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# Comment: In the Street Tonight: An Equal Protection Analysis of Baltimore City's Juvenile Curfew

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## COMMENT

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### IN THE STREET TONIGHT<sup>1</sup>: AN EQUAL PROTECTION ANALYSIS OF BALTIMORE CITY'S JUVENILE CURFEW

By: Andrew Middleman<sup>2</sup>

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<sup>1</sup> This Comment derives its title from a song entitled "In the Street, Today," which was written and performed by The Jam. Though released in 1977—nearly forty years before Baltimore City's juvenile curfew ordinance took effect—the song's depictions of crime, paranoia, and adolescent restlessness squarely describe the impetus for the curfew. THE JAM, *In the Street, Today*, on THIS IS THE MODERN WORLD (Polydor Records 1977).

<sup>2</sup> The author wishes to express his sincere gratitude to Professor C.J. Peters, Professor of Law, University of Baltimore School of Law, for his insightful notes to previous drafts of this Comment, and for his guidance and encouragement throughout the researching, writing, and editing processes.

Special thanks to Patrick Toohey, Editor-in-Chief, *University of Baltimore Law Forum*, for his thoughtful editing of later drafts, and for his flexibility throughout the production process. In addition, thank you to David Schult for his feedback on earlier drafts, and to Deborah Richardson and Lauren M. Vint for critiquing other iterations of this Comment.

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## INTRODUCTION

The sun is setting on a late-August evening in Baltimore. Children are playing in the gym at an elementary school in Berea, a small neighborhood in East Baltimore. Ulysses Cofield is watching the clock.<sup>3</sup> Cofield keeps the Fort Worth Elementary School gym open late so the neighborhood kids have a place to blow off steam at the end of the day.<sup>4</sup> At 8:30 p.m., he tells a pair of ten-year-olds they must leave so they can be home within the next thirty minutes.<sup>5</sup> Cofield closes the gym for the evening, then scans the block for lingering children; he wants to order the children home before police do.<sup>6</sup> This anecdote hardly is unique<sup>7</sup>—the result of Baltimore City’s juvenile curfew ordinance,<sup>8</sup> which took effect in August 2014.<sup>9</sup>

The ordinance subjects minors to both “nighttime” and “daytime” curfews.<sup>10</sup> Both curfews prohibit minors from “remain[ing] in or about any public place or establishment”<sup>11</sup> during specified hours, depending on the

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<sup>3</sup> Julia Botero, *For Their Own Good? New Curfew Sends Baltimore Kids Home Early*, NPR (Aug. 31, 2014, 1:33 PM), <http://www.npr.org/2014/08/31/344643559/for-their-own-good-new-curfew-sends-baltimore-kids-home-early>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> In Collington Square Park, another East Baltimore neighborhood, children ask: “What time is my curfew?”; “What if I’m out with my brother and he’s 18?”; “If I hide, can I still stay out and play?” Edith Honan, *Go home kids: Baltimore launches strict evening curfew for youth*, WASH. POST (Aug. 9, 2014), [http://www.washingtonpost.com/politics/go-home-kids-baltimore-launches-strict-evening-curfew-for-youth/2014/08/09/197f7f9e-1ff8-11e4-ab7b-696c295ddfd1\\_story.html](http://www.washingtonpost.com/politics/go-home-kids-baltimore-launches-strict-evening-curfew-for-youth/2014/08/09/197f7f9e-1ff8-11e4-ab7b-696c295ddfd1_story.html).

In yet another Baltimore neighborhood, fifteen-year-old Isaiah Jackson and his friends wait until dusk to play basketball under the nocturnal glow of the streetlights, which illuminates a makeshift court in an alley near his home. Emma Fitzsimmons, *Baltimore Joins Cities Toughening Curfews, Citing Safety but Eliciting Concern*, N.Y. TIMES (June 21, 2014), <http://www.nytimes.com/2014/06/22/us/baltimore-joins-cities-toughening-curfews-citing-safety-but-eliciting-concern.html>. But Jackson worries that he and his friends will attract attention from police officers who are looking for curfew violators. *Id.*

<sup>8</sup> For the full text of the curfew, see BALT., MD., CODE - UNREVISED ARTICLES art. 19, subtit. 34, at 79-86, (Balt. City Dep’t of Legislative Reference 2015), available at <http://archive.baltimorecity.gov/portals/0/charter%20and%20Codes/code/Art%2019%20-%20PoliceOrds.pdf>.

<sup>9</sup> Council B. 13-0261, Balt. City Council (Balt., Md. 2014) (providing that the curfew will take effect sixty days after the date on which it is enacted).

<sup>10</sup> See BALT., MD., CODE - UNREVISED ARTICLES art. 19, §§ 34-3, 34-4. See also discussion *infra* Part I.C.

<sup>11</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, §§ 34-3(b), 34-3(c)(1), 34-3(c)(2), 34-4(a).

minor's age, the day of the week, and the time of year.<sup>12</sup> There are, however, exceptions to each curfew.<sup>13</sup> The curfew further forbids parents "to knowingly permit or, by insufficient control, to allow" their children to violate the curfew.<sup>14</sup>

The curfew is among the strictest in the nation,<sup>15</sup> and is unlike any other. A curfew violation does not subject a minor to civil or criminal penalties.<sup>16</sup> Instead, it imposes penalties on the child's parent.<sup>17</sup> A parent who violates the curfew<sup>18</sup> faces issuance of a civil citation,<sup>19</sup> or he or she may elect to attend family counseling sessions with the minor at a city-approved agency.<sup>20</sup>

Baltimore City's curfew is sharply divisive; it has sparked controversy and debate among concerned city officials, community leaders, and citizens.<sup>21</sup> Chief among those concerns are the curfew's constitutional and policy implications.<sup>22</sup> The curfew raises several constitutional issues, namely a minor's equal protection rights under the Fourteenth Amendment.<sup>23</sup>

<sup>12</sup> See *id.* §§ 34-3(b), 34-3(c)(1), 34-3(c)(2), 34-4(a).

<sup>13</sup> See *id.* See also discussion *infra* Part I.C.2.

<sup>14</sup> See BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-5. See also discussion *infra* Part I.C.2.

<sup>15</sup> See, e.g., Lauren Gambino, *Outrage follows Baltimore's 'deeply flawed' youth curfew decision*, THE GUARDIAN (Aug. 12, 2014, 9:56 AM), <http://www.theguardian.com/world/2014/aug/12/-sp-baltimore-city-council-youth-curfew>; Justin Worland, *Baltimore Tightens Curfew Amid Skepticism and Protests*, TIME (Aug. 8, 2014), <http://time.com/3089931/baltimore-curfew/>; Yvonne Wenger & Colin Campbell, *Baltimore's new curfew takes effect Friday*, BALTIMORE SUN (Aug. 7, 2014), [http://articles.baltimoresun.com/2014-08-07/news/bs-md-ci-curfew-effective-20140806\\_1\\_curfew-collington-square-recreation-center-sandtown-winchester](http://articles.baltimoresun.com/2014-08-07/news/bs-md-ci-curfew-effective-20140806_1_curfew-collington-square-recreation-center-sandtown-winchester); Fitzsimmons, *supra* note 7.

<sup>16</sup> See generally BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-7.

<sup>17</sup> See generally *id.* § 34-9(a).

<sup>18</sup> See generally *id.* § 34-5. See also discussion *infra* Part I.C.3.b.

<sup>19</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-9(a)(1)(i).

<sup>20</sup> *Id.* § 34-9(a)(1)(ii).

<sup>21</sup> See discussion *infra* Part I.D.2.

<sup>22</sup> Luke Broadwater, *Council approves tough new curfew for city youths*, BALTIMORE SUN (May 12, 2014, 8:24 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-curfew-20140512-story.html> (quoting Sonia Kumar, an attorney with the American Civil Liberties Union of Maryland).

The ACLU sent a letter to the Baltimore City Council in opposition of the curfew, and considered filing a lawsuit to challenge it. See *Baltimore's Tough Curfew Law Takes Effect*, CBSLOCAL.COM (Aug. 8, 2014, 6:22 AM), <http://washington.cbslocal.com/2014/08/08/baltimores-tough-curfew-law-takes-effect-today/> (updated Aug. 9, 2014, 9:53 AM); Fitzsimmons, *supra* note 7; Broadwater, *supra*.

<sup>23</sup> See generally U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.") See also discussion *infra* Parts II and III.

This Comment analyzes Baltimore City's juvenile curfew under the Equal Protection Clause.<sup>24</sup> Part I provides a brief history of curfew laws in the United States and Maryland; discusses relevant case law in the Supreme Court of the United States and the Court of Appeals of Maryland; outlines the curfew's restrictions and enforcement strategies; and suggests the legislative policies underlying the curfew extend beyond those explicitly stated in it.

Part II summarizes the standards of review applicable to an equal protection analysis; compares various constitutional challenges to juvenile curfews in the federal courts; and analyzes the age-based classifications in, and the racially disproportionate effects of, Baltimore City's curfew.

Part III proposes two independent standards for reviewing Baltimore City's curfew: a heightened form of rational basis review for the curfew's age-based classifications, and strict scrutiny for the curfew's racially disproportionate effects. Part III also offers several alternative means by which the Baltimore City Council can advance the legislative policies underlying the curfew.

This Comment concludes that Baltimore City's juvenile curfew will survive an equal protection attack to its age classifications. This Comment further concludes that strict scrutiny is the appropriate standard to apply to the curfew's racially disproportionate effects, but that more data is needed to properly review the curfew under that standard. Finally, this Comment concludes that the alternative strategies offered in Part III would more effectively advance the legislative policies behind the curfew without offending the Equal Protection Clause.

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<sup>24</sup> Challenges to juvenile curfew ordinances on other grounds are beyond this Comment's scope, but juvenile curfews are vulnerable to myriad constitutional attacks. *See* cases cited *infra* notes 205-10.

## I. SINKING SUNS: CURFEWS IN THE UNITED STATES, MARYLAND, AND BALTIMORE

### A. A BRIEF HISTORY OF CURFEW LAWS IN THE UNITED STATES<sup>25</sup>

Juvenile curfew ordinances began to develop at the turn of the twentieth century<sup>26</sup> out of fear that immigrants would not control their children.<sup>27</sup> More than fifty percent of all cities with 100,000 residents had enacted a juvenile curfew ordinance by the mid-1950s;<sup>28</sup> more than seventy percent of such cities had done so by the 1990s.<sup>29</sup>

In the 1990s, municipalities frequently cited rising juvenile crime and victimization rates as the impetus for their curfews.<sup>30</sup> Although juvenile

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<sup>25</sup> Part I.A. merely offers a cursory glance at the history of curfew laws in the United States. *Cf.* Note, *Juvenile Curfews and the Major Confusion over Minor Rights*, 118 HARV. L. REV. 2400, 2402 (2005) [hereinafter *Major Confusion*] (“Juvenile curfews have deep historical roots.”).

