need for crime control and prevention; the latter points to the need for punitive sanctions against parents who fail to meet their responsibilities. Is Atlanta’s response simply an isolated example? Can we simply dismiss it as one city’s response or overreaction to its problems?

Consider the response of the Washington, D.C. City Council to what was perceived as an epidemic of illicit drug sales and use on the streets of Washington. The Council passed a curfew aimed at protecting minors by reducing the likelihood that they would be victims or perpetrators of drug-related crimes. It was also viewed as an aid to parents in meeting their responsibility to exercise reasonable supervision over children entrusted to their care. Again, one is struck by the degree to which it is difficult to ascertain who is victim and who is perpetrator. If the attempt to “assist” parents in exercising their parental responsibil-

4. Id.
5. Davetta Johnson, a member of the Atlanta City Council, believed the problem represented, in part, a failure of parental responsibility. While acknowledging homelessness, hunger, illiteracy and unemployment as significant causes of social unrest, she also believed these problems had no immediate solution. See Davetta C. Johnson, Curfew Laws Protect our Children, USA TODAY, Nov. 27, 1990, at 10A. This harsh reality led her to conclude that the curfew protects children “and places the primary responsibility for keeping them out of harm’s way with the parents.” Id. For Ms. Johnson, the issue became a simple question with a self-evident answer: “Can and should a parent be held responsible for their children’s actions? I respond by asking, if not the parent, then who in our society is responsible for our children?” Id.
ity is successful, will the drug epidemic be reduced? If it is reduced, this suggests that minors are, if not the primary cause of the drug problem, at least a palpable one. Or is it the other way around? Minors are not necessarily a major cause of the drug epidemic. Yet, the failure of parents to exert parental authority may invariably lead to the victimization of children by those causing the epidemic.

Lest one believes that the current spate of curfews imposed upon minors is limited to large, densely populated, urban environments, consider the plight of David Simmons. David, a 15 year-old minor, was caught skateboarding with a friend at 10:35 p.m. in Panora, Iowa. Not only was David prohibited by local ordinance from being abroad at that hour, the ordinance charged David's parents with the responsibility of enforcing this prohibition. The City passed the ordinance in the interest of protecting minors from the national epidemic of drugs, and parents were designated the primary agents for the enforcement of the ordinance.

There are other indications that the concerns of these cities are neither isolated pockets of anxiety over drugs, nor limited to particular regions of the country. In this regard, it is helpful to consider some of the findings articulated by the National Commission On Children (the "Commission"). These findings suggest that drugs and curfew ordinances are merely symptomatic of deeper problems affecting American families. America is undergoing a fundamental change in the composition of its population, suggesting that problems concerning youth should, over time, diminish. The proportion of young people in the population is decreasing while there is a corresponding increase in the percentage of older people. Unfortunately, the composition of the younger population is also changing. A higher percentage of minority children are found in this group, and these children are least likely to succeed in America. These simple observations might lead one to conclude that curfew ordinances, particularly those enacted in larger cities, are directed at this ever increasing percentage of minority children. This view was partially articulated by one commentator on the Atlanta Curfew Ordinance when he observed that "adults periodically develop a sense that kids are out of control, and then turn to measures

8. Id. at 370.
9. NATIONAL COMM'N ON CHILDREN, BEYOND RHETORIC A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES (1991) [hereinafter NATIONAL COMM'N, BEYOND RHETORIC].
10. Id. at 16.
11. Id. at 16-17.
like curfews." 12 This general concern about children was narrowed to target what has been described as the "plight of black men and black children." 13 The curfew could be viewed as an explicit attempt to impose some form of social control over the group that is least likely to succeed in America. 14

But, what about David Simmons in Panora, Iowa? Were the same forces that presumably instigated the movement to pass the curfew ordinance in Atlanta also operative in Panora? Is Panora attempting to ameliorate the plight of black children? Perhaps Panora has a problem with its children, though not minority children. 15 Consider some of the additional observations made by the Commission on the difficulties faced by all children in America, though some experience them more acutely than others. An ever increasing number of children must care for themselves while their parents work. This fact is not lost on parents. According to a national survey conducted by the Commission, only 39% of parents believe they were spending the right amount of time with their children. Thirty percent believe they need a lot more time with their families, and 29% believe they require a little more time. 16 In addition, the Commission noted the existence of high risk behavior engaged in by one in four adolescents which may result in harmful long-term consequences. 17

The Commission did not simply limit itself to delineating the nature of the problem. Although not purporting to present a total solution to the issues raised by the report, the Commission believed that any solution must start with meeting the needs of children through the creation and support of stable families. By viewing the family as the core element that any solution must contain, the Commission adopted a well-recognized and accepted position on the relationship between society's ills, children and the role of the family in solving social problems. 18 Even Vice President Quayle articulated the same sentiments.

12. See Smothers, supra note 3.
13. Id.
14. Id.
15. The City of Panora, Iowa has a total population of 1,100. The minority population of the City is two (Native American) and the remaining 1,098 are white. BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUS. SUMM. OF POPULATION AND HOUS. CHARACTERISTICS, IOWA (1990).
17. Examples of high risk behavior include: committing acts of juvenile delinquency; drug and alcohol use; and early and unprotected sexual activity. Id. at 52-54.
18. Id. at 62. The Commission's report was not the first time that a national commission articulated a relationship between social ills and the family. In 1967, the President’s Commission on Law Enforcement and Administration of Justice reached a similar conclusion concerning.
when he pointed to an episode of *Murphy Brown*, a popular television series, as symptomatic of what is wrong with America. A combination of a breakdown in family structure and personal responsibility has lead to social anarchy and anti-family values such as those championed on *Murphy Brown*.19

Panora’s problem is, therefore, America’s problem, so to speak. The recent surge in the number of cities looking to implement or vigorously enforce existing curfews may be a response to a deeper feeling of desperation over what is happening to children and families in

the significance of the family in coping with the problem of juvenile delinquency:

The family is the first and most basic institution in our society for developing the child’s potential, in all its many aspects: emotional, intellectual, moral, and spiritual, as well as physical and social. Other influences do not even enter the child’s life until after the first few formative years. It is within the family that the child must learn to curb his desires and to accept rules that define the time, place, and circumstances under which highly personal needs may be satisfied in socially acceptable ways. This early training - management of emotions, confrontation with rules and authority, development of responsiveness to others - has been repeatedly related to the presence or absence of delinquency in later years . . .

Research findings . . . point to the principle that whatever in the organization of the family, the contacts among its members, or its relationship to the surrounding community diminishes the moral and emotional authority of the family in the life of the young person also increases the likelihood of delinquency.

The President’s Comm’n on Law Enforcement and Admin. of Justice, Task Force Report, Juvenile Delinquency and Youth Crime 45 (1967).

These observations are similar to those offered by yet another presidential commission which studied mental health. One of the task panels of the Commission observed that all of its recommendations were based upon principles reflective of certain values. Some of these values are:

- The viability and primacy of families, regardless of specific structure, as the basic units of our society and a major mental health resource, and the need to respect family forms in all of their diversity.
- The desirability of government policies that strengthen families and maintain family intactness as a primary goal, that encourage natural supports for families to the fullest possible extent before going on to intrusive interventions.
- The importance of giving parents appropriate influence in decision making about their children and in the policies and operating programs of social institutions that support, supplement, or substitute for families.

Task Panel Reports, Appendix to the Report to the President From the President’s Comm’n on Mental Health 567 (1978).

It is readily apparent that even though the Commission on Children was to lay the foundation for a new agenda on children and families, it was merely reiterating previously articulated views on values and the role of the family in America.

19. Vice President Quayle believed that America was experiencing a poverty of values, threatening the very foundation upon which the American family was built and leading to social anarchy. *Murphy Brown* was cited as an example of a decline in moral values. The protagonist’s decision to bear a child out of wedlock was seen as irresponsible behavior that ridiculed the importance of fatherhood. Vice President Quayle went even further and drew a connection between the civil unrest in Los Angeles and the disintegration of family values and structure which *Murphy Brown* and television programming either caused or exacerbated. See Michael Wines, *Views on Single Motherhood are Multiple at White House*, N.Y. Times, May 21, 1992, at A1.
America. The public's reaction to Atlanta's ordinance suggests that the ordinance represents more than a legal response to a particular issue. Rather, it is more akin to a political response to a cultural phenomenon — the loss of control by families over children and the plight of black youth. A curfew passed in this context may be more indicative of our anxieties rather than a reasoned response to a known and well-defined threat. A sensitive spot in the collective psyche of the community may have been touched by our perception of the changes occurring in American families and the curfew. If the ordinance does bear this direct relationship between anxieties and a response to them, one might expect these ordinances to meet with a wide degree of acceptance by the courts when their legitimacy is challenged.

However, recent decisions by the courts on the legality of curfew ordinances for minors have not consistently endorsed them. Courts have focused on the extent to which the ordinance trammels a minor's exercise of her constitutional rights. While the specific right alleged to have been violated may vary, the issue is the same: the extent to which the behavior of minors and adults are subject to different degrees of control by the state. The "rights" of minors appear to be on a collision course with the anxiety of adults. This problem has not escaped the view of commentators. The issue is generally phrased as the extent to which the constitutional rights of minors are coextensive with those of adults, and where they are not, on what basis may a principled distinction be drawn.

The constitutional validity of juvenile curfew ordinances raises the question of the extent to which social/cultural problems are formulated in ways that render them capable or incapable of legal solutions. Whether one looks to Panora, Atlanta or Washington, D.C., the curfew

20. See e.g., Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981); People ex rel. J.M., 768 P.2d 219 (Colo. 1989); City of Milwaukee v. K.F., 426 N.W.2d 329 (Wis. 1988).
21. See e.g., Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989) (finding that a minor's First Amendment rights of expression and association were entitled to the same degree of protection as an adult's rights).
grew out of a community's perception that a law was needed to impose some type of control over the behavior of minors. And, quite significantly, parents must bear some responsibility; either because they have failed to prevent the behavior prior to intervention by the state, or they are charged with some responsibility in enforcing the curfew. This charge to parents and limitation placed upon the behavior of minors occurs against a constitutional backdrop that places limitations upon the extent minors may, in fact, be constrained in their behavior, and their parents told how to manage the affairs of the family.

Typically, the commentators who have examined the issues surrounding the legality of curfew ordinances have limited their analysis to ascertaining whether minors have rights that are coextensive with those of adults. This will not be the focus of this Article. This Article is not an attempt to explicate previously undiscovered or ill-defined rights. Quite frankly, this Article is concerned with the unsettling feelings one cannot help but experience given the almost daily reports in the newspapers of violence committed by or against children. One's immediate intuitive response is to question whether a curfew ordinance could stem the tide of woe which children are experiencing. At a very basic level, imposing a curfew requirement upon minors and holding parents responsible for a violation presupposes that there are parents who are present to be held responsible. The rise of the "zero parent families" calls into question the applicability of these ordinances to minors who are perhaps most vulnerable to the evils the ordinance is supposed to eliminate. Somehow the issue of rights — whether children have a constitutional right commensurate with that of adults to be upon the streets at night — appears all too distant from offering any solution to the pervasive and imminent problems we face.