For more comprehensive discussions, *see generally id.* at 2402-03; Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267, 277-85 (1998); Patryk J. Chudy, Note, *Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges*, 85 CORNELL L. REV. 518, 523-525 (2000); Brian Privor, Article, *Dusk ‘Til Dawn: Children’s Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 418-21 (1999).

<sup>26</sup> *See* Hemmens & Bennett, *supra* note 25, at 280 (noting that approximately 3,000 municipalities had enacted a juvenile curfew ordinance by the turn of the twentieth century); Note, *Assessing the Scope of Minors’ Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1164 n.9 (1984). *See also* Privor, *supra* note 25, at 418 (“American cities have implemented juvenile curfews[] . . . for at least 100 years.”).

<sup>27</sup> *See* Chudy, *supra* note 25, at 524-25; Gregory Z. Chen, Note, *Youth Curfews and the Trilogy of Parent, Child, and State Relations*, 72 N.Y.U. L. REV. 131, 134 (1997); Brian J. Lester, Comment, *Is It Too Late for Juvenile Curfews: QUTB Logic and the Constitution*, 25 HOFSTRA L. REV. 665, 668 (1996) (citation omitted).

<sup>28</sup> *See Major Confusion, supra* note 25, at 2403 (citation omitted); Chudy, *supra* note 25, at 525.

<sup>29</sup> *See Major Confusion, supra* note 25, at 2403 (stating that seventy-three percent of cities with 100,000 residents had enacted a juvenile curfew by 1995) (citation omitted); Privor, *supra* note 25, at 419 (stating that approximately eighty percent of cities with 100,000 residents have passed curfews between 1949 and 1999) (citation omitted). *See also* Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and To Whom?*, 2006 UTAH L. REV. 5, 19 n.69 (stating that more than seventy-five percent of the 200 largest U.S. cities had a juvenile curfew ordinance in effect by 1995) (citations omitted).

<sup>30</sup> Chudy, *supra* note 25, at 519 & n.2, 525. *See also Major Confusion, supra* note 25, at 2403 (“In the 1990s, . . . juvenile victimization and crime rates seemed to explode across the country.”); Privor, *supra* note 25, at 420-21 (stating that juvenile arrests for violent crimes increased by seventy percent between 1989 and 1993);

curfews are most prevalent in urban areas,<sup>31</sup> municipalities have enacted curfews “in a variety of contexts and circumstances,”<sup>32</sup> including attempts to control loitering and vagrancy,<sup>33</sup> subdue civil disorder and race riots,<sup>34</sup> regulate access to public parks,<sup>35</sup> and “keep African Americans off the streets during certain hours of the night.”<sup>36</sup> The Supreme Court has even upheld a general curfew and other restrictions as a constitutional means to protect national security.<sup>37</sup>

In *Hirabayashi v. United States*,<sup>38</sup> for example, the Court upheld a curfew which confined Japanese-Americans who resided in designated military areas to their homes between 8 p.m. and 6 a.m.<sup>39</sup> as a valid “defense measure[] for the avowed purpose of safeguarding the military area . . . at a time of threatened

Hemmens & Bennett, *supra* note 25, at 268 (“There is widespread sentiment in America that juvenile crime is out of control.”).

<sup>31</sup> Privor, *supra* note 25, at 416.

<sup>32</sup> Chudy, *supra* note 25, at 523.

<sup>33</sup> See generally, e.g., *Guidoni v. Wheeler*, 230 F. 93 (9th Cir. 1916) (upholding a Juneau, Alaska, ordinance which defined and prohibited vagrants from “wandering about the streets of the city” after 11 p.m.); *Ruff v. Marshall*, 438 F. Supp. 303 (M.D. Ga. 1977) (enjoining the city of Eatonton, Georgia, from enforcing two ordinances which prohibited loitering in public places). See also Chudy, *supra* note 25, at 523-24.

<sup>34</sup> See generally, e.g., *United States v. Chalk*, 441 F.2d 1277 (4th Cir. 1971) (upholding against First Amendment, vagueness, and overbreadth challenges a temporary nighttime curfew in force during a declared state of emergency in Asheville, North Carolina, that resulted from a “clash” between police and African-American high school students); *Glover v. District of Columbia*, 250 A.2d 556 (D.C. 1969) (upholding against First Amendment, due process, and vagueness challenges a nighttime curfew in force in Washington, D.C., in the wake of Dr. Martin Luther King Jr.’s assassination); *Ervin v. State*, 41 Wis. 2d 194, 199 n.3, 201, 163 N.W. 2d 207, 210 n.3, 211 (1968) (stating that an emergency curfew in Milwaukee, Wisconsin, was “an emergency measure undertaken to restore order in the community.”). See also Chudy, *supra* note 25, at 524.

The *Glover* court stated that “the nation has witnessed in recent years numerous civil disorders and disturbances in American cities which have increasingly had to resort to curfews to deal with such disorders.” *Glover*, 250 A.2d at 560 (citations omitted). Cf. discussion *infra* Part I.B.3.

<sup>35</sup> See generally, e.g., *Peters v. Breier*, 322 F. Supp. 1171 (E.D. Wis. 1971) (involving a Milwaukee, Wisconsin, ordinance which prohibited one’s presence in a certain public park between 10 p.m. and 7 a.m.). See also Chudy, *supra* note 25, at 524.

<sup>36</sup> See also Chudy, *supra* note 25, at 523 (citing Peter L. Scherr, *The Juvenile Curfew Ordinance: In Search of a New Standard of Review*, 41 WASH. U. J. URB. & CONTEMP. L. 163, 164-65 (1992)).

<sup>37</sup> See cases cited *infra* notes 38-45. See also Chudy, *supra* note 25, at 524.

<sup>38</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943) (opinion of Stone, J.).

<sup>39</sup> *Hirabayashi*, 320 U.S. at 83-84.

air raids and invasion by the Japanese forces.”<sup>40</sup> In *Korematsu v. United States*,<sup>41</sup> the Court upheld Congress’s authorization<sup>42</sup> to remove more than 112,000 Japanese-Americans from designated military areas<sup>43</sup> as an “aggregation of hardships”<sup>44</sup> incident to war.<sup>45</sup>

The Supreme Court decided both *Hirabayashi* and *Korematsu* under the Equal Protection Clause.<sup>46</sup> Curfews are, however, subject to constitutional attack under a host of other grounds,<sup>47</sup> including the First, Fourth, and Fifth Amendments, and the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.<sup>48</sup> Nevertheless, the Supreme Court has never decided the constitutionality of a juvenile curfew ordinance.<sup>49</sup> Moreover, the Court of Appeals of Maryland has reviewed juvenile curfews only within the due process framework,<sup>50</sup> despite such a “wide array of legal challenges to juvenile curfew laws[.]”<sup>51</sup>

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<sup>40</sup> *Hirabayashi*, 320 U.S. at 94-95, 102. *Accord Yasui v. United States*, 320 U.S. 115, 116-17 (1943) (opinion of Strone, J.) (following *Hirabayashi* in affirming a Japanese-American’s conviction for violating a wartime curfew).

<sup>41</sup> *Korematsu v. United States*, 323 U.S. 214 (1944) (opinion of Black, J.).

<sup>42</sup> *Id.* at 216.

<sup>43</sup> *Id.* at 236, 242 (Murphy, J., dissenting).

<sup>44</sup> *Id.* at 219.

<sup>45</sup> *Id.*

<sup>46</sup> *Korematsu* and *Hirabayashi* are the only two Supreme Court rulings to affirm the constitutionality of a race-based classification. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 715 (4th ed. 2011). *But cf.* *Korematsu*, 323 U.S. at 235 (Murphy, J., dissenting) (characterizing the internment of more than 112,000 Japanese-Americans as “one of the most sweeping and complete deprivations of constitutional rights in the history of this nation.”).

These decisions, however, have since been looked upon with disfavor. *See* CHERMERINSKY, *supra*. *See also* *Conaway v. Deane*, 401 Md. 219, 279, 932 A.2d 571, 607 (2007) (opinion of Harrell, J.) (“[T]he Supreme Court has characterized repeatedly as suspect classes distinctions based on . . . national origin[.]”); *Chew v. State*, 71 Md. App. 681, 712, 527 A.2d 332, 347-48 (1987) (“The Supreme Court has deemed discrimination by states on the basis of ancestry to be violative of the equal protection clause of the Fourteenth Amendment.”) (citations omitted).

<sup>47</sup> *See generally* Danny R. Veilleux, *Annotation, Validity, construction, and effect of juvenile curfew regulations*, 83 A.L.R. 4th 1056 (1991).

<sup>48</sup> *See generally id.*

<sup>49</sup> *See* Hemmens & Bennett, *supra* note 25, at 273 n.40 (1998); Susan M. Horowitz, *A Search for Constitutional Standards: Judicial Review of Juvenile Curfew Ordinances*, 24 COLUM. J.L. & SOC. PROBS. 381, 383 (1991).

<sup>50</sup> *See* discussion *infra* Part I.B.2.

<sup>51</sup> *Privor*, *supra* note 25, at 428.

## B. A BRIEF HISTORY OF CURFEW LAWS IN MARYLAND

1. *Curfews in Other Maryland Counties and Municipalities*<sup>52</sup>

Baltimore City is not the only county<sup>53</sup> or municipality<sup>54</sup> in Maryland that can enforce a curfew.<sup>55</sup> At least two other counties—Cecil County and Prince George’s County—have a juvenile curfew ordinance currently in force.<sup>56</sup> The Howard County and Prince George’s County executives each are statutorily authorized to establish an emergency curfew.<sup>57</sup>

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<sup>52</sup> The discussion of curfew laws in other Maryland counties and municipalities in Part I.B.1. is not exhaustive. All local curfew laws referenced in this discussion are accessible in one of two online databases, eCode360 or Municode. See ECODE360, <http://www.generalcode.com/codification/ecode/library> (last visited Oct. 12, 2015); MUNICODE, <https://www.municode.com/library/> (last visited Oct. 12, 2015).

<sup>53</sup> See MD. CODE ANN., LOCAL GOV’T § 1-101(e) (“‘County’ means a county of [Maryland] or Baltimore City.”).

<sup>54</sup> The term “municipality,” as used in Part I.B. refers to a city or town located in one of Maryland’s twenty-four counties; it does not refer to a county or Baltimore City. See *supra* note 53. Such references do not necessarily include the statutory definition of “municipality.” Cf. MD. CODE ANN., LOCAL GOV’T § 1-101(g) (“‘Municipality’ means a municipality that is organized under Article XI-E of the Maryland Constitution.”).

<sup>55</sup> See *infra* notes 56-57, 61-65. See also Hemmens & Bennett, *supra* note 25, at 273 (“The vast majority of juvenile curfews are local municipal legislation.”).

<sup>56</sup> CECIL CNTY., MD., CODE pt. II, ch. 180 (General Code Online through Nov. 4, 2014), available at <http://www.ecode360.com/15792287>; PRINCE GEORGE’S CNTY., MD., CODE subtit. 14, div. 1 (Municode Library through Aug. 26, 2015), available at [https://www.municode.com/library/MD/prince\\_george's\\_county/codes/code\\_of\\_ordinances?nodeId=PTIITI17PULOLAPRGECOMA\\_SUBTITLE\\_14MOCO\\_DIV1JUCU](https://www.municode.com/library/MD/prince_george's_county/codes/code_of_ordinances?nodeId=PTIITI17PULOLAPRGECOMA_SUBTITLE_14MOCO_DIV1JUCU).

Neither Cecil County nor Prince George’s County has explicit power to enact a juvenile curfew. Instead, such authority might be inherent or implied in other powers granted under those counties’ charters. See, e.g., CECIL CNTY., MD., CHARTER § 301 (General Code Outline through Nov. 4, 2014) (“[T]he Council may enact public local laws for the peace, good government, health, safety or welfare of the County.”), available at <http://www.ecode360.com/15790738>. Cf. U.S. CONST. art. I, § 8, cl. 18 (“The Congress shall have Power \* \* \* To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”).

<sup>57</sup> See HOWARD CNTY., MD., CODE §§ 6.103, 6.104 (Municode Library though July 16, 2015), available at [https://www.municode.com/library/MD/howard\\_county/codes/code\\_of\\_ordinances?nodeId=HOCOCO\\_TIT6COEXEXBR\\_SUBTITLE\\_1THCOEX](https://www.municode.com/library/MD/howard_county/codes/code_of_ordinances?nodeId=HOCOCO_TIT6COEXEXBR_SUBTITLE_1THCOEX); PRINCE GEORGE’S CNTY., MD., CODE §§ 6-102, 6-135 (Municode Library through Aug. 26, 2015), available at [https://www.municode.com/library/MD/prince\\_george's\\_county/codes/code\\_of\\_ordinances?nodeId=PTIITI17PULOLAPRGECOMA\\_SUBTITLE\\_6EMMA\\_DIV1GEPR](https://www.municode.com/library/MD/prince_george's_county/codes/code_of_ordinances?nodeId=PTIITI17PULOLAPRGECOMA_SUBTITLE_6EMMA_DIV1GEPR).

Similarly, at least forty-five municipalities in Maryland either are explicitly authorized to enact a juvenile curfew,<sup>58</sup> have one currently in force,<sup>59</sup> or have the power to establish and enforce an emergency curfew.<sup>60</sup> Twenty-three municipalities do not have a juvenile curfew currently in force, but are authorized under their charters to enact one.<sup>61</sup> In contrast, twenty municipalities<sup>62</sup> have a juvenile curfew currently in force,<sup>63</sup> nine of which are not explicitly authorized by that municipality's charter.<sup>64</sup> Twelve

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For a discussion of an emergency curfew in Baltimore City that was enforced between April 28 and May 4, 2015, see discussion *infra* Part I.B.3.

<sup>58</sup> See *infra* note 61.

<sup>59</sup> See *infra* notes 62-64.

<sup>60</sup> See *infra* note 65.

<sup>61</sup> Berlin, Brentwood, Cambridge, Chesapeake Beach, Delmar, Denton, Fruitland, Glenarden, Hagerstown, Hampstead, Indian Head, La Plata, Leonardtown, Lonaconing, Mardela Springs, Ocean City, Pittsville, Princess Anne, Rockville, St. Michaels, Sharptown, Snow Hill, and Willards. See, e.g., BERLIN, MD., CHARTER § C5-1(B)(14) (Municode through Nov. 18, 2014), available at [https://www.municode.com/library/md/berlin/codes/code\\_of\\_ordinances?nodeId=PTITHCH\\_ARTVGEPO\\_SC5-1ENPO](https://www.municode.com/library/md/berlin/codes/code_of_ordinances?nodeId=PTITHCH_ARTVGEPO_SC5-1ENPO); BRENTWOOD, MD., CHARTER § 402.11 (General Code Outline through June 6, 2013), available at <http://www.ecode360.com/27505182>; CAMBRIDGE, MD., CHARTER § 3-27(16) (Municode through Feb. 27, 2012), available at [https://www.municode.com/library/md/cambridge/codes/code\\_of\\_ordinances?nodeId=PTITHCH\\_S3-27POLI](https://www.municode.com/library/md/cambridge/codes/code_of_ordinances?nodeId=PTITHCH_S3-27POLI); CHESAPEAKE BEACH, MD., CHARTER § C-501(16) (General Code Outline through Nov. 20, 2014), available at <http://www.ecode360.com/15138318>; WICOMICO CNTY., MD., DELMAR CHARTER § DC4-12(C)(14) (General Code Outline), available at <http://www.ecode360.com/13348784>.

<sup>62</sup> Aberdeen, Emmitsburg, Federalsburg, Forest Heights, Frederick, Galena, Havre de Grace, Laurel, Manchester, Middletown, Mt. Airy, Myersville, New Windsor, North Beach, Ridgely, Rock Hall, Smithsburg, Sykesville, Westminster, and Woodsboro. See *infra* notes 63-64.

<sup>63</sup> See, e.g., FOREST HEIGHTS, MD., CODE § 13.7 (General Code Outline through Jan. 21, 2015), available at <http://www.ecode360.com/26873408>; GALENA, MD., CODE ch. 112 (General Code Outline through July 7, 2014), available at <http://www.ecode360.com/16069635>; HAVRE DE GRACE, MD., CODE ch. 52 (General Code Outline through June 1, 2015), available at <http://www.ecode360.com/8367988>; LAUREL, MD., CODE ch. 9, art. V (Municode through Dec. 15, 2015), available at [https://www.municode.com/library/md/laurel/codes/code\\_of\\_ordinances?nodeId=CH9MIPROF\\_ARTVCUPARE](https://www.municode.com/library/md/laurel/codes/code_of_ordinances?nodeId=CH9MIPROF_ARTVCUPARE); MT. AIRY, MD., CODE ch. 51 (General Code Outline through June 1, 2015), available at <http://www.ecode360.com/6264839>.

<sup>64</sup> See, e.g., ABERDEEN, MD., CODE ch. 272 (General Code Outline through May 18, 2015), available at <http://www.ecode360.com/14364539>; EMMITSBURG, MD., MUN. CODE § 9.12.040 (Municode through July 17, 2015), available at [https://www.municode.com/library/md/emmitsburg/codes/code\\_of\\_ordinances?nodeId=TIT9PUPEMOWE\\_CH9.12OFAGMI\\_9.12.040JUCU](https://www.municode.com/library/md/emmitsburg/codes/code_of_ordinances?nodeId=TIT9PUPEMOWE_CH9.12OFAGMI_9.12.040JUCU); FEDERALSBURG, MD., CODE ch. 48 (General Code Outline through Jan. 6, 2014), available at <http://www.ecode360.com/9899580>; FREDERICK, MD., CODE ch. 15 (Municode through June 30, 2015), available at <https://www.municode.com/library/md/frederick/codes/>

municipalities have the power to establish and enforce an emergency curfew.<sup>65</sup>

In total, at least three of Maryland's twenty-four counties, including Baltimore City,<sup>66</sup> have a county-wide juvenile curfew currently in force.<sup>67</sup> Among forty-three municipalities which are explicitly or implicitly authorized to enact a juvenile curfew,<sup>68</sup> twenty-three do not have one currently in force.<sup>69</sup> These patterns suggest that juvenile curfews are relatively uncommon in Maryland.<sup>70</sup>

Constitutional challenges to juvenile curfews in Maryland are even more infrequent. The Court of Appeals of Maryland has never decided a constitutional challenge to a county-wide curfew; it has decided a constitutional challenge to a municipal curfew only twice.<sup>71</sup>

## 2. *Maryland's Highest Court Upholds One Local Curfew and Invalidates Another*

Only two cases which lodged a constitutional attack against a juvenile curfew ordinance have reached the Court of Appeals of Maryland: *Thistlewood v. Trial Magistrate for Ocean City*<sup>72</sup> and *Ashton v. Brown*.<sup>73</sup> The

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code of ordinances?nodeId=PTIITHCO\_CH15OFIS; MANCHESTER, MD., CODE ch. 77 (General Code Outline through Jan. 13, 2015), *available at* <http://www.ecode360.com/11818001>.

<sup>65</sup> Annapolis, Berlin, Forest Heights, Hagerstown, La Plata, Laurel, Ocean City, Ridgely, Salisbury, Smithsburg, Snow Hill, and Westminster. *See, e.g.*, ANNAPOLIS, MD., CODE § 11.48.040(B)(3) (Municode through Aug. 3, 2015), *available at* [https://www.municode.com/library/md/annapolis/codes/code\\_of\\_ordinances?nodeId=TIT11PUPEMOWE\\_CH11.48EMMA\\_11.48.040DESTEMFF](https://www.municode.com/library/md/annapolis/codes/code_of_ordinances?nodeId=TIT11PUPEMOWE_CH11.48EMMA_11.48.040DESTEMFF); BERLIN, MD., CODE § 10-21 (Municode through Nov. 18, 2014), *available at* [https://www.municode.com/library/md/berlin/codes/code\\_of\\_ordinances?nodeId=SPAADLE\\_CH10CIEM\\_ARTIEMMA\\_S10-21CU](https://www.municode.com/library/md/berlin/codes/code_of_ordinances?nodeId=SPAADLE_CH10CIEM_ARTIEMMA_S10-21CU); FOREST HEIGHTS, MD., CODE § 2.9(A)(1) (General Code Outline through Jan. 21, 2015), *available at* <http://www.ecode360.com/29005190>; HAGERSTOWN, MD., CODE § 76-3 (General Code Outline through Sept. 30, 2014), *available at* <http://www.ecode360.com/9906165>; LA PLATA, MD., CODE § 146-3 (Jan. 31, 2015), *available at* [https://www.municode.com/library/md/la\\_plata/codes/code\\_of\\_ordinances?nodeId=CH146PEGOOR\\_146-3CU](https://www.municode.com/library/md/la_plata/codes/code_of_ordinances?nodeId=CH146PEGOOR_146-3CU).

<sup>66</sup> *See supra* note 53.

<sup>67</sup> *See supra* note 56.

<sup>68</sup> *See supra* notes 61-64.

<sup>69</sup> *See supra* note 61.