This less than cerebral response to a legal question does have some value. Our relationship with children and the institutions in which they are raised (families) are part of our culture. Since one function of culture is to make our world more intelligible to us, any challenge to or change in such a significant institution is likely to emit emotional

23. See supra note 22.
24. The term "zero parent families" refers to the living arrangements of children who are not with either their mother or father. High concentrations of these children are occurring with increasing frequency within many urban, inner-city areas. It is estimated that in 1990 nearly 10% of American children lived in households headed by someone other than a parent. This figure is up from 6.7% in 1970. See Jane Gross, Collapse of Inner-City Families Creates America's New Orphans, N.Y. TIMES, Mar. 29, 1992, at 1.
shock waves experienced both at an individual and community level. Curfew ordinances and the evil they are intended to eliminate or control may be a manifestation of cultural seismic activity. This is because "culture survives principally . . . by the power of its institutions to bind and loose men in the conduct of their affairs with reasons which sink so deep into the self that they become commonly and implicitly understood . . . ." 26 If our understanding of children and the institutions that shape them is changing, implicit understanding is reduced and the search for new meaning and control begins. The analysis of the constitutionality of curfew ordinances provides a window into a process that obfuscates rather than clarifies the nature of the problem. By defining the issue as one governed by rights, we limit our ability to comprehend the larger issue of how the Supreme Court has defined the relationship between minors, the family and society. The issue of the rights of minors as they relate to curfew ordinances offers a measure of solace by reducing the number of disturbing questions which concern cultural change and public policy decisions relating to the family.

An understanding of this process requires that the legal issue, as to the constitutionality of juvenile curfews as defined by the courts, be more fully understood. To that end, Part I will examine those decisions and their results. Part II will follow with an examination of the Supreme Court's vision of the American Family. 27 Part III examines the extent to which the attempt to define the issue solely as one of constitutional rights represents a natural extension of the Court's view of the family and the Court's acceptance of the political and cultural assumptions underlying the establishment of the juvenile court system. These assumptions are particularly manifest in the Supreme Court's opinion in In re Gault. 28 Throughout this section, the Court's view of the rights of minors and the importance of the family is juxtaposed with selected views of the Commission to demonstrate that, notwithstanding the radically different origins of the two bodies, the respective conclusions are

26. Id. at 2.

27. The Supreme Court has not addressed the question of whether municipalities may, consistent with the Constitution, impose a curfew ordinance on minors that would be unconstitutional if imposed upon adults. However, the Court was presented with the opportunity to do so in Bykofsky v. Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), aff'd, 535 F.2d 1245 (3d Cir. 1976), cert. denied, 429 U.S. 964 (1976). Bykofsky involved a challenge to a juvenile curfew ordinance which made it unlawful for minors to be on the streets during certain hours. The ordinance was upheld by the lower court. Certiorari was denied and Justice Marshall dissented from the denial. He believed the case presented a constitutional issue which the Court should address, i.e., the extent to which the due process rights of minors are entitled to less protection than those of adults. 429 U.S. at 965.

remarkably similar. Finally, there are, hopefully, some lessons to be learned from this excursion into the realm of juvenile curfews.

I. THE EVOLVING VIEW OF JUVENILE CURFEW STATUTES

A. THE RISE AND FALL OF THE PRESENCE/LOITERING DISTINCTION

Juvenile curfew ordinances are not new.29 What is different about the recent emphasis upon them is the type of legal challenge mounted against them. Early decisions either affirming or denying the legitimacy of a curfew ordinance turned on such distinctions as whether the ordinance prohibited minors from being present on the streets or in public places, as opposed to loitering.30 The constitutionality of the ordinance hinged upon whether it prohibited minors from being present at a particular location during the hours of the curfew, or whether the ordinance proscribed juveniles from remaining at a particular location.31 It was impermissible to proscribe the presence of a juvenile in public places during certain hours. If, however, presence changed into remaining at a particular location for an extended period of time, that conduct could be proscribed.32

It is readily apparent how the practical answer to the constitutional question depended upon how ambulatory the juvenile was or at what point the officer enforcing the statute encountered the juvenile. In practice, the enforcement of these two types of ordinances created a distinction with little difference.33 Indeed, it is very difficult to see how any meaningful distinction could be made. Regardless of whether the juvenile was present in a public place or remained there, neither activity is inherently suspicious and obviously are not criminal. The activity is proscribed because of the actor's identity, as opposed to the nature of

29. For a brief history of the origin of curfew ordinances generally and juvenile curfew ordinances in particular, see Note, Curfew Ordinance, supra note 22, at 67 n.5.
31. See, e.g., Thistlewood, 204 A.2d at 692.
32. The key to the distinction lies in the definition of "remains." In People v. Walton, 161 P.2d 498 (Cal. App. Dep't Super. Ct. 1945), the court adopted the dictionary definition of remains. Thus, to remain means "[t]o stay behind while others withdraw;" "to tarry;" "to stay." Id. at 501. From this definition the court concluded that the ordinance was aimed at preventing minors from staying unnecessarily upon the streets. However, it does not restrict minors from using the streets while in the process of going to or from business or amusement. Id. This definition narrows the focus of inquiry to answering the question of to what extent the minor is using the street or other public place as the focus of her activity or is using it as a means of achieving some other end, i.e., as a means of conveyance to some other location or activity.
33. See Note, Curfew Ordinances, supra note 22, at 73.
the conduct. A juvenile who loiters is believed to be more prone to engage in illegal activity.34

Even this assumption, no matter how intuitive its appeal, cannot withstand sustained scrutiny. Mere presence upon the streets during the proscribed hours may equally indicate a juvenile who is neither prone to participate in illegal activity nor is preparing to engage in criminal conduct. Given the fact that the identity of the actor and not her overt behavior renders the conduct suspicious, it is easy to see why a doctrine based upon the presence/loitering distinction was likely to collapse under the weight of police enforcement. One officer's identification of loitering could be another's definition of presence. In both instances, no criminal or attempted criminal activity is observed. Thus, this initial attempt to define the constitutionality of juvenile curfew statutes rested upon a distinction between types of conduct that in reality may not have existed, and if they did, were often too subtle to discern by police officers charged with enforcing the ordinance.35

It was not until the mid-1970s that the courts abandoned the presence/loitering distinction. The focus shifted to whether the ordinance infringed upon the liberty interests of juveniles. This approach resulted from two factors. The Supreme Court began to specify the areas of a minor's life which could not be subject to intrusive state regulation. In addition, the Court delineated procedural protections which must be extended to minors even when the State could lawfully subject a minor to state control.36

34. Curfew ordinance violations, regardless of the penalty imposed, are therefore status offenses. Liability is based upon the identity of the offender. If an adult was engaged in the same behavior there would be no violation. See S. Korbin et al., Offense Patterns of Status Offenders, in CRITICAL ISSUES IN JUVENILE DELINQUENCY 203 (D. Shichor & D. Kelly, eds. 1980). The remaining/presence distinction makes more sense when one understands the assumptions underlying status offenses. Special beliefs and expectations are associated with childhood. Childhood is therefore more than a particular biological stage in life. It represents a social status that has meaning only within a particular social context and in relation to other statuses. See LAMAR T. EMPEY, AMERICAN DELINQUENCY, ITS MEANING AND CONSTRUCTION 5 (1978). Juvenile curfews presuppose that children using the street for any other purpose than as a means of conveyance are likely to get into trouble. Whether or not this is empirically demonstrable is less important than the social beliefs and expectations concerning appropriate behavior for minors. It is more a reflection of a particular view of childhood rather than a device formulated from rational, empirically tested hypotheses. Id. at 5.

35. See Note, Curfew Ordinances, supra note 22, at 73, 96-97, 99.

36. See generally Bellotti v. Baird, 443 U.S. 623 (1978) (holding that a state requirement of parental consent in every instance involving a request by an unmarried minor to have an abortion performed on her is unconstitutional); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (state law banning the sale of nonprescription contraceptives to minors held unconstitutional); Breed v. Jones, 421 U.S. 519 (1975) (Double Jeopardy Clause bars subsequent prosecution for crime that served as the basis for adjudicating a minor delinquent); Goss v. Lopez, 419
B. THE SEARCH FOR THE RIGHT OF MINORS TO BE ABROAD AT NIGHT

Waters v. Barry\textsuperscript{37} illustrates the current approach employed by courts in assessing the constitutionality of juvenile curfew ordinances. In Waters, the City Council of Washington, D.C. passed an ordinance designed to provide for the welfare of minors by reducing the likelihood that they would be the victims or perpetrators of criminal acts. It was also believed that the ordinance would assist parents in fulfilling their obligation to exercise reasonable supervision over their children.\textsuperscript{38} An 11:00 p.m. to 6:00 a.m. curfew was imposed which prohibited minors from remaining in certain public places and made it unlawful for parents to allow their children to violate the curfew.\textsuperscript{39}


\textsuperscript{38} Id. at 1127.

\textsuperscript{39} The ordinance listed its purposes as: "(1) [r]educing the likelihood that minors will be the victims of criminal acts during the curfew hours; (2) [r]educing the likelihood that minors will become involved in criminal acts or exposed to drug trafficking during the curfew hours; and (3) [a]iding parents in carrying out their responsibility to exercise reasonable supervision of the minors entrusted to their care." Id. at 1141. The curfew was limited to persons under the age of 18 and was in effect between the hours of 11:00 p.m. to 6:00 a.m. each day except Friday and Saturday evenings when the curfew commenced at 11:59 p.m.

It was unlawful for any minor to "remain in or upon any street, sidewalk, park or other outdoor public place in the District during the curfew hours." Id. It was unlawful for a parent not "knowingly to permit or, by negligent failure to exercise reasonable control, allow his or her minor child to remain on any street, sidewalk, park or other outdoor public place within the District during the curfew hours." Id.

Finally, certain enumerated exceptions were allowed. The curfew did not apply to: "(1) [w]hen a minor is accompanied by a parent; (2) [w]hen a minor is returning home by way of a direct route from an activity that is sponsored by an educational, religious, or non-profit organization within 60 minutes of the termination of the activity, if the activity has been registered with the Mayor in advance; (3) [w]hen a minor is traveling in a motor vehicle; (4) [w]hen a minor is acting within the scope of legitimate employment . . . ." Id. There was also an exception which allowed for travel if necessary to accomplish certain additional purposes delineated in the ordinance. Id.

Even though the ordinance used the term "remain," it did not play any role in the assessment of the constitutionality of the statute. Apparently, the Court either rejected or saw no relevance in the presence/remaining distinction previously employed by courts in their constitutional analysis of curfew ordinances. See supra notes 30-34 and accompanying text. Moreover, by ignoring the presence/remaining distinction and focusing upon the rights of minors, the ordinance could no longer be justified as simply a status offense. That is, the ordinance could
The district court held that the ordinance was an unconstitutional infringement of the First Amendment rights of expression and association, as well as a violation of a Fifth Amendment fundamental liberty interest. The court cited *Papachristou v. City of Jacksonville* as authority for the position that the Constitution recognized a liberty interest in using public streets for presumably no other reason than to simply enjoy wandering about town. A clear restriction was placed upon the nocturnal activity of juveniles and *Papachristou* demonstrated that the same type of activity, when engaged in by adults, was constitutionally protected activity that could not be regulated in the manner attempted by the City Council. After the *Waters* Court identified the right involved, the question became whether a minor's liberty interest in nocturnal activity should receive less protection than that of an adult. To answer this question, the Court adopted the three factor test used in *Bellotti v. Baird*. Notwithstanding the different factual context in which *Bellotti* arose, the *Waters* Court found the test appropriate for determining when a state may be less deferential to the rights of minors and may subject their conduct to a higher degree of regulation.

The first *Bellotti* factor, which requires inquiry into the peculiar vulnerability of minors, provided insufficient justification for the ordinance. Juveniles were not exposed to any danger peculiar to them. Drugs and the violence afflicting the streets of Washington, D.C. posed not be justified on the basis of it being a codification of assumptions concerning childhood and the way minors behave. See *supra* note 34 and accompanying text. The search was now for some rationally and empirically based justification for the ordinance.

40. 405 U.S. 156 (1972).

41. 443 U.S. 622 (1979). *Bellotti* involved a Massachusetts statute which required parental consent before an abortion could be performed on an unmarried woman under the age of 18. If one or both parents refused consent, the abortion could be obtained by order of a Superior Court Judge "for good cause shown." The state court construed the statute as requiring consent for every nonemergency abortion unless a parent was unavailable to give consent. If a parent was available he/she must be given notice of any judicial proceeding brought by a minor to obtain consent for an abortion. Even if the minor were found capable of making and made an informed and reasonable decision to have an abortion, the court could withhold its consent on a finding that a parent's or the court's own contrary decision is a better one.

The statute was found to be unconstitutional. Justice Powell acknowledged in his plurality opinion that children are not beyond the protection of the Constitution, but the rights of children have never been equated with those of adults. The status of minors under the law is unique and constitutional principles must be applied to them with "sensitivity and flexibility." *Id.* at 633-34. Instead of following any rigid formula for determining when the constitutional rights of minors are the same as adults', the Court relied upon three factors in assessing whether the constitutional rights of minors must be accorded the same protection as 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." *Id.* at 634.
a threat to everyone; adults as well as juveniles. The ordinance did not fare any better under the second Bellotti factor. A juvenile’s decision not to remain in her home during the curfew hours was not a decision so difficult as to be beyond the ability of a minor to make without intervention by the District. Leaving one’s home during curfew hours does not inevitably lead to such harmful consequences as to justify the District’s decision to intervene in that decision-making process and limit the discretion of the juvenile. The final factor, the importance of the parental role in raising children, was equally unpersuasive. While conceding the accuracy of the District’s assumption that parental control over children’s activities has diminished due to the dissolution of the traditional family unit, the Court found the District’s response unwarranted. The problem was that “this assumption ignores the many thousands of the District’s families for whom the ideal of family unity and parental control still lives.” Ironically, the assumption exacerbated rather than ameliorated the problem. However true the assumption may be in some if not many instances, it undermined parental authority by arrogating to the District the decision-making authority normally reserved for parents.

The ordinance was also vulnerable to an equal protection challenge under the Fifth Amendment. The ordinance distinguished between juveniles and nonjuveniles, subjecting the conduct of juveniles to a greater degree of state control. Here again the district court encountered the question whether the classification and restrictions trammelled a fundamental right protected by the Constitution. Since the ordinance burdened the exercise of the First Amendment right of association and a Fifth Amendment fundamental liberty interest, the constitutionality of the ordinance had to be reviewed under the more demanding strict scrutiny standard. Only a compelling state interest could justify the classification scheme and the classification chosen had to bear an intimate relationship to the problem the District sought to alleviate.

Even though the district court found that the purpose of the ordinance was to advance a compelling state interest, there was no logical relationship between the classification chosen and the compelling interest. The purposes of the ordinance — protection of juveniles from

42. Waters, 711 F. Supp. at 1137.
43. Id.
44. Id.
45. Id.
46. Id. at 1137-38.
47. Id. at 1139.
harm, insulation from the evils of the street, and reduction of street violence — were not advanced by the juvenile/nonjuvenile classification.\textsuperscript{48} For the \textit{Waters} Court, it was sheer naivety to assume that those youths who would leave their homes at night to engage in the sale or use of drugs, or street violence, would be deterred from doing so by the existence of a curfew ordinance. Street violence — homicide — is illegal and presumably a juvenile who was undeterred by the existing criminal sanctions would not be deterred by the less severe sanctions imposed by the curfew.\textsuperscript{49} Only those juveniles already inclined to obey the law would be predisposed to follow the command of the ordinance. Moreover, of all the juvenile killings in the District in 1988, arguable none would have been prevented by the enactment and enforcement of the ordinance.\textsuperscript{50}

The approach adopted in \textit{Waters} was not unique. Prior to the \textit{Waters} decision, the Fifth Circuit Court of Appeals applied the same type of analysis in \textit{Johnson v. City of Opelousas},\textsuperscript{51} and the \textit{Waters} Court cited \textit{Johnson} in support of its position. \textit{Johnson} also involved a challenge to a curfew prohibiting a minor from being present in public during certain hours unless she were accompanied by her parent, tutor or other responsible adult.\textsuperscript{52} The curfew was challenged by a mother and her son as being overbroad. It swept into its regulatory ambit conduct which constituted exercise of the freedoms of expression and association protected by the Constitution.\textsuperscript{53} As in \textit{Waters}, the Court initial-

\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.}
\textsuperscript{50} In 1988, 7% of the murder victims in the District were juveniles (26 out of a total 372). However, none of the juveniles killed were "clearly killed at a time or place that he or she would not have been had the curfew been in effect." \textit{Id.}
\textsuperscript{51} 658 F.2d 1065 (5th Cir. 1981).
\textsuperscript{52} The ordinance provided in part:

\begin{quote}
It shall be unlawful for any unemancipated minor under the age of seventeen (17) years to travel, loiter wander, stroll, or play in or upon or traverse any public streets, highways, roads, alleys, parks, places of amusements and entertainment, places and buildings, vacant lots or other unsupervised places in the City of Opelousas, Louisiana, between the hours of 11:00 p.m. on any Sunday, Monday, Tuesday, Wednesday or Thursday night and 4:00 a.m. of the following day, or 1:00 a.m. on any Friday or Saturday night and 4:00 a.m. of the following day, all official time of the City of Opelousas, Louisiana, unless the said minor is accompanied by his parents, tutor or other responsible adult or unless the said minor is upon an emergency errand.

Any minor violating any of the provisions of this section shall be deemed a neglected child, ... and such minor and his parents, tutor or other adult having the care and custody of such minor shall be dealt with under proper procedure in any juvenile court having jurisdiction over such child.
\end{quote}
\textit{Id.} at 1067 n.1 (citation omitted).
\textsuperscript{53} \textit{Johnson}, 658 F.2d at 1071.
ly determined whether or not protected rights were involved, then as­
certained whether the state had greater authority to regulate a minor’s
exercise of these rights. Once again, Bellotti provided the standard for
assessing the legitimacy of the state’s actions.

None of the Bellotti factors were found to justify the curfew’s
restrictions. There was no showing that juveniles were peculiarly vul­
nerable while traveling the streets to attend various “bona fide orga­
nized activity during the nighttime.” The associational, employment
and travel activities conducted by juveniles during the nighttime did not
involve any critical decisions which would justify the state’s intru­
sion. The appellate court conceded that the state may have a legiti­
mate concern over the presence of juveniles on the streets at night.
However, the Johnson Court concluded that the parents, not the state,
should determine whether juveniles may engage in the type of night­
time activity proscribed by the ordinance.

The result and approach taken in Waters and Johnson have re­
ceived the support of some commentators and other courts. But,

54. Id. at 1073.
55. Id.
56. Id. at 1073-74. The court placed special emphasis upon how broad the ordinance was:
"under this curfew ordinance minors are prohibited from attending associational activities such
as religious or school meetings, organized dances, and theater and sporting events, when reason­
able and direct travel to or from these activities has to be made during the curfew period." Id.
at 1072. Presumably in response to this kind of criticism, the District of Columbia provided
such an exception in its ordinance. See Waters, 711 F. Supp. at 1141-42. However, even these
exceptions were insufficient to save the ordinance in Waters. Even with its exemptions the
ordinance reached every “innocent juvenile” in the District. Id. at 1136. “Every juvenile in the
District of Columbia would be arrested if he or she sought to wander the monuments at night,
or if he or she sought to gaze at the stars from a public park.” Id. Waters, therefore, is much
broader in scope than Johnson. Johnson offered no opinion on the legality of an ordinance that
provided sufficient exceptions. See Johnson, 658 F. 2d at 1072. However, Waters suggests that
an ordinance with exceptions is still constitutionally inadequate. Waters does not necessarily rule
out the possibility of crafting a valid ordinance with exceptions, but it does leave one to won­
der how such an ordinance could be drafted to allow for a curfew broad enough to allow for
“star-gazing.”

It does not take much reading between the lines to see that the court in Waters was re­
jecting the status offense nature and assumptions undergirding the curfew ordinance. See supra
notes 34, 39 and accompanying text. The court was simply unwilling to equate juvenile noctur­
nal activity with criminality. In fact, the court was “certain” that the number of innocent
juveniles abroad at night far exceeds the number prone to commit crimes. Waters, 711 F. Supp.
at 1136. Thus juveniles are as free as adults to star-gaze and this behavior by juveniles is no
more indicative of anti-social or suspicious behavior than it would be by adults.

57. See, e.g., McCollester v. City of Keene, 586 F. Supp. 1381 (D.N.H. 1984) (using the
three factor test in Bellotti to ascertain the legitimacy of constraints placed upon nocturnal
activity of juveniles that would not be constitutionally valid if applied to adults); Allen v. City
the state did not have a compelling interest justifying a curfew ordinance for minors); Note,
there is no consensus on the issue of whether these ordinances are constitutionally permissible. For example, in City of Panora v. Simmons,58 the Iowa Supreme Court's identification of the constitutional issue59 was similar to the views expressed in Waters and Johnson. The court agreed that the ordinance, if applied to adults, would restrain the exercise of fundamental rights. In Simmons, the rights at issue were those of interstate travel and the right to "wander and stroll about town."60 A further point of agreement between the cases is the Simmons Court's reliance upon Bellotti to provide the framework within which to assess the degree of deference that must be shown to the juvenile's rights. After this point, Simmons parts company with Waters.

The Iowa Court prefaced its Bellotti analysis with the observation that the United States Supreme Court acknowledged the existence of a heightened state interest in regulating the activities of minors on city streets. The Iowa Court cited Prince v. Massachusetts61 as authority


58. 445 N.W.2d 363 (Iowa 1989). As in Waters, the ordinance restricted the nocturnal activity of minors. It was unlawful "for any minor to be or remain upon any of the alleys, streets or public places or places of business and amusement in the city between the hours of ten (10) o'clock p.m. and five (5) o'clock a.m. of the following day." Id. at 364. Exceptions were provided for minors accompanied by a guardian, parent or other person charged with the care and custody of the minor. Minors who were traveling from their residence to any approved place of employment, church, municipal or school function were also exempt. Id. And, it was unlawful for a parent to allow a minor to be at any of the proscribed places during the proscribed hours. Id.