<sup>70</sup> *See* CUMBERLAND, MD., CODE § 11-131 (1966 & Supp. 1977), *repealed by* Cumberland, Md., Ordinance 3205 (Oct. 17, 1995) (Municode through Aug. 28, 2015), *available at* [https://www.municode.com/library/md/cumberland/codes/code\\_of\\_ordinances?nodeId=PTIICUCO\\_CH11MIPROF\\_ARTVOFINPUMO\\_S11-131RE](https://www.municode.com/library/md/cumberland/codes/code_of_ordinances?nodeId=PTIICUCO_CH11MIPROF_ARTVOFINPUMO_S11-131RE).

<sup>71</sup> *See* discussion *infra* Part I.B.2.

<sup>72</sup> 236 Md. 548, 204 A.2d 688 (1964) (opinion of Hammond, J.).

<sup>73</sup> 339 Md. 70, 660 A.2d 447 (1995) (opinion of Eldridge, J.).

curfew at issue in *Thistlewood* “prohibited persons under twenty-one [years old] from remaining on the streets of [Ocean City] between 12:01 a.m. and 6:00 a.m.” during Labor Day Weekend in 1963.<sup>74</sup> A trial magistrate convicted two defendants who violated the curfew.<sup>75</sup>

The defendants sought an annulment of their convictions on grounds that the curfew unconstitutionally restricted their “personal liberties.”<sup>76</sup> Four judges upheld the curfew.<sup>77</sup> The defendants appealed to the Court of Appeals of Maryland, arguing that the curfew violated their substantive due process rights.<sup>78</sup>

The court of appeals interpreted the curfew’s meaning before it turned to the due process question. The court concluded that Ocean City’s curfew was promulgated “against those who . . . loiter or congregate” in public areas “as a short term emergency measure to protect both its citizens and visitors from groups of minors and the minors from themselves.”<sup>79</sup> The court held, therefore, that the curfew prohibited minors from “remaining” on city streets and in other public areas, but that it permitted their mere presence there.<sup>80</sup>

Turning to the due process question, the court concluded that there was “a real and substantial relation”<sup>81</sup> between the curfew and “the objects sought to be attained.”<sup>82</sup> The court held, therefore, that the curfew did not infringe upon the petitioners’ fundamental rights.<sup>83</sup> Accordingly, the court upheld the curfew’s constitutional validity,<sup>84</sup> and affirmed the petitioners’ convictions.<sup>85</sup>

Like *Thistlewood*, the curfew at issue in *Ashton* implicated the Due Process Clause,<sup>86</sup> but the court of appeals struck it down as unconstitutionally vague.<sup>87</sup> At issue in *Ashton* was the City of Frederick’s curfew,<sup>88</sup> which prohibited a minor less than eighteen years old from “remain[ing] in or upon any public place or any establishment”<sup>89</sup> from 11 p.m. until 6 a.m. during the week, and from 11:59 p.m. until 6 a.m. on the weekend.<sup>90</sup>

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<sup>74</sup> *Thistlewood*, 236 Md. at 549, 204 A.2d at 689.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 550, 204 A.2d at 689.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 556, 204 A.2d at 693.

<sup>80</sup> *Thistlewood*, 236 Md. at 555, 204 A.2d at 692.

<sup>81</sup> *Id.* at 556, 204 A.2d at 693.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 557, 204 A.2d at 693.

<sup>84</sup> *Id.* at 557, 204 A.2d at 694.

<sup>85</sup> *Id.*

<sup>86</sup> *See generally Ashton*, 339 Md. 70, 660 A.2d 447.

<sup>87</sup> *Id.* at 93, 660 A.2d at 458.

<sup>88</sup> *Id.* at 79, 660 A.2d at 451.

<sup>89</sup> *Id.* at 80 & n.1, 660 A.2d at 452 & n.1 (citing FREDERICK, MD., CODE § 15-10 (1966 & Supp. 1992)).

<sup>90</sup> *Id.* at 80 & n.1, 660 A.2d at 452 & n.1 (citing FREDERICK, MD., CODE §§ 15-9(a), 15-10 (1966 & Supp. 1992)).

Police detained the plaintiffs and twenty-six other suspected curfew violators outside a privately-owned business, of which the clientele was predominately African-American.<sup>91</sup> At least twenty-five of the twenty-eight people detained were African-American.<sup>92</sup>

The plaintiffs alleged that enforcement of Frederick's curfew was racially motivated.<sup>93</sup> They sought a declaratory judgment that the curfew was unconstitutionally overbroad and vague, and infringed upon their First and Fourteenth Amendment rights, among others.<sup>94</sup> The plaintiffs further sought an injunction against the curfew's enforcement.<sup>95</sup>

The Circuit Court for Frederick County concluded that the curfew was constitutional, and therefore, enforceable.<sup>96</sup> The court, however, did not rule on the plaintiffs' allegations that the curfew's enforcement was racially discriminatory.<sup>97</sup>

The plaintiffs appealed to the Court of Special Appeals of Maryland,<sup>98</sup> which concluded that Frederick's curfew was unconstitutional<sup>99</sup> because it "burden[ed] the fundamental rights of minors and [was] not justified by any compelling governmental interest."<sup>100</sup> Reasoning in the alternative, the court of special appeals also held that the curfew was unconstitutionally vague.<sup>101</sup> Accordingly, it reversed the trial court's judgment.<sup>102</sup> Like the trial court, though, the court of special appeals did not rule on the appellants' contention that enforcement of the curfew was racially discriminatory.<sup>103</sup>

The City of Frederick appealed to the court of appeals,<sup>104</sup> which decided the issue on vagueness grounds.<sup>105</sup> The court concluded that neither the public nor police could determine from the curfew's prohibitions and exceptions whether a minor's "nighttime excursion" was violative of, or protected by, the

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<sup>91</sup> *Id.* at 82, 660 A.2d at 453.

<sup>92</sup> *Ashton*, 339 Md. at 82 & n.4, 660 A.2d at 453 & n.4 ("According to affidavits filed by the plaintiffs, twenty-eight suspected curfew violators were detained in the crackdown . . . , all of whom were African-American. \* \* \* According to the defendants, twenty-five of the twenty-eight arrestees were African-American.").

<sup>93</sup> *Id.* at 82, 660 A.2d at 453-54.

<sup>94</sup> *Id.* at 84, 660 A.2d at 454.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 85, 660 A.2d at 454.

<sup>97</sup> *Id.*

<sup>98</sup> *Ashton*, 339 Md. at 85, 660 A.2d at 454.

<sup>99</sup> *Id.* at 85, 660 A.2d at 455.

<sup>100</sup> *Id.* (quoting *Brown v. Ashton*, 93 Md. App. 25, 46, 611 A.2d 599, 609 (1992)).

<sup>101</sup> *Id.* at 85-86, 660 A.2d at 455 (citing *Brown*, 93 Md. App. at 49, 611 A.2d at 611).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 86, 660 A.2d at 455.

<sup>104</sup> *Ashton*, 339 Md. at 86, 660 A.2d at 455. Both parties petitioned the court of appeals for a writ of *certiorari*. *Id.* Only the City of Frederick's appeal, which challenged the Court of Special Appeals's judgment that the curfew was unconstitutional, *id.*, is relevant to this discussion.

<sup>105</sup> *Id.* at 88 n.8, 660 A.2d at 456 n.8.

curfew.<sup>106</sup> The court held, therefore, that the curfew was unconstitutionally vague, and thus violative of the Due Process Clause of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights.<sup>107</sup> The court of appeals, like the courts below, did not address whether the curfew's enforcement was racially discriminatory.<sup>108</sup>

*Ashton* suggests that Maryland courts are hesitant to review a juvenile curfew ordinance on grounds of race discrimination, perhaps because courts in different jurisdictions do not analyze the issue under a uniform standard.<sup>109</sup> However, Baltimore City's juvenile curfew<sup>110</sup> is vulnerable to such an attack,<sup>111</sup> and an attack on grounds of age discrimination.<sup>112</sup> In contrast, a challenge to the city's power to enforce an emergency curfew has proved futile.<sup>113</sup>

### 3. *An Emergency Curfew in Baltimore City Is Challenged*

Freddie Gray's death on April 19, 2015,<sup>114</sup> ignited a wave of protests, and, according to various media characterizations, "riots," "civil unrest," "civil disorder", and "the Baltimore uprising."<sup>115</sup> On April 27, the Governor of Maryland, Larry Hogan, declared a state of emergency<sup>116</sup> in response to the public outcry following Gray's death.<sup>117</sup> A few hours later, the Mayor of

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<sup>106</sup> *Id.* at 89, 660 A.2d at 456-57.

<sup>107</sup> *Id.* at 93, 660 A.2d at 456. Article 24 of the Maryland Declaration of Rights is Maryland's analog to the Due Process Clause of the Fourteenth Amendment. *Compare* MD. CONST., DECLARATION OF RIGHTS art. 24 ("That no man ought to be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."), *with* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]").

<sup>108</sup> *Ashton*, 339 Md. at 88 n.8, 660 A.2d at 456 n.8.

<sup>109</sup> *See* Chudy, *supra* note 25, at 522.

<sup>110</sup> *See* discussion *infra* Part I.C.

<sup>111</sup> *See* discussion *infra* Part II.C.

<sup>112</sup> *See* discussion *infra* Part II.B.

<sup>113</sup> *See* discussion *infra* Part I.B.3.

<sup>114</sup> On April 12, 2015, police officers arrested Freddie Gray, who suffered fatal injuries while he was in police custody. Gray fell into a coma, and died a week later, on April 19. For detailed accounts of Freddie Gray's death, its aftermath, and the criminal prosecution of the six police officers who allegedly were involved, see *Freddie Gray & Baltimore Unrest*, BALTIMORESUN.COM, <http://www.baltimoresun.com/news/maryland/freddie-gray/> (last visited Oct. 2, 2015).

<sup>115</sup> *Id.*

<sup>116</sup> *See* Exec. Order No. 01.01.2015.16, 42 Md. Reg. 644 (May 1, 2015).

<sup>117</sup> The executive order cited Baltimore City's need to:

Baltimore City, Stephanie Rawlings-Blake, announced that an emergency curfew would take effect the following day, and would remain in force until May 4.<sup>118</sup>

The emergency curfew applied equally to juveniles and adults between 10 p.m. and 5 a.m. on the following day.<sup>119</sup> The Circuit Court for Baltimore City upheld a challenge to Rawlings-Blake's power to impose and enforce the emergency curfew.<sup>120</sup>

The challenge arose when a man was charged with violating the emergency curfew.<sup>121</sup> The Circuit Court for Baltimore City concluded that Rawlings-Blake's imposition and enforcement of the emergency curfew was within her mayoral powers as a "conservator of the peace."<sup>122</sup>

Similarly, Baltimore City's juvenile curfew is within the City Council's legislative powers, as granted by the city's charter<sup>123</sup> and the Maryland General Assembly.<sup>124</sup> Whether the City Council's exercise of that power comports with the Equal Protection Clause is explored in Parts II and III.

take protective actions to protect the lives and property of citizens being currently impacted . . . ;

\* \* \*

to activate certain emergency contracts, and to facilitate the deployment of requisite resources . . . ;

\* \* \*

Use . . . resources of the Maryland National Guard[.]

*Id.* at 644.

<sup>118</sup> Balt., Md., Curfew – Emergency (Apr. 27, 2015), available at <http://www.baltimorecity.gov/sites/default/files/Curfew-Emergency-20150427.pdf>.

<sup>119</sup> *Id.* at 1-2.

<sup>120</sup> See Justin Fenton, *Judge upholds mayor's curfew authority while dismissing charge*, BALTIMORE SUN (July 7, 2015 10:03 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-curfew-upheld-20150707-story.html>. The circuit court did not issue a written order. Instead, it announced its ruling on the record in open court.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* See also BALT. CITY, MD., CHARTER art IV, § 4(a), at 110, (Balt. City Dep't of Legislative Reference 2015) ("The Mayor, by virtue of the office, shall have all the powers of a conservator of the peace."), available at <http://archive.baltimorecity.gov/Portals/0/Charter%20and%20Codes/ChrtrPLL/01%20-%20Charter.pdf>.

<sup>123</sup> See BALT., MD., CHARTER art. II, § 47; art. III, § 11 (Balt. City Dep't of Legislative Reference 2015), available at <http://archive.baltimorecity.gov/Portals/0/Charter%20and%20Codes/ChrtrPLL/01%20-%20Charter.pdf>.

<sup>124</sup> See MD. CODE ANN., LOCAL GOV'T § 10-206(a)(2) ("A county council may pass any ordinance, resolution, or bylaw not inconsistent with State law that: . . . may aid in maintaining the peace, good government, health, and welfare of the county.").

C. BALTIMORE CITY'S JUVENILE CURFEW<sup>125</sup>1. *Defining the Curfew and Its General Prohibitions*<sup>126</sup>

Baltimore City's new curfew applies to minors<sup>127</sup> in public places,<sup>128</sup> and their parents.<sup>129</sup> Both the daytime and nighttime curfews prohibit a minor from "remain[ing]"<sup>130</sup> in or about any public place or establishment"<sup>131</sup> during specified hours, depending on the minor's age, the day of the week, and the time of the year.<sup>132</sup> The curfew further prohibits a minor's parent from knowingly permitting, or by insufficient control allowing, the minor to violate either curfew.<sup>133</sup>

2. *The Curfew's Time and Place Restrictions*a. The Daytime Curfew<sup>134</sup>

The daytime curfew requires minors less than sixteen years old to be in school between 7:30 a.m. and 3 p.m. on any school day.<sup>135</sup> The daytime curfew's exceptions protect a minor who is absent from school if:

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<sup>125</sup> See generally BALT., MD., CODE - UNREVISED ARTICLES art. 19, subtit. 34.

<sup>126</sup> For the curfew's relevant definitions, see *id.* § 34-1. See also *infra* notes 127-31.

<sup>127</sup> "Minor" means any person less than seventeen years old. BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-1(d). This Comment hereinafter uses the terms "minor," "juvenile," and "child" or "children" interchangeably.

<sup>128</sup> "Public place" means any public street, highway, road, alley, park, playground, wharf, dock, public building, or vacant lot. *Id.* § 34-1(g) (quotation marks omitted).

<sup>129</sup> "Parent" means a minor's biological parent, legal guardian, or any person at least eighteen years old who is legally responsible for the care and custody of a minor. *Id.* § 34-1(f).

<sup>130</sup> "Remain" means to loiter, idle, wander, stroll, or play in or upon. *Id.* § 34-1(h) (quotation marks omitted).

<sup>131</sup> "Establishment" means any privately-owned, for-profit place of business, or any public place of amusement or entertainment. *Id.* § 34-1(b).

<sup>132</sup> See discussion *infra* Part I.C.2.

<sup>133</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-5. The curfew also prohibits the "operator" of an establishment, and his agents and employees, from knowingly permitting a minor in violation of the daytime or nighttime curfews to remain on the premises. *Id.* §§ 34-1(e)(1), 34-6. However, the curfew's constitutional implications upon establishments and their owners, if any, are beyond this Comment's scope.

<sup>134</sup> See generally *id.* § 34-4.

<sup>135</sup> *Id.* § 34-4(a).

- the minor has written proof from school authorities excusing attendance at a particular time;<sup>136</sup>
- the minor is accompanied by a parent or person at least twenty-one years of age,<sup>137</sup> or
- the minor is traveling to or from school.<sup>138</sup>

The nighttime curfew, however, is more nuanced than its daytime counterpart.<sup>139</sup>

b. The Nighttime Curfew<sup>140</sup>

The nighttime curfew differs for minors who are less than fourteen years old and those who are between fourteen and seventeen years old.<sup>141</sup> The nighttime curfew categorically requires minors less than fourteen years old to be at home between 9 p.m. and 6 a.m. of the following day—regardless of the day of the week or time of the year.<sup>142</sup>

In contrast, the curfew permits minors between fourteen and seventeen years old to stay out until 10 p.m. on weeknights, and until 11 p.m. on the weekends, during the academic year.<sup>143</sup> During the summer months, minors between fourteen and seventeen years old may be out until 11 p.m. every night of the week.<sup>144</sup>

For minors between fourteen and seventeen years old, the curfew's two different time components<sup>145</sup> seem to be at odds with each other. The curfew's plain language does not clearly indicate whether minors between fourteen and seventeen years old are permitted to stay out until 11 p.m. on a weeknight during the academic year when school is closed the following day.<sup>146</sup>

<sup>136</sup> *Id.* § 34-4(b)(1).

<sup>137</sup> *Id.* § 34-4(b)(2).

<sup>138</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-4(b)(3) (quotation marks omitted).

<sup>139</sup> See discussion *infra* Part I.C.2.b.

<sup>140</sup> See generally BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-3.

<sup>141</sup> Compare *id.* § 34-3(b), with *id.* § 34-3(c)(1) to (c)(2). However, the nighttime curfew terminates at 6 a.m. each day, regardless of the minor's age. See *id.* §§ 34-3(b), 34-3(c)(1) to (c)(2)(iii).

<sup>142</sup> See *id.* § 34-3(b).

<sup>143</sup> See *id.* § 34-3(c)(2)(i) to (c)(2)(iii).

<sup>144</sup> See BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-3(c)(1).

<sup>145</sup> See *id.* § 34-3(c)(1) to (c)(2)(iii).

<sup>146</sup> Compare *id.* § 34-3(c)(1) ("From and including 12:01 a.m. on the *Friday preceding Memorial Day* each year through 12 midnight of the *last Sunday of August* each year, no minor at least 14, but less than 17, years of age may remain in or about any public place or any establishment between the hours of 11 p.m. on any day and 6 a.m. of the following day.") (emphasis added), with *id.* § 34-3(c)(2)(iii) ("For the remainder of the calendar year, no minor at least 14, but less than 17, years of age

Nonetheless, the nighttime curfew provides for seven exceptions.<sup>147</sup> It protects minors who are:

- accompanied by a parent;<sup>148</sup>
- exercising their First Amendment rights under the U.S. Constitution;<sup>149</sup>
- traveling in a motor vehicle;<sup>150</sup>
- traveling to, engaged in, or returning from their place of employment;<sup>151</sup>
- involved in an emergency;<sup>152</sup>
- present on the sidewalk abutting their residence;<sup>153</sup> or
- traveling to, attending, or returning from an official school, religious, or recreational activity.<sup>154</sup>

Moreover, the nighttime curfew's exceptions apply equally to both age classifications.<sup>155</sup>

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may remain in or about any public place or any establishment . . . between the hours of 10 p.m. and 6 a.m. of the following day, *on any other day of the week.*") (emphasis added).

<sup>147</sup> See *infra* notes 148-54.

<sup>148</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-3(a)(1).

<sup>149</sup> *Id.* § 34-3(a)(2). This provision does not delineate the permissible scope within which a minor may exercise his or her First Amendment rights. For example, this provision seems to permit a minor's participation in a protest during the late evening and early morning hours, subject to other constitutionally valid time, place, and manner restrictions, even though the curfew generally prohibits the minor's presence in public during those times.

<sup>150</sup> *Id.* § 34-3(a)(3).

<sup>151</sup> *Id.* § 34-3(a)(4).

<sup>152</sup> *Id.* § 34-3(a)(5) (quotation marks omitted).

<sup>153</sup> *Id.* § 34-3(a)(6).

<sup>154</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-3(a)(7).

<sup>155</sup> See *generally id.* § 34-3(a).

### 3. *Enforcing the Curfew*<sup>156</sup>

#### a. Enforcing the Curfew Against Minors<sup>157</sup>

Police do not specifically target curfew violators.<sup>158</sup> Instead, detentions for curfew violations occur during routine patrol.<sup>159</sup>

Police may detain a minor believed to be in violation of the curfew,<sup>160</sup> but the detention is not an arrest, nor does it create a criminal record for the minor.<sup>161</sup> Police must take a minor believed to be in violation of the curfew to the minor's school,<sup>162</sup> a "Youth Connection Center,"<sup>163</sup> or the minor's home.<sup>164</sup>

The Youth Connection Center<sup>165</sup> must notify a parent of the violation and take appropriate measures to reduce the probability that the minor will commit

<sup>156</sup> See generally *id.* §§ 34-8, 34-8.1, 34-9.

<sup>157</sup> See generally *id.* § 34-8.

<sup>158</sup> Telephone Interview with Angela Johnese, Dir., Mayor's Office on Criminal Justice, City of Balt., and Sulakshana Bhattacharya, Program Coordinator, Mayor's Office on Criminal Justice, City of Balt. (Feb. 25, 2015).

<sup>159</sup> *Id.*

<sup>160</sup> A police officer who has reason to believe that a minor is violating either the daytime or nighttime curfew must "seek to obtain" the minor's name, age, address, school or other valid identification, and the name of his parent(s). BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-8(a)(1) to (a)(2).

<sup>161</sup> *Id.* § 34-7. This provision does not preclude a police officer from arresting a minor who is engaged in criminal activity while in violation of the curfew. Telephone Interview with Angela Johnese and Sulakshana Bhattacharya, *supra* note 158. In such cases, police will not enforce the curfew against the minor, but they will charge the minor with a crime. *Id.*

<sup>162</sup> This provision applies only to the daytime curfew. See BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-8(b)(1)(i).