59. The statute was attacked as an unconstitutional invasion of the right to gather, walk or loiter in the city. Id. at 366-67. The Court believed the key issue in the case was whether the ordinance implicated a juvenile's fundamental right to engage in these activities. If a fundamental right were involved, the level of judicial scrutiny brought to bear on the statute would be raised from a rational relationship test to that of strict scrutiny. Id. at 367.

60. Id. The right to "wander and stroll" was found in the Supreme Court's decision in Papachristou. See Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Waters cited and relied upon Papachristou. See Waters, 711 F. Supp. at 1134. Johnson did not explicitly rely upon Papachristou but identified the right to travel freely within a state and the right to associate freely as implicated by the ordinance. See Johnson, 658 F.2d at 1072. However one characterizes the rights involved in the three cases, all of the courts recognized that the ordinance, if applied to adults, would implicate a fundamental right. Thus, any distinction between the cases cannot rest upon the right itself but must be due to the court's analysis of whether the right, when exercised by juveniles, retained its "fundamental" and protected character.

61. 321 U.S. 158 (1944). Prince involved a challenge to a Massachusetts child labor statute prohibiting minors from selling newspapers and magazines on public streets. It was also unlawful for anyone to provide magazines or newspapers to minors which he knew the minor intended to sell. Sarah Prince was convicted of violating the statute when she allowed a minor, over whom she had legal custody, to distribute religious material on a public street. The statute was challenged as a violation of Ms. Prince's First Amendment right to freedom of religion and a violation of her parental rights as secured by the Due Process Clause of the Fourteenth
for this proposition, which provided the backdrop against which the court assessed the applicability of the Bellotti factors. In the Iowa Court's view, youths abroad at night are more vulnerable to crime and peer pressure than adults. This peculiar vulnerability combined with a minor's immaturity lead to delinquent acts or involvement in drug use.\(^6^2\) The state's exercise of control over a minor's freedom of movement also had the beneficial effect of promoting the important role of parents in child-rearing by reinforcing parental authority and encouraging parents to take an active role in supervising their children.\(^6^3\) In effect, the same test applied to virtually the same restrictions leads to diametrically opposed results. And, the Iowa Supreme Court's analysis cannot be dismissed as an aberration. Other courts have assessed the validity of curfew ordinances and reached a result in accord with Simmons.\(^6^4\)

II. THE SUPREME COURT'S VISION OF THE AMERICAN FAMILY

A. THE TRADITIONAL FAMILY

The conflicting results reached by the courts should not be surprising. Indeed it is unavoidable given the United States Supreme Court's stance on how states must determine whether a minor's constitutional rights equate with those of an adult. Bellotti does not represent a comprehensive theory explaining precisely when and on what basis the rights of a minor are coextensive with those of an adult. At best, Bellotti represents a catalogue of factors the Supreme Court found significant in its previous decisions assessing whether or not a state

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62. Simmons, 445 N.W.2d at 368.
63. Id.
may treat minors differently from adults. This approach is mandated by what the Court articulated as the unique role of the family in society.\textsuperscript{65} The inconsistency between \textit{Waters} and \textit{Simmons} is attributable to what the Supreme Court viewed as the need for sensitivity and flexibility in applying constitutional principles to an institution as unique and important as the family.\textsuperscript{66} Since it is the family’s unique role that drives the constitutional analysis of \textit{Bellotti} and the analysis of curfew ordinances, a critical question is, “How does the Court define the family’s role?”

After reviewing decisions relating to families and the relationship between families and the state, the Court asserted that certain principles emanate from these decisions. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder ( . . . [a]nd it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter).”\textsuperscript{67} The constitutional recognition and protection of the family’s sanctity is based upon an acknowledgment that the family is deeply rooted in the American tradition and performs a function peculiar to it. In \textit{Moore v. City of East Cleveland},\textsuperscript{68} Justice Powell observed that “[i]t is through the family that we inculcate and pass down many of the most cherished values, moral and cultural.”\textsuperscript{69} These values include those attributes necessary for a democracy, such as elements of good citizenship and preparation for meaningful and rewarding participation in a free society.\textsuperscript{70} Implicit in these views is the notion that families stand between society and the individual. It is from this vantage point that the family serves as a kind of membrane through which cultural values and traditions are filtered and assimilated by children.\textsuperscript{71}

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\textsuperscript{65} \textit{Bellotti}, 443 U.S. at 634.  
\textsuperscript{66} \textit{Id}.  
\textsuperscript{67} \textit{Prince}, 321 U.S. at 166.  
\textsuperscript{68} 431 U.S. 494 (1977). In \textit{Moore}, a city ordinance was challenged as a violation of the Due Process Clause of the Fourteenth Amendment. The ordinance limited the occupancy of dwelling units to members of a single family. However, the definition of family effectively precluded some related family members from living together. In a plurality opinion, Justice Powell found the ordinance violated the Fourteenth Amendment.  
\textsuperscript{69} \textit{Id}. at 503-04.  
\textsuperscript{70} See \textit{Bellotti}, 443 U.S. at 638-39.  
\textsuperscript{71} The family is charged with the crucial responsibility of preserving society and the state. Yet, the state acts most judiciously when it abstains from interfering in the workings of the family. Self-preservation is achieved by noninterference, or a kind of passivity which seems inconsistent with protecting such a significant interest as self-preservation. \textit{But see Smith v.}
Moreover, the Court has made it clear that the process of acculturation occurring in families is not biologically rooted. The mere fact of a biological relationship between the parent and child plays little if any role in preparing children for their responsibilities in life. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationships."\textsuperscript{72}

\footnotesize{Organization of Foster Families, 431 U.S. 816, 844 (1977), and Lehr v. Robinson, 463 U.S. 248 (1983) (foster families may perform significant familial functions similar to biological families but are subject to a higher degree of state regulation and intervention). At a very basic level it appears that the Court believes if the family is left alone it will do the "right thing" and make the "right choices" that support basic values and good citizenship. Support for this proposition is found in the continuous existence of the traditional family (as defined by the Court), a stable society, and a democratic state. These seemingly self-evident propositions provide the Court's position with an intuitive appeal. The Court's conclusions appear natural and irrefutable. After all, how can one argue with the way things are and the way they have always been? See Morton J. Horowitz, The History of the Public/Private Distinction, 130 U. PA. L. REV. 1423, 1427 (1982) [hereinafter Horowitz, The History]. Perhaps the greatest power of this formulation is found in its acceptance at a level that is "implicitly understood" as a cultural phenomenon. It is, therefore, rarely, if ever, consciously questioned. See supra notes 25-26 and accompanying text.

Moreover, even if we assume that noninterference is in fact the position adopted by the state, the Court does not explain exactly how the family does the "right thing" and makes the "right choices" when it is left to its own devices. It is suggested that families are able to inculcate moral standards, religious beliefs, and elements of good citizenship by "teaching, guiding, and inspiring by precept and example." See Bellotti, 443 U.S. at 637-38. Presumably this process provides both the substantive standards and procedural mechanisms by which the family performs its pivotal role in preserving the state and society. Exactly where these moral standards originate and whether they need to be uniformly accepted by all families or certain families is never explained by the Court.

\textsuperscript{72} Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977) (quoting Wisconsin v. Yoder, 406 U.S. 205, 231-33 (1972)). In Smith, the Court acknowledged that a foster family may have a constitutionally protected liberty interest capable of violation by a state which adopts inadequate procedures for determining when to remove a child. However, notwithstanding the emotional attachments that may develop in a foster family, the Court identified an important distinction between a biological family and a foster family. The latter has its origins in state law and contractual arrangements. Id. at 845. Owing to its origins in "positive law," foster families are from the outset formed in partnership with the state. The state, because of its involvement from the beginning, may place limitations upon the rights and expectations of the participants in that familial relationship. Id. at 845-46. Even though the Court recognizes the importance of familial relationships and the significant role these relationships play in securing the future and integrity of society, a state's involvement in the creation of these relationships renders them vulnerable to subsequent state intervention.

Lehr v. Robertson, 463 U.S. 248 (1983), is another example of the Court's view of the family as a system of emotional attachments and relationships rather than exclusive biological kinship. The Court rejected the claim of a father that the Due Process Clause was violated by a state statute for failure to provide him with notice of the adoption of his child who was born out of wedlock. For the Court, the significance of the liberty interest at stake was not the
Public schools are another institution in which minors are likely to spend a great deal of time. The Court views public schools as performing an assimilative role closely resembling that performed by families. Public schools obviously are not families, but the Court's description of them leaves little doubt that schools are akin to families in preserving those values most cherished in society. Schools prepare individuals for participation in society and transmit values. They are perceived as an "assimilative force" in harmonizing diverse and disparate elements in society.\textsuperscript{73} Using virtually the same language employed in describing the historically significant function performed by families, the Court endorsed the view that public schools "inculcat[e] fundamental values necessary to the maintenance of a democratic political system . . . ."\textsuperscript{74} Thus, two of the more significant institutions in the lives of minors are charged with similar responsibilities, although one acts in the private realm; the other is explicitly public.

\begin{quote}
father's biological parentage, but whether there existed an ongoing relationship between the father and the child. No such relationship existed and his liberty interest was correspondingly reduced. \textit{Id.} at 260-65.
\textsuperscript{74} \textit{Id.} at 77. The Court explicated its view of the significant role of teachers in the lives of students as follows:

Within the public school system, teachers play a critical part in developing a student's attitude towards government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the student's experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students . . . . Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.
\textit{Id.} at 78-79 (footnotes omitted).

Except for the word "teacher," the quote sounds very similar to the Court's comments about the significance of the family. \textit{See supra} notes 69-72 and accompanying text. This close identity of purposes between schools and families is due in part to the compulsory education system serving to "Americanize" each successive wave of European immigrants. \textit{See Christopher Lasch, Culture of Narcissism} 232-37 (1978). \textit{See also} Samuel Bowles, \textit{Unequal Education and the Reproduction of the Social Division of Labor}, in \textit{Schooling in a Corporate Society: The Political Enemy of Education in America} (M. Carnoy ed., 1972) (schools evolved in America not as part of a pursuit of equality but to: meet the needs of capitalist employers for a disciplined work force; to provide mechanisms for social control in the interests of political stability; and to facilitate the reproduction of the class structure from one generation to the next).
B. QUESTIONS LEFT UNANSWERED BY THE COURT’S VIEW OF FAMILIES

Given the Court’s perspective on families it should not be surprising that it has never endorsed the notion that a minor’s constitutional rights are always coextensive with those of an adult. Instead, the Court proceeds on an issue-by-issue approach, assessing the various interests involved, and either extends, withholds, or modifies the particular constitutional right. But, lurking behind this case-by-case approach are several questions which are troublesome. For example, are rights granted to children in order to allow the family to function better as a unit? Or do rights allow individual family members — minors — to prosper as individuals even if individual success or happiness may impair the cohesiveness or effectiveness of the family in performing its historically and constitutionally recognized role?

This question is engendered by the Court’s focus upon the family as an organic unit rather than as a collection of individuals. In this

75. See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings); New Jersey v. T.L.O., 469 U.S. 325 (1985) (the Fourth Amendment protection afforded children in a school setting is not the same as that of adults in other settings); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (not all constitutional rights assured to an adult accused of a crime must be made available to a minor in a delinquency proceeding; a state therefore need not provide a jury trial during the adjudicative phase of a state juvenile court delinquency proceeding); Ginsberg v. New York, 390 U.S. 629 (1968) (a state may restrict a minor’s right to determine for herself what sex material she may read and see even if the same restriction would be unconstitutional if applied to adults). See also Note, Developments In The Law, the Constitution and the Family, 93 HARv. L. REV. 1156, 1358-77 (1980) [hereinafter Note, Developments] (discussing the distinction between the constitutional rights of adults and children and the basis therefore).