<sup>163</sup> *Id.* §§ 34-8(b)(1)(ii), 34-8(c)(1)(ii).

The curfew does not explicitly define "Youth Connection Center." See generally *id.* § 34-1. Nevertheless, police may transport a minor believed to be in violation of the daytime curfew to a "truancy center." See *id.* § 34-1(i). Similarly, police may transport a minor believed to be in violation of the nighttime curfew to a "juvenile holding facility." See *id.* § 34-1(c).

Both terms mean a place to which minors believed to be in violation of the curfew may be taken to determine an appropriate course of action. *Id.* §§ 34-1(c), 34-1(i).

<sup>164</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, §§ 34-8(b)(1)(iii), 34-8(c)(1)(i).

<sup>165</sup> Baltimore City operates two Youth Connection Centers. Press Release, Office of the Mayor of Balt. City, Mayor Rawlings-Blake Releases Curfew Violation Numbers (Sept. 11, 2014) (on file with Office of the Mayor of Balt. City), available at <http://mayor.baltimorecity.gov/news/press-releases/2014-09-11-curfew-violation-numbers-released>.

The Lillian Jones Recreation Center (1301 North Stricker Street) is located in the Sandtown-Winchester neighborhood in West Baltimore; Collington Square Community Recreation Center (1409 North Patterson Park Avenue) is located in the

a subsequent violation.<sup>166</sup> If the minor's parent or another adult family member<sup>167</sup> does not claim the minor from a youth connection center by 6 a.m. the following morning, the minor may be referred to or placed in the custody of the Baltimore City Department of Social Services.<sup>168</sup>

b. Enforcing the Curfew Against Parents<sup>169</sup>

Police may issue a civil citation to a parent who violates the curfew for the first time.<sup>170</sup> In lieu of being issued a civil citation for the first offense, a parent may agree to attend family counseling sessions with the minor at a city-approved agency.<sup>171</sup> A parent who subsequently violates the curfew is guilty of a misdemeanor<sup>172</sup> and is subject to a maximum fine of \$500 and/or community service.<sup>173</sup> Thus, the curfew's enforcement strategy and sanctions on parents imply legislative policies beyond those stated in the ordinance.<sup>174</sup>

D. THE BALTIMORE CITY COUNCIL'S INTERESTS UNDERLYING ITS CURFEW

1. *Explicit Policies: Reducing Juvenile Crime and Delinquency, and Promoting Education*

a. The Baltimore City Council's Legislative Findings

Section 34-2 of Baltimore City's juvenile curfew ordinance states three legislative findings underlying the curfew.<sup>175</sup> First, the "substantial increase" in the volume and severity of crimes committed by minors is a "menace to the

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Broadway East neighborhood in East Baltimore. *Id.*

<sup>166</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, §§ 34-8(b)(2)(i) to (b)(2)(ii), 34-8(c)(2).

<sup>167</sup> *See id.* § 34-8(c)(2)(i) ("If the minor is taken to a Youth Connection Center, the facility shall notify a parent or an adult brother, sister, aunt, uncle, or grandparent to come and take charge of the minor.").

<sup>168</sup> *Id.* § 34-8(c)(3)(ii).

<sup>169</sup> *See generally id.* § 34-9(a).

<sup>170</sup> *Id.* § 34-9(a)(1)(i).

<sup>171</sup> *Id.* § 34-9(a)(1)(ii). A parent's attendance at a family counseling session is entirely voluntary. Telephone Interview with Angela Johnese and Sulakshana Bhattacharya, *supra* note 158. As such, there are no records of parents who opt for the family counseling sessions. *Id.* Family Tree is one example of an organization which provides family counseling services. *Id.* For additional information for Family Tree, see FAMILYTREE, <http://www.familytreemd.org/>.

<sup>172</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-9(a)(2).

<sup>173</sup> *Id.* § 34-9(a)(2)(i) to (a)(2)(ii).

<sup>174</sup> *See discussion infra* Part I.D.2.

<sup>175</sup> *See generally* BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-2.

preservation of public peace, safety, health, morals, and welfare.”<sup>176</sup> The Mayor of Baltimore and the Baltimore City Council dubbed this finding an “emergency.”<sup>177</sup>

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<sup>176</sup> *Id.* § 34-2(1).

Indeed, reducing the juvenile crime rate and protecting juveniles from becoming victims of crime are among the most common policies underlying juvenile curfew ordinances. See Brant K. Brown, Note, *Scrutinizing Juvenile Curfews: Constitutional Standards & the Fundamental Rights of Juveniles & Parents*, 53 VAND. L. REV. 653, 659 (2000). See also Privor, *supra* note 25, at 416 (“Many municipal policymakers have embraced juvenile curfew laws to keep youths off the streets and out of harm’s way during the nighttime and early morning hours.”). But see Memorandum from Shalik D. Fulton, Comm’r Chairman, Balt. City Youth Comm’n, and Cody L. Dorsey, Comm. Chairman, Balt. City Youth Comm’n, to Bernard C. “Jack” Young, President, Balt. City Council (Oct. 10, 2013) (on file with author) (“We have spoken to our peers, and some believe this legislation will not deter youth from committing crime.”).

<sup>177</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-2(1).

The volume and severity of crime in Baltimore City is not exclusive to minors. See, e.g., Justin Fenton & Luke Broadwater, *Stray bullets again strike bystanders in city*, BALTIMORE SUN (Oct. 5, 2015, 8:15 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-bystander-shootings-20151005-story.html> (reporting an eighty percent rise in gun violence in Baltimore City between 2014 and 2015, and that the number of homicides in the city is on pace to reach 300 for the first time since the 1990s); Justin Fenton, Christina Jedra, & Mayah Collins, *45 murders in 31 days: Looking back at Baltimore's deadliest month*, BALTIMORE SUN (Aug. 29, 2015, 12:08 PM), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-ci-july-homicide-victims-20150829-story.html> (reporting the highest monthly homicide total in Baltimore City, forty-five, since August 1972, when the city had approximately 275,000 more residents).

Still, the Mayor and City Council’s findings as to the volume and severity of juvenile crime and victimization are not unfounded. See, e.g., Mark Puente, *Girl, 9, shot Sunday afternoon in Waverly*, BALTIMORE SUN (Oct. 4, 2015, 9:02 PM), <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-ci-shooting-20151004-story.html> (reporting the death of a nine-year-old who was struck by a stray bullet while playing outside on a weekend afternoon); Kevin Rector, *Two teens with toy gun arrested in Bolton Hill carjacking*, BALTIMORE SUN (Sept. 22, 2015, 6:00 PM), <http://www.baltimoresun.com/news/maryland/crime/blog/bs-md-toy-gun-carjacking-20150922-story.html> (reporting that two teenagers, ages sixteen and eighteen, respectively, were arrested and charged with armed robbery and assault after they allegedly used a toy gun in a carjacking at 7 a.m.). But see Luke Broadwater, *Key lawmaker questions need for new youth jail in city*, BALTIMORE SUN (Sept. 1, 2015, 7:38 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-juvenile-jail-20150901-story.html> (reporting a ten-year low, and a fifty-seven percent drop since 2012, in the daily average number of juveniles who are detained at the Baltimore City Juvenile Justice Center).

Second, the city's increase in juvenile delinquency "has been caused in part by the large number of minors who are permitted to remain in public places and in certain establishments during night hours without adult supervision, and during daylight hours at times when, by law, they are required to attend school."<sup>178</sup> Third, the "alarming" increase in truancy,<sup>179</sup> coupled with the "rapid" decrease in academic achievement,<sup>180</sup> has resulted in an "increase in failures and dropouts, frustration, malcontent, antisocial conduct, and, for many, a future without promise."<sup>181</sup>

b. The Baltimore City Council's Legislative Intent

The curfew purports to reduce juvenile delinquency by "regulating the hours during which minors may remain in public places and in certain establishments without adult supervision, and by imposing certain duties and responsibilities upon the parents or other adult persons who have care and custody of minors."<sup>182</sup> The curfew further purports to ensure a basic education of the city's youth:

Education is the foundation of success and a productive life. The City of Baltimore provides the educational system and its staff, but the cooperation of students and their parents determines the productivity of the educational system. Late evening activity by certain of our youth prevents them from concentrating in class or, even worse, causes their absence from class. This, together with truancy, has risen alarmingly in recent years and youth is thus deprived of a necessary basic education.<sup>183</sup>

The curfew's stated policies notwithstanding, the Baltimore City Council's unstated intent is implicit in the curfew's legislative history.<sup>184</sup>

2. *Implicit Policies: Encouraging Parents to Take a More Active Role in Raising Their Children*

The Baltimore City Council's interest behind the curfew extends beyond reducing juvenile crime, delinquency, and promoting education. For example,

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The curfew, however, would not have prevented the death of a nine-year-old girl or the alleged carjacking. See discussion *supra* Part I.C.2.

<sup>178</sup> BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-2(2).

<sup>179</sup> *Id.* § 34-2(3).

<sup>180</sup> *Id.* § 34-2(2).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* § 34-2(4).

<sup>183</sup> *Id.* § 34-2(3).

<sup>184</sup> See discussion *infra* Part I.D.2.

the legislative history suggests the curfew will force parents to be more involved in raising their children, connect at-risk families with the social services they need, or both.<sup>185</sup> The curfew's sanctions on parents<sup>186</sup> imply the curfew's purpose is to compel parents to take a more active role in raising their children.<sup>187</sup> Indeed, the Baltimore City Police Department and the Office of the State's Attorney have recognized that curfew violation likely results from unstable home environments.<sup>188</sup>

A parent's curfew violation, however, may not constitute parental abuse or neglect.<sup>189</sup> Nevertheless, the Baltimore City Department of Social Services suggested providing "in-home services" to parents of children who are less than thirteen years old and who violate the curfew.<sup>190</sup>

Thus, the curfew implicitly seeks to link "those persons who violate the curfew and their families with appropriate services"<sup>191</sup> not merely to

<sup>185</sup> See sources cited *infra* notes 188-91.

<sup>186</sup> See generally BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-9(a).

<sup>187</sup> See Orly Jashinsky, Article, *Liberty for All? Juvenile Curfews: Always an Unconstitutional and Ineffective Solution*, 4 RUTGERS J.L. & PUB. POL'Y 546, 548-50 (1997).

<sup>188</sup> See Memorandum from Ganesha Martin, Chief of Staff, Office of the Police Comm'r, Balt. City Police Dep't, to the Balt. City Council (May 6, 2014) (on file with author) ("Minors who are found to be in violation of the curfew often times lack supervision created by unstable living environments. The access to counseling services in lieu of a civil citation is an opportunity to link youth and their families to the social services they need."); Memorandum from Greg L. Bernstein, State's Att'y for Balt. City, Office of the State's Att'y for Balt. City, to the Balt. City Council (Oct. 12, 2013) (on file with author) ("[C]urfew violation is often a sign of lack of supervision from the addiction of a parent, unstable living arrangements, or other problems facing the family.").

<sup>189</sup> Memorandum from David Thompson, Interim Dir., Balt. City Dep't of Social Servs., to the Balt. City Council (May 6, 2014) (on file with author).

Others, however, are concerned with child safety and parental neglect. See *Despite concern, Baltimore City positive about new curfew law*, ABC2NEWS.COM (Aug. 11, 2014), <http://www.abc2news.com/news/region/baltimore-city/despite-concern-baltimore-city-positive-about-new-curfew-law> (updated Aug. 12, 2014); Kai Reed, *Baltimore leaders answer child curfew questions at forum*, WBALTV.COM (July 22, 2014, 8:17 AM), <http://www.wbalTV.com/news/baltimore-leaders-answer-child-curfew-questions-at-forum/27087298>; Lowell Melser, *New Baltimore curfew law sparks controversy*, WBALTV.COM (June 4, 2014, 7:40 AM), <http://www.wbalTV.com/news/new-baltimore-curfew-law-sparks-controversy/26310430>; Cody L. Dorsey, *Curfew law will make Baltimore safer for youths [Letter]*, BALTIMORE SUN (May 19, 2014), [http://articles.baltimoresun.com/2014-05-19/news/bs-ed-curfew-20140519\\_1\\_baltimore-city-council-curfew-law-youths](http://articles.baltimoresun.com/2014-05-19/news/bs-ed-curfew-20140519_1_baltimore-city-council-curfew-law-youths).

<sup>190</sup> Memorandum from David Thompson, *supra* note 189.

<sup>191</sup> Memorandum from Greg L. Bernstein, *supra* note 188. See also Interview with Brandon Scott, Councilman, Balt. City Council, in Balt., Md. (Aug. 5, 2015) (notes on file with author).

encourage, but to compel parents to be more involved in raising their children.<sup>192</sup> The curfew is, therefore, vulnerable to a constitutional challenge on grounds that it infringes on a parent's fundamental right under the Fourteenth Amendment to raise his or her children.<sup>193</sup>

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Opponents of the curfew further acknowledge that many parents in the city are in need of the social services to which the curfew is designed to connect them, but they argue the curfew will be ineffective in doing so. See Gary Gately, *Baltimore's Newly Approved Youth Curfew Among Strictest in Nation*, JUVENILE JUSTICE INFORMATION EXCHANGE (June 16, 2014), <http://jjie.org/baltimores-newly-approved-youth-curfew-among-strictest-in-nation/>.

<sup>192</sup> The American Civil Liberties Union of Maryland contends that:

[T]he proposal significantly infringes upon fundamental parental rights by depriving parents of discretion to raise their children in ways that make sense for the family. . . . There are an infinite number of scenarios in which the proposed expansion deprives parents of the ability to make perfectly healthy, appropriate and good decisions for their kids.

Letter from Sonia Kumar, Staff Att'y, Am. Civil Liberties Union of Md., to Bernard C. "Jack" Young, President, Balt. City Council, and City Council, Balt., Md. (May 12, 2014) (on file with author), available at [http://www.aclu-md.org/uploaded\\_files/0000/0548/curfew\\_letter\\_080614.pdf](http://www.aclu-md.org/uploaded_files/0000/0548/curfew_letter_080614.pdf).

<sup>193</sup> See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (opinion of Rutledge, J.) ("[T]he custody, care and nurture of the child reside first in the parents[.]") (citation omitted); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (opinion of McReynolds, J.) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (opinion of McReynolds, J.) ("[T]he right of parents to engage [a teacher] to instruct their children . . . [is] within the liberty of the [Fourteenth] Amendment."); *Accord* *In re Ashley S.*, 431 Md. 678, 683-84 & n.1, 66 A.3d 1022, 1025 & n.1 (2013); *Janice M. v. Margaret K.*, 404 Md. 661, 671, 948 A.2d 73, 79 (2008); *Koshko v. Haining*, 398 Md. 404, 422-23, 921 A.2d 171, 181-82 (2007). An analysis of this issue, however, is beyond this Comment's scope.

For cases in which a court decided whether a juvenile curfew impermissibly infringed on a parent's right to raise his or her children, see, for example, *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C. Cir. 1999); *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998), cert. denied, 119 S. Ct. 1252 (1999); *McColleston v. Keene*, 586 F. Supp. 1381 (D.N.H. 1984); *Bykofsky v. Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975); *People v. Liccione*, 964 N.Y.S. 2d 405 (J. Ct. 2013); *Treacy v. Municipality of Anchorage*, 91 P.3d 252 (Alaska 2004); *State v. T.M.*, 761 So. 2d 1140 (Fla. Dist. Ct. App. 2d Dist. 2000); *City of Panora v. Simmons*, 445 N.W. 2d 363 (Iowa 1989); *Milwaukee v. K.F.*, 145 Wis. 2d 24, 426 N.W. 2d 329 (1988); *Allen v. Bordentown*, 216 N.J. Super. 557, 524 A.3d 478 (1987); *Eastlake v. Ruggiero*, 7 Ohio App. 212, 220 N.E. 2d 126 (1966).

For a discussion of a juvenile curfew ordinance's constitutional implications on parental rights, see Harris, *supra* note 29; Brown, *supra* note 176; Chen, *supra* note

Such an attack,<sup>194</sup> however, is not the only one available. Indeed, the curfew's unstated policies and implicit intended effects<sup>195</sup> raise additional questions as to its enforcement patterns, which indicate that it discriminates on the basis of age,<sup>196</sup> race,<sup>197</sup> or both.

## II. ANALYZING BALTIMORE CITY'S JUVENILE CURFEW UNDER THE EQUAL PROTECTION CLAUSE

Baltimore City's juvenile curfew implicates the Equal Protection Clause in two ways. First, the curfew's age classifications<sup>198</sup> distinguish between those subject to its restrictions and those free from them.<sup>199</sup> Second, the curfew is vulnerable to a challenge that the city enforces it disproportionately against minorities.<sup>200</sup>

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27.

<sup>194</sup> The curfew's lenient enforcement practices against parents diminish the threat that it is an unconstitutional infringement on parental rights. *See infra*. For example, police have discretion to issue a citation to parents who violate the curfew, but they did not do so for any of the city's first 398 reported violations. Telephone Interview with Angela Johnese and Sulakshana Bhattacharya, *supra* note 158 (statistics reported to be accurate through Feb. 21, 2015); E-mail from Sulakshana Bhattacharya, Program Coordinator, Mayor's Office on Criminal Justice, City of Balt. to author (Feb. 26, 2015, 10:29 EST) (on file with author).

Moreover, attendance at a family counseling session at a city-approved agency is voluntary, because a parent can elect this option instead of receiving a citation. *See* BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-9(a)(1); Telephone Interview with Angela Johnese and Sulakshana Bhattacharya, *supra*. The city does not, therefore, keep records of parents who elect to attend family counseling. Telephone Interview with Angela Johnese and Sulakshana Bhattacharya, *supra*.

Similarly, the city does not track the number or identity of parents who are fined for a subsequent curfew violation. *See* Interview with Brandon Scott, *supra* note 191. Thus, the absence of any citations to parents who permit their children to violate the curfew, and of their participation in city-approved family counseling programs, render the parental rights issue all but moot.

<sup>195</sup> *See* sources cited *supra* notes 188-91.

<sup>196</sup> *See* discussion *infra* Part II.B.

<sup>197</sup> *See* discussion *infra* Part II.C. *See also* Hemmens & Bennett, *supra* note 25, at 275 (“[C]urfew opponents sometimes raise the specter of racist motivation for such laws.”).

<sup>198</sup> *See* BALT., MD., CODE - UNREVISED ARTICLES art. 19, §§ 34-1(d), 34-3(b), 34-3(c) (Balt. City Dep't of Legislative Reference 2015), *available at* <http://archive.baltimorecity.gov/portals/0/charter%20and%20Codes/code/Art%2019%20-%20PoliceOrds.pdf>. *See also* discussion *supra* Part I.C.

<sup>199</sup> *See* discussion *infra* Part I.C.2.

<sup>200</sup> *See* discussion *infra* Part II.C.3.

Critics of the curfew are especially leery of its potential for racial profiling, fearing it will target predominantly, or entirely, African-American neighborhoods. *See* Lauren Gambino, *Outrage follows Baltimore's 'deeply flawed' youth curfew*

However, federal and state courts often appear to avoid deciding a juvenile curfew under the Equal Protection Clause<sup>201</sup>—perhaps because there is no consensus among them as to the applicable standard of scrutiny,<sup>202</sup> or because deciding cases on other grounds<sup>203</sup> is less burdensome.<sup>204</sup> Instead, courts are

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*decision*, THE GUARDIAN (Aug. 12, 2014, 9:56 AM), <http://www.theguardian.com/world/2014/aug/12/-sp-baltimore-city-council-youth-curfew> (“Some of the strongest criticism of the law has come from those who believe it’s shrouded in discrimination.”); *Baltimore’s Tough Curfew Law Takes Effect*, CBSLOCAL.COM (Aug. 9, 2014, 9:53 AM), <http://washington.cbslocal.com/2014/08/08/baltimores-tough-curfew-law-takes-effect-today/> (“Critics say the stringent bill could unfairly target African American children and teenagers.”); Justin Worland, *Baltimore Tightens Curfew Amid Skepticism and Protests*, TIME (Aug. 8, 2014), <http://time.com/3089931/baltimore-curfew/> (“Large cities, the types that might benefit from a curfew, [do not] have the resources to actually patrol the entire city. Instead, they focus on particular neighborhoods, often leading to racial disparities in enforcement of the curfew, experts say.”).

<sup>201</sup> See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1068, 1074 (5th Cir. 1981) (limiting the unconstitutionality of a juvenile curfew to its overbreadth while declining to review the appellant’s First Amendment, due process, and equal protection challenges); *Naprstek v. City of Norwich*, 545 F.2d 815, 817-18 (2d Cir. 1976) (voiding a juvenile curfew on vagueness grounds while declining to review appellants’ First Amendment and Fourteenth Amendment challenges); *Ashton v. Brown*, 339 Md. 70, 93, 108, 600 A.2d 447, 458, 466 (1995) (voiding a juvenile curfew on vagueness grounds while remanding for trial the appellees’ due process and equal protection claims for civil damages under Article 24 of the Maryland Declaration of Rights). See also Note, *Assessing the Scope of Minors’ Fundamental Rights: Juvenile Curfews and the Constitution*, 97 HARV. L. REV. 1163, 1165 (1984) [hereinafter *Assessing the Scope*] (“Courts have frequently sidestepped equal protection objections to juvenile curfews by striking down challenged ordinances on grounds of vagueness or overbreadth.”). But see, e.g., *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993); *Waters v. Barry*, 711 F. Supp. 1125 (D. D.C. 1989); *Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975); *Treacy v. Municipality of Anchorage*, 91 P.3d 252 (Alaska 2004); *Allen v. City of Bordentown*, 216 N.J. Super. 557, 524 A.2d 478 (1987); *People v. Walton*, 70 Cal. App. 2d Supp. 862, 161 P.2d 498 (1945).