76. The Court recognized that the rights of an individual may not necessarily be consistent with the rights and interests of other members of the family unit. Bellotti v. Baird 443 U.S. 623 (1978). Bellotti is an example of this problem. A mature minor’s decision to have an abortion may not represent the same conclusion a parent would reach, yet the Court upheld the right of the minor to make that decision. See id. at 642-44. Consider also the case of an emotionally-disturbed or mentally-ill minor. The minor’s behavior may not only be self-destructive, but disruptive of the lives of other family members or the family unit as a whole. However, the minor may not wish to seek treatment, or if treatment is desired, she may not wish to seek the particular type of treatment advocated by her parents. In this situation, the minor and parents are, if not adversaries, at least individuals with dissimilar interests. Yet, the Court in this context recognizes no real conflict since it assumes the parent will act in the minor’s best interests, whether or not the minor is cognizant of this fact. See Parham v. J.R., 442 U.S. 584, 602-03 (1979). Thus, a minor is not constitutionally entitled to a full adversarial hearing on her interest in not being committed to a state institution. See id. at 605-10. See also Note, Developments, supra note 75, at 1377-83 (discussing the issue of the extent to which the interest of a parent and the interests of a child may not be in harmony).
view "[t]he family, in short, is the meaning of life, that which alone validates one's struggles and aspirations, so that life outside it is devoid of any ultimate human value."77 An alternative view of the family conceives of it not as an organic unit, but as a collection of individuals, each possessing rights independent of the other.78 The litmus test for extending or withholding rights to minors under the latter view is the extent to which rights directly or indirectly enhance the autonomy of the individual. Whether or not the extension of rights is also consistent with the collective interest or vision of the family is not of primary importance. Supreme Court decisions tend to accept the view of the family as having a single, collective interest that is presumed to be consistent with the individual interests of family members.79

Notwithstanding the Court's tendency to equate the interest of the family unit with those of individual members, the distinction between

77. David A.J. Richards, The Individual, The Family, And The Constitution: A Jurisprudential Perspective, 55 N.Y.U. L. Rev. 1, 37-38 (1980) [hereinafter Richards, The Individual]. Professor Richards views this definition of family as metaphysical in that it attempts to define ultimate reality and ignores any definition or empirical evidence inconsistent with the definition. This perspective on the family has empirical validity if it is relegated to defining families in pre-industrial society. At that time, families were a major social institution performing many functions and defining the moral climate of society as a whole. The same cannot be said of modern industrial society where the family is stripped of many of these functions and must compete with other institutions in defining ethical conduct. Id. at 38.

78. Id. at 37. For Professor Richards, the human rights theory undergirding the Constitution is the belief that every person has the capacity for autonomy and has the right to equal concern and respect in her pursuit of autonomy. Id. at 8-10. This principle, however, does not necessarily lead to the conclusion that children must have rights equal to those of adults. Intrusive regulation of the lives of children may be necessary to enable them to become autonomous. Children may lack fully-developed, rational capacities which are a necessary prerequisite to exercising autonomy. There may be instances in which children will, therefore, engage in irrational behavior which permanently impairs their ability to achieve their own ends and may limit the ability of a child to define the proper ends in life. Id. at 23-28.

79. Id. at 37. Professor Richards refers to Wisconsin v. Yoder, 406 U.S. 205 (1972) to demonstrate the confusion of individual and collective interests. The Court held that Wisconsin's compulsory education law could not be applied to Amish children who had completed the eighth grade. Applying the law to these children would violate the parent's right to educate their children according to Amish beliefs and methods. This holding, however much it respects the rights of Amish parents, violates a basic principle of human rights. Parental authority over children rests upon the assumption that the limitation upon the autonomy of children is justified by the assumption that parents are preparing children for "rational independence, including the capacity to evaluate critically, as free and rational individuals, what life to lead." Richards, The Individual, supra note 77, at 42. There is little doubt that the decision fostered maintenance of the Amish community and family, but did little to enhance the development of Amish children by providing them with the opportunity to develop rational independence through exposure to other values and the world beyond the borders of the Amish community. For Professor Richards, the Court's opinion conflated the interests of Amish children with those of the Amish family. It created an identity of interest between the Amish family and Amish children. Id. at 42-43.
the two interests is generally accepted and elevated to the level of a general theory on the historical evolution of the family. The family is seen as developing along a continuum from patriarchal domination to the liberation of individual members with rights protected by the state. The problem with this approach is that it obfuscates rather than clarifies the issue. By viewing the family as moving along a path towards the liberation of individuals, there is a tendency to view this movement as inexorable. Contemporary families and the problems they face are seen as an inevitable by-product of American history. An institution which is an historical and cultural phenomenon with numerous possibilities for change and development is placed beyond the reach of human intervention. Instead, it represents the irresistible and unalterable movement of history toward the final end product of the family unit as we know it today.

The same can be said of the view that the family represents an


81. Another critical deficiency in this view is that it fails to recognize the extent to which the family is subject to direct conscious control and manipulation through public policy initiatives. This too has escaped the notice of both the lay public and social historians. Historians of the family have paid too little attention to the way in which public policy, sometimes conceived quite deliberately not as a defense of the family at all but as an invasion of it, contributed to the deterioration of domestic life. The family did not simply evolve in response to social and economic influences; it was deliberately transformed by the intervention of planners and policymakers. Educators and social reformers saw that the family, especially the immigrant family, stood as an obstacle to what they conceived as social progress - in other words, to homogenization and "Americanization." The family preserved separatist religious traditions, alien languages and dialects, local lore, and other traditions that retarded the growth of the political community and the national state. Accordingly, reformers sought to remove children from the influence of their families, which they also blamed for exploiting child labor, and to place the young under the benign influence of state and school. LASCH, HAVEN supra note 80, at 13.

See also Robert W. Gordon, CRITICAL LEGAL HISTORIES, 36 STAN. L. REV. 57, 70 (1984) [hereinafter Gordon, Critical] (arguing that the dominant tradition in legal thinking assumes that society naturally evolves towards liberal capitalism and the natural and proper function of a legal system is to facilitate this process. The world is therefore seen as largely determined by impersonal social forces rather than as manufactured by people who assert that they are passively adapting to inevitable processes). Again, this process is seen as being as natural and irrefutable as the Supreme Court's view of the relationship among the family, society and democratic government. See supra note 71.
organic unit. Whether the family is an association of autonomous individuals pursuing their separate interests or individuals bound by their allegiance to a collective family interest, both positions view the family and the relationship between it and other institutions as being driven by forces beyond human control. Lost in all of this is the idea that the family is an historically and culturally contingent institution that may, at various times, be individualistic or group-oriented. When using either standard for assessing the existence or extent of the rights of minors, the same bottom line exists. Somehow the rights of minors will in some measure be dependent upon an invisible but powerful force controlling the direction of family development. Rights are tied to invisible forces whose power we feel and whose command we must obey, but whose will is not fully comprehended.

And, there is another related and equally significant question raised by the Supreme Court's view of the relationship between families and society. What does the Court mean when it associates the family with a private realm in which it performs functions necessary for the preservation of basic values and public institutions?82 Lest one think this difficulty in defining the relationship between the family and society is limited to the judicial sphere, consider once again the report of the National Commission On Children. The Commission Report makes it very apparent that the Commission and the Supreme Court

82. The Court's simple formulation "feels" intuitively correct. It conjures up images of an institution that appears to be omnipresent across time and societies. In this respect, families are viewed as a natural phenomenon largely beyond state regulation and indeed resistant to the efforts of the state to change natural contours of the families. This imagery places the family in the Lockean tradition of natural rights. The family is an institution rooted in certain inalienable rights held in the pre-governmental state of nature. See Paul Brest, State Action And Liberal Theory: A Case Note On Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296 (1982) [hereinafter Brest, State Action]. This differs from a more positivist view which asserts that citizens entering civil society relinquish all natural rights and possess only those granted by the legislature. Id. at 1297. The tension between these competing views is evident when one considers that family law often influenced attempts to legislate a public code of morality which placed limits upon acceptable forms of conduct within the family. See Note, Developments, supra note 75, at 1202-13; Carl Schneider, Moral Discourse And The Transformation of American Family Law, 83 Mich. L. Rev. 1803 (1985) [hereinafter Schneider, Moral Discourse] (arguing that family law has undergone a transformation from a discourse in moral terms about the relationship between family members, to a transfer of moral decision-making authority to individuals that the law formerly regulated). It is, therefore, difficult to comprehend precisely what the Court means when it speaks of an essentially private institution performing essential functions for society, particularly when that institution was subject to legislatively imposed views of how it and its members ought to behave. If families are not natural in the Lockean sense but are what the state allows them to be, private behavior in the families would always implicate public policy (morality) in some way. See Brest, State Action, supra at 1301. See also supra note 72.
share some common views on the relationship between the family, minors and the state.

The Commission Report is a bipartisan assessment of the social circumstances facing children and sought “to serve as a forum on behalf of the children of the Nation.” The Commission’s broad charter directed the Commission to examine issues of health, education, social support, income security, tax policy, and to develop approaches to meet the needs of children in these areas. Equally as broad was the perspective from which the Commission assessed the problems facing children. Instead of focusing exclusively on individual families and their problems, the inquiry expanded to include the organization, structure and policies of institutions that affect families and children. Given the Commission’s charge — to develop an action agenda for the 1990s — the Commission Report represents a contemporary bipartisan statement of general consensus on the problems facing children and families.

What is important here is not the specific recommendations of the Commission, but rather what the Commission termed its “Principles For Action.” These principles served as the foundation upon which all of the Commission’s specific recommendations were built. One principle announced that children should have the opportunity to develop to their full potential and it is the primary responsibility of parents to provide guidance and to meet their children’s needs — physical, emotional and intellectual.

The Commission also endorsed the position that the family bears the primary responsibility for inculcating basic values necessary for society and democracy. However, the family is not completely autonomous. Society has a legitimate interest in how children are raised and must intervene when parents engage in behavior that places their children at risk.

83. NATIONAL COMM’N, BEYOND RHETORIC, supra note 9, at viii.
84. Id. at ix.
85. See id. at xi-xii.
86. This is not to say that the findings and recommendations of the Commission represent, in fact, a consensus of Americans’ views on the family and its problems. However, given the conscious attempt to diversify the composition of the Commission and its methodology of conducting hearings and meetings around the country, it is fair to say that the Commission Report is perceived as, and was intended to articulate, at a very general level, principles and views upon which most Americans would agree. See id. at viii-x.
87. Id. at xix.
88. Id. at 63-65.
89. See id. at 68-74.
These Principles For Action are virtually the same as those articulated by the Supreme Court in defining the nature of the family and its relationship to society in preparing children to become responsible citizens. Specifically, the Supreme Court noted that "[t]he duty to prepare the child for additional obligations . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship . . . This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens."\(^90\) And, like the Commission, the Court asserted that "... this process, in large part, is beyond the competence of impersonal political institutions."\(^91\) It is not a coincidence that the Commission and the Supreme Court agree on these basic principles. The reason for this similarity was articulated by the Commission's observation that Americans tend to view the caring and rearing of children as a private matter and not a public responsibility.\(^92\)

However, this position is in stark contrast to the charge issued to the Commission. Developing an action agenda for the 1990s by formulating specific governmental programs to implement this agenda explicitly invokes public resources and institutions to intervene in a private realm — the family.\(^93\) The Commission acknowledged the tension existing between the public and private nature of the family. Yet, the Commission offered no solution other than to announce that there is a growing consensus on the importance of addressing the needs of children through a combination of individual actions, private sector decisions, and public sector reforms. No clue is given as to how these various resources are to coalesce in a way that maintains child-rearing as a private as opposed to a public function.\(^94\) Since the Commission makes recommendations for specific courses of action, one can only assume that these proposals represent an appropriate blending of public and private resources that will leave intact the quintessentially private nature of the family.

Essentially, the same problem facing the Commission confronts the

\(^{90}\) Bellotti, 443 U.S. at 637-38.
\(^{91}\) Id. at 638.
\(^{92}\) NATIONAL COMM’N, BEYOND RHETORIC, supra note 9, at 61.
\(^{93}\) Some of the proposals called for specific governmental actions. For example, the Commission recommended the creation of a "$1,000 refundable child tax credit for all children through age 18 and elimination of the personal exemption for dependent children to partially offset the costs." Id. at xxi. For a detailed statement of the Commission's proposals, see Id. at Part II.
\(^{94}\) Id. at 62.
courts in their struggle to assess the validity of curfew statutes. There is an inability to identify a clear point of demarcation that separates those nocturnal activities of a minor whose legitimacy should be determined in the private realm of family decision-making, and other types of conduct and family decision-making that is vulnerable to state intervention. For example, in *People ex rel J.M.*, the court applied the three factor *Bellotti* test and found that a minor’s right to “loiter” is not coextensive with that of an adult and, therefore, was not a fundamental right. This conclusion is not unique since other courts have reached the same conclusion. But even when *Bellotti* resolves the problem as to what level of scrutiny applies in reviewing a particular ordinance or governmental action, there remains the very basic and unresolved question of government intervention in a “private” realm in the name of a “public interest.”

In *J.M.*, the Colorado Court applied the third *Bellotti* factor — the importance of the parental role in child-rearing — and found that the ordinance reinforced parental authority and encouraged parents to take an active role in supervising minors. The ordinance was, therefore, one which regulated behavior that did not involve a fundamental liberty interest. Yet this determination did not eliminate the existence of the conflict between the public interest and the sanctity of the family. Though the ordinance was subject to the rational basis standard of review, a justification had to be found for exercising state power to preempt the decision of either the family or the minor. One justification advanced and accepted by the court was the state’s interest in enforcing parental control over children. Regardless of how the particular court applies *Bellotti*, there remains the very basic issue of state intervention into private family life. *Bellotti* does no more than resolve the question of what level of scrutiny will be applied to the curfew ordinance. It does not resolve the difficult questions of on what basis

95. 768 P.2d 219 (Colo. 1989). The challenged ordinance made it unlawful for anyone under 18 years to loiter in various public and private locations during the enumerated hours, without the consent of the owner or occupant of the location involved. The ordinance was inapplicable to minors accompanied by a parent, guardian or other adult over the age of 21. *Id.* at 221.

96. *Id.* at 223.

97. *Id.*

98. *See supra* notes 58-64 and accompanying text.


100. *J.M.*, 768 P.2d at 223.

101. *Id.*

102. *Id.*
should the state intervene or abstain from involvement in family decision making, and whether the private realm imagery as applied to the family is a meaningful and accurate description of the relationship between the family and the state.

III. PUBLIC INTERVENTION IN THE NAME OF SURROGATE PARENTING

Whether or not curfew ordinances will be found constitutional is inextricably tied to the view of the family as having a dual nature. Whether one looks to a contemporary political statement concerning the nature of the problem facing families and children, i.e., the Commission Report, or to judicial decisions addressing the constitutionality of curfew ordinances, one is still confronted with the same rhetoric. That is, the family is seen as a preeminently private institution performing important functions which are necessary for the preservation of society and democratic government. It appears, therefore, that the legality of curfew ordinances is being determined by using some of the same principles and rhetoric that serve as the basis for political solutions to the problems facing children in the 1990s and beyond. There will be a search for the elusive but proper balance between public intervention and family autonomy. However, while attention is focused upon what is the proper balance and how it will be obtained, little if any attention is paid to asking the basic question of exactly what is meant when the distinction is made between the private inviolate world of the family versus its public responsibilities and functions.

This section will explore this question and demonstrate how the Supreme Court's line of demarcation between the public and private nature of the family is not a bright one and is, at best, dim and wavering. Rather than representing a fixed, legal or constitutional principle when applied to minors, and in particular juvenile delinquents, it is more akin to an indication of the shifting political and cultural consensus existing at a particular time.

A. GAULT: HOW TO FIX A SYSTEM WHEN IT'S NOT REALLY BROKEN

The Supreme Court's decision in In re Gault is an example

103. 387 U.S. 1 (1967). Gerald Gault was a fifteen-year-old taken into custody on the basis of a complaint that he made lewd telephone calls to a neighbor. He was adjudicated delinquent and committed to the State Industrial School. Gault's parents challenged the constitutionality of the adjudicatory stage of the state juvenile process. The Court held that the constitutional guar-
of how analytically dysfunctional and misleading the private realm imagery is when used in connection with the family. *Gault* assessed the constitutional validity of a state's juvenile justice system and in the process, discussed the basis for the state's authority to intervene in what was otherwise considered the private activity of minors and their families. Justice Fortas, writing for the Supreme Court, devoted a great deal of his opinion to a recitation of the historical and theoretical underpinnings of the juvenile justice system. He accepted the view that reformers envisioned the system as an alternative to the criminal justice system. In fact, the juvenile system was designed to serve as a surrogate parent. Children had a right "not to liberty but to custody."104 Juvenile courts were, therefore, performing a custodial rather than punitive function.105

After reciting this history, the opinion takes a curious turn. Justice Fortas observed that notwithstanding the fact that a spirit of enlightenment and concern for youth spawned the juvenile justice system, the constitutional and theoretical bases for the entire system are debatable.106 As pointed out by Justice Harlan in his concurring opinion, the majority never explains what is theoretically or constitutionally suspect about the system.107 This questioning of the system by Justice Fortas is followed by an extensive explication of how the system failed to achieve its original goals. This was due, in part, to the absence of procedural safeguards at the adjudicatory stage of juvenile court proceedings.108 However, the opinion further explains how procedural safeguards would enhance, not diminish, the ability of the state to achieve the substantive benefits the system was designed to accomplish.109

It does not require much reflection to realize that the meandering course of the opinion suggests, at certain points, contradictory conclusions. For example, if as the Court suggests, the juvenile court were flawed both theoretically and constitutionally at its inception, it would make little if any difference what the original motivation and vision of

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antee of due process applies to juvenile delinquency proceedings where the juvenile may be committed to a state institution. Several of the procedural rights applicable to adult criminal proceedings applied to delinquency proceedings as well. These rights included the right to be represented by counsel, to receive notice, and the privilege against self incrimination.

104. *Id.* at 17.
105. *Id.*
106. *Id.*
107. *Id.* at 66.
108. *Id.* at 17-21.
109. *Id.* at 21-26.
the reformers were. These observations are relevant insofar as they underscore how the reformers' benign motivation did not prevent them from erring and running afoul of the Constitution. Clearly this was not the purpose of Justice Fortas' recapitulation of the system's history. The tone of his observations is sympathetic to the objectives and motivation of the reformers. Another observation made by Justice Fortas, which is no less difficult to fathom, is that if the system were fundamentally flawed, how could procedural safeguards shore-up the system? Justice Harlan sensed these inconsistencies and questioned the relevance of the observations asserted by the majority. He suggested that the frustrated expectations of the system's founders were irrelevant unless the Court was questioning the wisdom of having a separate juvenile justice system.110

Justice Harlan's intuition that something was awry in the majority opinion is correct, but the Court was not questioning the wisdom or basic assumptions of the system's founders. Quite simply, the Court was willing to accept a system with a debatable justification if it worked — if it in fact functioned as a surrogate parent and successfully performed its custodial function. It was only when the system failed to meet its goals that it was transmogrified into a benevolently motivated system exercising a dangerously high level of unbridled discretion that defeated rather than served the system's purposes.

This same theme was articulated a year earlier in Kent v. United States,111 where the Court made explicit the calculus it used in assessing the validity of a juvenile court system that did not provide the procedural safeguards found in the adult criminal justice system. After conceding the special needs of the child-oriented juvenile court system, the Court turned to the pragmatic question of the juvenile court's performance:

While there can be no doubt of the original laudable purpose of the juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purposes to make tolerable the immunity of the process from the reach of constitutional guarantees applicable to adults. There is much evidence that some juvenile

110. Id. at 67.

111. 383 U.S. 541 (1966). Kent involved a challenge to the validity of a juvenile court's waiver of jurisdiction over a minor. The statute governing the procedure provided that waiver of jurisdiction was available only after a full investigation was conducted. The question before the Court was whether the juvenile court conducted a full investigation within the meaning of the statute. The Court determined that the juvenile court's investigation was inadequate in that it did not afford the juvenile adequate procedural protection.
courts, ... lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violations.\textsuperscript{112}

There are limits, however, on the extent to which the Court is willing to allow the failures of the juvenile court to totally undermine the validity of the system. What the Court identified as debatable premises undergirding the system are now well entrenched, and the system is subject only to periodic adjustments rather than a massive overhaul.\textsuperscript{113}

B. \textit{Gault} And The Melding Of Politics, Law And Culture

Behind the pragmatic assessment of the juvenile court’s effectiveness and the level of success required to justify the system’s immunity from scrutiny is the unquestioning acceptance of the idea that the state is capable of acting and should act as a surrogate parent. In other words, there are circumstances that dictate that the private realm of the family must yield to state intervention. However, effective intervention does not destroy the private character of the family. The state is assuming a different identity and acting as a parent would if she were able to intervene on behalf of the minor. Rather than weakening the private nature of the family, state intervention reinforces it by serving as a model for how the family should act in the best interests of the child.\textsuperscript{114}

\textsuperscript{112.} \textit{Id.} at 555-56.

\textsuperscript{113.} See, e.g., \textit{Schall v. Martin}, 467 U.S. 253 (1984) (holding the Constitution does not mandate the elimination of all differences between the treatment of minors and adults — the state’s parens patriae interest in promoting the welfare of minors justifies a juvenile system fundamentally different from that of the adult system); \textit{McKeiver v. Pennsylvania}, 403 U.S. 528 (1971) (finding previous rulings by the Supreme Court mandating procedural safeguards for juveniles were not intended to undermine the purpose of the juvenile justice system or its informality and flexibility).

\textsuperscript{114.} The system may not in fact have had such benign origins. The advocates of reform viewed themselves as disinterested advocates motivated by conscience and morality rather than class or political interests. See \textit{An\textsc{th}ony M. \textsc{platt}, \textsc{the child savers} \textsc{the invention of delinquency} 3 (1969)} [hereinafter \textsc{platt, child savers}]. The Supreme Court accepted this conventional wisdom about the reformers in its review of the origin of the system in \textit{Gault}. See \textit{Gault}, 387 U.S. at 14-17. However, this view fails to recognize that the term delinquency is not descriptive of inherently “bad” human behavior. Rather, it is a term applied to certain types of unacceptable conduct. Thus, the reformers were arguably engaged in a “rule-making” process designed to establish the standards by which certain types of behavior by minors were judged to be deviate. See \textsc{platt, child savers}, supra at 7-9; \textit{Stanford J. Fox, Juvenile Justice Reform: An Historical Perspective}, 22 \textsc{Stan L. Rev.} 1187, 1201 (1970) [hereinafter Fox, \textit{Juvenile Justice Reform}]. Instead of being politically neutral, the movement was in fact motivat-
There is a reason why the *Gault* decision included a historical review of the juvenile court system and the prevalent socio-cultural view of children. It was impossible to talk about the issue of the rights of juveniles without delineating the socio-historical context in which the question arose. One simply could not understand or analyze this question without appreciating the assumptions underlying the *parens patriae* doctrine and the relationship among minors, the family and the state. Part of this socio-historical context necessarily includes the juvenile justice movement itself and its place in American society during the early years of the twentieth century. When the Court uncritically accepted a particular view of the system’s origin, it was explicitly legitimating the assumptions of the reformers who created the system. These reformers represented a break from the goals and style of other reform movements. It was not seen as a political movement, as other reforms had been in the past. Politics involved issues of government while juvenile courts sought to redefine the quality and meaning of life experienced by minors. Hence the notion that the courts were surrogate parents helping to shape and redefine the content and direction of an aberrant youth’s life. Juveniles were seen as victims of

ed by class and political interests. See generally PLATT, CHILD SAVERS, supra at 109. What superficially appeared to be right, necessary and fair to children was far more complicated than a recognition of undeniably humane values and concern for the best interests of children.

115. The need to assess the meaning of juvenile rights within the broader socio-cultural context in which the dialogue occurs is an example of what Professor Tushnet calls “fundamental indeterminacy.” See Mark Tushnet, *An Essay On Rights*, 62 Tex. L. Rev. 1363, 1375 (1984) [hereinafter Tushnet, *An Essay*]. Tushnet argues that recognizing a right as implicated in a particular setting does not produce any determinate consequences. An abstract right, such as the liberty interest implicated by a curfew statute, is specified in particular social contexts. Recall, for example, the Atlanta ordinance and the various explanations as to its necessity and the different views on what it was designed to accomplish. See supra notes 1-5 and accompanying text. The public discourse on whether a minor’s rights were violated was inextricably tied to the social context in which the rights were exercised, i.e., the increased drug use in the cities, rising crime rates, and an increase in the number of drug-related homicides. This same type of approach is mirrored in the court’s assessment of the rights — liberty interests — of parents and minors. See supra notes 37-56 and accompanying text. Any attempt to specify the rights of minors under the curfew statute or even under the broader *parens patriae* doctrine ultimately leads to a description of the social order that created the rights. See Tushnet, *An Essay*, supra at 1375-80.

It is particularly difficult to avoid this broader discussion of the social context when examining the validity of curfew ordinances. A curfew violation is a status offense. An offender’s behavior violates preconceived notions of how children ought to behave and does not necessarily indicate the child is engaging in criminal or dangerous behavior. See supra note 34. Any discussion of the rights of minors raises the larger question of how one formulates a definition of appropriate behavior and whether that definition must be altered to accommodate the widespread divergence of children’s behavior from that definition.

116. LASCH, NEW RADICALISM, supra note 80, at 90.
Politics, however, were not removed from the reformers' agenda as much as it was being redefined. While the desire to transform how we should view aberrant youths may not be an inherently political act, it becomes political when the reformist impulse is transformed into a program for action implemented and enforced by the state. What began as a cultural issue — how some families vary from one another and may not perform or perform differently certain functions traditionally associated with families — became a political issue. Politics and the law were explicitly utilized as the instruments for solutions to cultural problems. From its inception, the system was premised upon a blurring of the line between the public welfare and the private interest of the family. Though recognized as two separate interests, they were thought of as mutually reinforcing so that state intervention in the family could occur without seriously damaging the identity of the family as a private institution. The state was not an unwelcome intruder as much as it was a partner in the effort to preserve the efficacy and identity of a private and culturally significant sphere of activity. The state did not intend to destroy the walls separating the private from the public; it merely sought to, at most, reconstruct them or, at the very least, reinforce them.

Alternatively, the line separating the private sphere of family the public interest could justifiably be, in the minds of some reformers, totally obliterated, and the integrity and identity of the family could remain intact. If one assumes, as some reformers did, that socio-cultural problems were generated by the existence of purely private interests, what was needed were institutions that transcended private interests in the name of an indisputable public good. Reducing the hardships

117. Id. at 150-57.
118. See id. at 90; PLATT, CHILD SAVERS, supra note 114, at 10-12, 98-100.
119. See LASCH, NEW RADICALISM, supra note 80, at 161-63.
120. For the reformers, the question was whether individuals and institutions would step forward and personally intervene in the lives of children to help develop their character and improve the quality of their lives. The problem appeared to be a technical one of how institutions and individuals could effectively alter some of the most intimate areas of a child's life. See PLATT, CHILD SAVERS, supra note 114, at 91-92. This was not seen as an exercise of political power, but rather as a matter of adjusting children to better cope with their circumstances. See LASCH, NEW RADICALISM, supra note 80, at 155-57. However, the conflict between public and private interests could not be so easily swept away. Children were reconciled with a system which the reformers acknowledged as victimizing. See id. at 157. Arguably, the reformers were acting, perhaps unwittingly, on behalf of a public interest by attempting to channel reform in the direction of reconciliation rather than confrontation. It appears, though, that what consciously motivated those seeking change was a belief in a public interest of protecting
experienced by some minors was seen as an undeniable public good that would justify radical intervention and restructuring of a family without due regard to the potential impact on the private identity of the family. Thus, the family was subject to state intervention either in the name of preserving the family as a private sphere of activity which indirectly served a public interest, or in the name of restructuring the family so that it could better serve a transcendent public interest which ultimately served the interests of all in society.

Given these assumptions and perspectives, Justice Fortas' opinion is somewhat less opaque. The Court, probably unwittingly, attempted to reconcile the conflict between the various strains of thought that existed in the juvenile justice reform movement. Minors were victimized by a social order that diminished the quality of their lives, but the solution was not to change the social order. Rather, the solution was to change the quality of their lives by redirecting and controlling their behavior. This was deemed to be enrichment, not control, of their lives.

There was, however, a double-edged sword operating here. No matter how much the movement was portrayed as improving the quality of the juvenile's life, there remained an irreducible element of social control inherent in the system. Despite the concern for the welfare of minors, the juvenile system allowed more control and intervention into the lives of minors and their families than traditional criminal law. By focusing on factors such as the quality of life and behavior indicative of future problems, the system justified intervention, often before there was overt behavior.

children from the ravages of the culture of capitalism. However, once the idea of the existence of a substantive public interest began to wane, i.e., a belief that there was a consensus on the need to protect children from capitalist evils, the tension caused by various competing private interests and the interpenetration of the public and the private interests came to the fore. See supra Horowitz, The History, note 71, at 1427. The juvenile court system no longer represented a system which transcended political debate by embodying a consensus on what was in the public interest. It became an institution, reflective of how the state sanctioned some competing interests and rejected others. See id. at 1427. See also text accompanying notes 121-123.

121. See LASCH, NEW RADICALISM, supra note 80, at 154.
122. Id. at 155-57.
123. Id. at 163.
124. This occurs because the juvenile system is based upon a deterministic view of criminal or antisocial behavior. A criminal is not born, but is a product of her environment. Thus crime does not represent individual failure or moral culpability and is better viewed as an inevitable and predictable response to certain social stimuli. See NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY 39-41 (1974) [hereinafter KITTRIE, THE RIGHT]. The juvenile justice system, therefore, focused upon the undesirability of one's condition. Intervention is justified because of one's status and what that status might lead to, as opposed
Gault then represents not a statement of principle, but an affirmation of a cultural consensus on the assumptions underlying the juvenile justice system, "i.e., the relationship among the family, minors and the state. The opinion is an example of what happens when the lines between culture, law and politics are not recognized as creating different spheres of human action. As a political movement with cultural goals, the juvenile justice reformers used the law as a mechanism for controlling certain minors and their families.\textsuperscript{125}

C. Gault And Its Challenge To Liberalism

There is another aspect to Gault which raises issues that go to the very heart of liberalism as it has been defined in America. The Gault decision accepted the idea that state intervention is essential if the child is to succeed in life. A child is always subject to some form of custody\textsuperscript{126} and the state perceived itself as doing no more than performing the parental functions of ascertaining the child's needs and providing the resources necessary for the child to succeed in society.\textsuperscript{127} This view of children and their behavior is rooted in a deterministic view of the relationship between family life and success in later life. The \textit{paresns patriae} doctrine focused on the minor's physical and social circumstances as the cause of socially undesirable behavior. Anti-social behavior is deemed to be a disease much like any other physical ailment. Unlike a physical ailment, however, the cure requires the loss of privacy and the monitoring and manipulation of the child's environment. Sometimes intervention was necessary even before the child exhibited undesirable behavior.\textsuperscript{128}

\textsuperscript{125} One of the consequences of melding distinct areas of human activity into an undifferentiated whole is that some of the more intimate areas of human activity are subject to political and legal control. Questions which were formerly the subject of debate and resolution in the arts and letters become political and legal issues. See \textsc{Lasch, New Radicalism}, supra note 80, at 90. Moreover, this problem is compounded by the inability of the legal system to define the rights of minors or their families without reference to the entire social framework in which the issue arose. See supra note 115. The legal system simply will not provide any definitive moral authority for resolving issues concerning intimate areas of human activity. See \textsc{generally Schneider, Moral Discourse}, supra note 82. Thus, the search for a "legal standard" or "rights" to govern certain aspects of family life invariably collapses into an assessment of cultural values under the guise of a search for transcendent legal principles. Cultural issues are then discussed in legal terms rather than using other intellectual disciplines whose modes of analysis and discourse are not limited to legal reasoning.


\textsuperscript{127} \textit{See In re Gault}, 387 U.S. at 14-17.

\textsuperscript{128} See supra note 124. There has been, however, a movement away from the determinis-
When the Court adopted this deterministic approach it committed itself to an escalating level of control over minors and their families. *Gault* attempted to limit the process by assessing the extent to which the state's actions were succeeding in changing the behavior of children after they were subjected to "treatment." It is this rising level of intervention which signals an ideological price to be paid for accepting this deterministic approach. As Professor Fishkin notes, liberalism is concerned with how society rations the opportunities for people to achieve unequal levels of success. Inequality of results is not deemed to be unjust and is indeed accepted if there has been fair competition for unequal positions in society.

Fair competition, however, can only be maintained at a substantial cost to liberty. In this instance, the liberty sacrificed is the autonomy of...
the family. This occurs because of the simple fact that not all families are equally alike in their structure, values and resources. Likewise, all children are not the same and do not have the same socio-economic advantages and disadvantages. In the competition for achievement of one’s preferences, those with privileged or advantaged backgrounds are more likely to succeed than not. Any attempt to assist children from less advantaged backgrounds would necessarily require a restructuring of their family environment in ways that will lead to success in the competition for unequal positions.132 This type of intervention is at odds with family autonomy, but it does reduce the negative aspects of diversity in family structure and values. Uniformity is necessary because diversity has the undesirable effect of producing minors with different developmental influences that may or may not be adventitious in the competition for unequal positions.133

At a superficial level, Gault appears to be consistent with liberalism’s requirement of fair competition, and arguably sought to equalize the life chances of wayward youths. The procedural rights granted to minors would seemingly increase the autonomy of juveniles by enhancing their ability to demonstrate the inappropriateness of the state’s actions. Procedural safeguards would, therefore, indirectly reduce the amount or level of intervention into the lives of juveniles and their families. But, the apparent compatibility of Gault and family autonomy is specious. Remember, the Court did not reject the assumptions underlying the system, it merely acknowledged that the system was not working as well as originally conceived. In fact, the Court carefully noted how its ruling would not compel the states to alter or abandon the original motivation in implementing the system.134 Thus, procedural safeguards made intervention more effective by limiting intervention only to those minors in need of reform, but did not necessarily reduce the level of the intervention nor undermine the state’s rationale in support of its intrusion.

Gault represents the acceptance of a system which at times is willing to sacrifice family autonomy, i.e., liberty, in the name of providing troubled minors with equal opportunity.135 A corollary to this proposition is that increasing the number of rights or safeguards in the system could increase the autonomy of families and result in the diminution of the minor’s ability to successfully compete in society. The

132. See id. at 3-10.
133. Id. at 67-68.
135. See FISHKIN, JUSTICE, EQUAL OPPORTUNITY, supra note 130, at 64-67.
Court's awareness of this proposition is evident in its mindful assessment of the extent to which an increase in the rights available to juveniles will affect the ability of the juvenile courts to accomplish its mission.136

Whether one looks to the *Gault* decision or the Report of the National Commission On Children, the same theme prevails. There is either an explicit or implicit recognition that the relationship between the family and society is, at best, an uneasy one. Yet, we still wish to maintain the imagery of the family as an autonomous institution, deeply rooted in our cultural tradition, and for the most part, beyond state control. While using the language and imagery of autonomy, families and specifically children are subject to extensive control. By searching for specific rights which minors should have, our attention is directed towards a specific issue. In reality, however, the issue is subsumed by the larger question of the extent to which rights and the family/state relationship reflect a process of politics and socio-cultural change.

The conception of the family as a private entity performing socially useful and, to a certain extent, public functions, obfuscates what is in fact the shifting nature of the political decision-making process spurred into action by socio-cultural changes in society. Instead of separating law from politics,137 the view of the family and minors as existing in a private not public realm serves to obscure the interconnectedness of families, society, politics and the law.138 Casting the relationship between these institutions as one involving rights does little to lessen the confusion. *Gault* is a prime example of how rights cannot be understood without reference to the social order in which the rights are analyzed or defined.139 Justice Fortas found it necessary to recount the history of the juvenile justice system because the rights of minors in the system had no meaning in the abstract. Only within the context of the juvenile justice movement, with its goals and role in

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136. See cases cited supra note 113.

137. See Horowitz, *The History*, supra note 120, at 1425 (showing how the private and public law distinction maintained by nineteenth century jurists was an attempt to sharply separate law from politics by creating a neutral and apolitical system of legal doctrine and legal reasoning free of what was thought to be the dangerous tendencies of democratic politics).

138. The real power of this view lies in its ability to convince people not so much that this is the right way to conceive of the world, as much as it is "the only attainable world in which a sane person would want to live." Gordon, *Critical Histories*, supra note 81, at 109. See also Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. Pa. L. Rev. 1358, 1417 (1982) (private spheres of life are linked to and partially constituted by law and politics, and the primary effect of conceiving of them as in different realms is to inhibit our ability to see social institutions as the product of human design and subject to change).

139. See supra note 115 and accompanying text.
society at large, was it possible to determine what rights were due minors.

D. THE CHILDREN’S RIGHTS MOVEMENT

The previous sections demonstrate the extent to which the issues raised by curfew ordinances reflect broader cultural and political issues left unresolved and not fully understood. The courts, however, will continue to resolve the “rights of minors issue” in narrow legal terms. If this is to prevail as the mode of analysis, what are the consequences of casting a socio-cultural issue in legal terms? Any attempt to answer this question must begin with an understanding of the effect of granting “rights” to minors had upon how society perceived minors.

The juvenile justice movement was unique in defining cultural issues in political terms and vice versa. Gault did not question this approach and enshrined it in juvenile justice jurisprudence. The Supreme Court accepted the problem solving methodology inherent in the juvenile courts and sought to cast subsequent issues as involving the expansion or contraction of rights extended to minors. Thereafter, the manifestations of cultural change and diversity apparent in families and society were camouflaged by the legal rhetoric of rights. That is, children have been increasingly viewed as autonomous individuals with rights, not as responsibilities we all share — as family members and members of society. Just as the advocates for a separate juvenile justice system responded to perceived problems in families and the urban environment, so too the latter day advocates of children’s rights attempted, in part, to address socio-cultural issues through legal mechanisms. As with the juvenile justice movement, the children’s rights movement came with “historical baggage” and assumptions that remained unexamined.

The children’s rights movement grew out of the larger civil rights movement of the 1950s and 60s. The motivating force was not necessarily the belief that children were damaged by the traditional common law doctrines governing family relationships. Rather, the commitment to egalitarian principles equated constraints with a diminution

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140. See supra notes 115-20 and accompanying texts.
of individual liberty. One consequence of this belief was the proliferation of discrete interests in the family. There was no longer a distinct and paramount corporate family interest, such as raising and nurturing the next generation. Instead, the family existed as an assemblage of individuals with similar, though not necessarily identical, interests. This pluralist view of the family raised the prospect that the autonomy of children required a certain measure of being "left alone." Children need this freedom to pursue their own lives and interests. Individual autonomy was the paramount value based upon the assumption that human beings have the capacity to shape their lives.

Children came to be viewed as similar to blacks who were struggling for integration into mainstream American life. In effect, children were a newly-discovered "minority" who stood outside of mainstream society because they were deprived of rights exercised by adults. The association asserted between the nonacceptance of blacks and the need to "free" children is significant. Constraints on liberty, from the integrationist perspective, are associated with irrational behavior. That is, children may be different from adults but there is a large area of common ground which eliminates any rational reason for imposing additional constraints upon children. That these constraints are imposed is evidence of obscured reason and not necessarily any satisfaction of a special need of children.

142. See Hafen, Individualism and Autonomy, supra note 80, at 4-5.
143. See Note, Developments, supra note 75, at 1160 (concluding that the constitutional limits on family law have created a family consisting of a collection of intimately related individuals who possess distinct and not necessarily harmonious individual rights, rather than an organic unit possessing intrinsic group rights applicable in all contexts).
144. This view is similar to the distinction drawn between negative and positive freedom. See ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 121-22 (1970) [hereinafter BERLIN, FOUR ESSAYS]. Berlin distinguishes between what he calls negative and positive liberty. Negative liberty refers to those areas of a person's life in which she is left to do what she chooses to do without interference. In other words, one is free to act unobstructed by others or the state. This contrasts with positive liberty which focuses upon self-realization through self-direction. Id. at 131.
145. See Richards, The Individual, supra note 77, at 8-11.
146. See Gary Pellar, Race Consciousness, 1990 DUKL L.J. 758, 768-89 (1990) [hereinafter Pellar, Race]. The argument here is not that children in America are in the same position that Blacks occupied prior to or during the civil rights movement. Nor is it argued that somehow the civil rights movement caused the children's rights movement. The point is that beliefs about the position of children were associated with the same perspective that assessed the plight of blacks in America. The law helped shape and limit the extent to which the position of children could be viewed from a perspective other than the liberal integrationist point of view. See Gordon, Critical, supra note 81, at 111 ("In short, the legal forms we use set limits on what we can imagine as practical options. Our desires and plans tend to be shaped out of a limited
This view of children as victims of irrational discrimination fits very easily into the prevailing liberal notion of the right of every individual to be judged according to her individual merit rather than her status or group membership. The domination experienced by children was akin to that experienced by blacks because of their race. Integration, with its emphasis upon rationality, neutrality and individual freedom was a powerful weapon in the struggle to free children from irrational constraints.\(^\text{147}\) And, the liberation of children from archaic forms of constraint may be considered as part of the larger process of social progress toward a more enlightened relationship between children and society.\(^\text{148}\) Any commitment to understanding and assessing the needs of children based upon their own peculiar experiences in society and the family was simply backwards, irrational and worst of all, unscientific.\(^\text{149}\)

Thus, the end product of the liberation effort was a change in perspective about children. They are now free to be people who, in
large measure, are deemed to be no different than adults. With rights as the motivational force behind the liberation, children became individuals, not charges.

CONCLUSION

Many of the forces that helped define the meaning and structure of families and their relationship to society were not impersonal social forces, but represented, in part, the product of state intervention and deliberate social engineering. What we are left with is a rather curious combination of influences, all of which can be identified in the Supreme Court’s efforts to shape the rights of minors in the juvenile justice system. Families are institutions recreated by generations of humans over time and within this recreative process there is always the possibility that individuals will redefine and change what it means to be a minor and family member in America. This dual nature of the family — the ability to promote stability and change — is tacitly acknowledged in the reverential terms used by the Supreme Court when it pays homage to the family and its pivotal role in society. It is a preeminently private institution beyond the control of the state, yet because of its important role it cannot be fully trusted to make the right decisions. It is therefore subject to monitoring by the state in the name of protecting the family from itself and the state from family decisions. And this view of the family is not limited to the Supreme Court, as evidenced by the Commission’s Principles for Action. Two different bodies — one political, the other judicial — are using the same rhetoric in attempting to define the meaning of family in America.

It is the tension created by the dual nature of the family that ultimately lies behind the curfew statutes and the broader question of the degree to which a minor’s constitutional rights differ from those of an adult. The short-hand term for this tension has come to be called “family values.” What exactly does this term mean? No one can say for certain! It only has one hundred definitions — if you limit the questioning to one hundred people. One thing is certain, though. Regardless of the definition offered, each person is likely to identify himself as possessing and/or practicing the enumerated value, as opposed to others who fail to recognize the value. A family value is not necessarily a descriptive term with a substantive meaning. It is more an attempt to define the boundaries that identify certain families as being “real” and “traditional” and therefore “natural,” “private” and beyond the reach of state regulation.
This type of response is not new and ultimately helped to spawn the juvenile justice system with its view of what a family ought to be and how minors ought to behave. Equally as clear is that the Supreme Court's conception of what a family is and the values it promotes will serve as the force behind any decision the Court may render on the constitutionality of juvenile curfew ordinances. Perhaps a better way of viewing the issue is that there is not and never has been a shortage of values; the question is whose values shall prevail and how will this cultural phenomenon translate into political and legal power.