<sup>202</sup> See Patryk J. Chudy, Note, *Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges*, 85 CORNELL L. REV. 518, 536 (2000) (“In adjudicating juvenile curfews, courts have applied three standards of review: strict scrutiny, intermediate scrutiny, and rational [basis] review.”); Brian Privor, Article, *Dusk ‘Til Dawn: Children’s Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 660 (1999) (“[T]hree standards have emerged for courts to use in determining the constitutionality of a statute [sic] under equal protection analysis.”). See also discussion *infra* Part II.A.4.

<sup>203</sup> See sources and cases cited *infra* notes 205-10.

<sup>204</sup> See discussion *supra* Part I.B.2.

more inclined to analyze a juvenile curfew under the First,<sup>205</sup> Fourth,<sup>206</sup> or Fifth<sup>207</sup> Amendments; the overbreadth<sup>208</sup> or vagueness<sup>209</sup> doctrines; or the Due Process Clause of the Fourteenth Amendment.<sup>210</sup>

Still, juvenile curfews are always vulnerable to an equal protection attack,<sup>211</sup> because they facially classify on the basis of age.<sup>212</sup> Thus, challenging a juvenile curfew's age-based classification is the most direct constitutional attack.<sup>213</sup>

Prior to the curfew's enactment, several city officials questioned the curfew's constitutionality under the Equal Protection Clause.<sup>214</sup> The curfew's legislative history suggests that the required constitutional "nexus"<sup>215</sup>—the degree to which the curfew's classifications<sup>216</sup> are linked to the Baltimore City Council's explicit<sup>217</sup> and implicit<sup>218</sup> interests—is tenuous.<sup>219</sup> However, whether the Equal Protection Clause requires the link to be rigid or merely relaxed depends on the applicable standard of scrutiny.<sup>220</sup> The Supreme Court

<sup>205</sup> See, e.g., *City of Maquoketa v. Russell*, 484 N.W. 2d 179 (Iowa 1992). See also *Privor*, *supra* note 202, at 426-28.

<sup>206</sup> See, e.g., *Schleifer v. City of Charlottesville*, 963 F. Supp. 534 (W.D. Va. 1997), *aff'd*, 159 F.3d 843 (4th Cir. 1998). See also *Privor*, *supra* note 202, at 426-28.

<sup>207</sup> See, e.g., *Waters*, 711 F. Supp. 1125. See also *Privor*, *supra* note 202, at 426-28.

<sup>208</sup> See *Privor*, *supra* note 202, at 426-28.

<sup>209</sup> See *id.*

<sup>210</sup> See *id.*

<sup>211</sup> Brant K. Brown, Note, *Scrutinizing Juvenile Curfews: Constitutional Standards & the Fundamental Rights of Juveniles & Parents*, 53 VAND. L. REV. 653, 654 n.5 (2000).

<sup>212</sup> See discussion *supra* Part I.C.2.

<sup>213</sup> See *Privor*, *supra* note 202, at 440.

<sup>214</sup> See *infra* note 219.

<sup>215</sup> Memorandum from Elena R. DiPietro, Chief Solicitor, Dep't of Law, Office of the Mayor of Balt., to the Balt. City Council (May 6, 2014) (on file with author).

<sup>216</sup> See discussion *supra* Parts I.C.2.

<sup>217</sup> See discussion *supra* Part I.D.1.

<sup>218</sup> See discussion *supra* Part I.D.2.

<sup>219</sup> Baltimore City's chief solicitor, Elena R. DiPietro, cautioned, "Under current Maryland law, it is *possible* that [the curfew] will be upheld. It is *recommended* that there be proof offered that the law has a nexus to the governmental purposes sought to be achieved." Memorandum from Elena R. DiPietro, *supra* note 215 (emphasis added).

DiPietro's recommendation gives rise to two implications. First, the possibility that a court will uphold the curfew necessarily suggests a possibility that a court will invalidate it. Second, the recommendation that the City Council offer proof of a legal nexus between the curfew and the "governmental purposes sought to be achieved" suggests the City Council does not have proof of a legal nexus, or alternatively, that it did not have proof of a legal nexus before enacting the curfew.

<sup>220</sup> See discussion *infra* Parts II.A.1-3.

has applied three different standards of review to equal protection challenges: strict scrutiny, intermediate scrutiny, and rational basis review.<sup>221</sup>

A. ARTICULATING THE STANDARDS OF SCRUTINY

1. *Strict Scrutiny*

Strict scrutiny is the most stringent standard of scrutiny under the equal protection framework.<sup>222</sup> Courts apply strict scrutiny to government action which “operat[es] to the peculiar disadvantage of a suspect class,”<sup>223</sup> including those which discriminate on the basis of race.<sup>224</sup> Government action subject to strict scrutiny is presumptively invalid.<sup>225</sup> However, a suspect classification may nonetheless comport with the Equal Protection Clause if it is necessary to achieve a compelling state interest.<sup>226</sup>

2. *Intermediate Scrutiny*

Courts apply intermediate scrutiny to government action that discriminates on the basis of gender<sup>227</sup> or illegitimacy.<sup>228</sup> Under intermediate scrutiny, the state bears the burden of proving its action is constitutional.<sup>229</sup> However, government action subject to intermediate scrutiny may nonetheless comport with the Equal Protection Clause if it is substantially related to furthering a significant state interest.<sup>230</sup>

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<sup>221</sup> Brown, *supra* note 211, at 654 (“The Equal Protection Clause provides three possible standards for courts to use when deciding on the constitutionality of juvenile curfews: strict scrutiny, intermediate scrutiny, and rational basis review.”). That the Equal Protection Clause does not itself provide for the tiers of scrutiny to be applied to equal protection challenges should be noted; rather, the tiers of scrutiny are a judicially-created rubric.

<sup>222</sup> See ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: POLICIES AND PRINCIPLES 554 (4th ed. 2011) (“Strict scrutiny . . . is the most intensive type of judicial review.”).

<sup>223</sup> Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (per curiam).

<sup>224</sup> See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (opinion of Stone, J.).

<sup>225</sup> See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979) (opinion of Stewart, J.); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (opinion of White, J.). See also CHEREMINSKY, *supra* note 222, at 554 (“[L]aws generally are declared unconstitutional when [strict scrutiny] is applied.”).

<sup>226</sup> See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) (opinion of Burger, C.J.) (citing *McLaughlin*, 379 U.S. at 196); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (opinion of Warren, C.J.).

<sup>227</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 524 (1996) (opinion of Ginsburg, J.) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (opinion of Brennan, J.).

<sup>228</sup> See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (opinion of O'Connor, J.).

<sup>229</sup> See, e.g., *Virginia*, 518 U.S. at 533 (citing *Miss. Univ. for Women*, 458 U.S. at 724).

<sup>230</sup> See *Craig*, 429 U.S. at 197.

### 3. Rational Basis Review

#### a. Traditional Rational Basis Review

Rational basis review is the most flexible standard under the equal protection framework.<sup>231</sup> Courts apply rational basis review to government action which discriminates on the basis of age,<sup>232</sup> among others. Under rational basis review, courts defer to the legislature,<sup>233</sup> and presume that government action is valid.<sup>234</sup> Thus, a court will strike down government action only if it is not “rationally related to furthering a legitimate state interest.”<sup>235</sup>

Rational basis review reflects a judicial awareness that legislatures cannot avoid creating distinctions.<sup>236</sup> However, critics of rational basis review argue the high degree of judicial deference to legislatures militates toward upholding discriminatory laws.<sup>237</sup>

#### b. Rational Basis Review “With Teeth”

Though rational basis review permits government action to incidentally burden or operate to the disadvantage of a class of citizens, the Equal Protection Clause forbids a legislative desire to do so.<sup>238</sup> Thus, courts will

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<sup>231</sup> See CHEMERINSKY, *supra* note 222, at 694 (“The rational basis test is the minimal level of scrutiny that all government actions challenged under equal protection must meet.”).

<sup>232</sup> See, e.g., *Vance v. Bradley*, 440 U.S. 93, 106, 111 (1979) (opinion of White, J.); *Mass. Bd. of Ret.*, 427 U.S. at 313-14.

<sup>233</sup> See CHEMERINSKY, *supra* note 222, at 696.

<sup>234</sup> See *Vance*, 440 U.S. at 97 (citing *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973)); *Mass. Bd. of Ret.*, 427 U.S. at 314. See also CHEMERINSKY, *supra* note 222, at 553.

<sup>235</sup> *Vance*, 440 U.S. at 97 (citations omitted) (internal quotation marks omitted).

<sup>236</sup> *Mass. Bd. of Ret.*, 427 U.S. at 314. See also *Romer v. Evans*, 517 U.S. 620, 631 (1996) (opinion of Kennedy, J.) (“The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.”) (citations omitted).

<sup>237</sup> See CHEMERINSKY, *supra* note 222, at 696. But see *Mass. Bd. of Ret.*, 427 U.S. at 314, 316 (stating that government action “does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect[,]” because “[p]erfection in making the necessary classifications is neither possible nor necessary.”) (citing *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

<sup>238</sup> See *Romer*, 517 U.S. at 633 (stating that rational basis review “ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”). See also *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) (“If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”).

invalidate government action that burdens or operates to the disadvantage of a class of citizens without advancing a legitimate state interest.<sup>239</sup>

In *Romer v. Evans*,<sup>240</sup> for example, the Court reviewed a Colorado law that prohibited executive, legislative, or judicial protection of homosexuals.<sup>241</sup> Even under rational basis review, the Court invalidated the law because it operated to achieve “respect for . . . the liberties of landlords or employers who have personal or religious objections to homosexuality.”<sup>242</sup> The Court concluded the law was not rationally related to its stated purpose,<sup>243</sup> because it sought instead to disadvantage homosexuals.<sup>244</sup>

While the Court in *Romer* and *Lawrence v. Texas*<sup>245</sup> invalidated laws within the context of homosexual equality, these cases demonstrate the Court’s propensity to apply a more stringent form of rational basis review to government action which is traceable to a discriminatory purpose.<sup>246</sup> However, constitutional review of juvenile curfew ordinances remains a mystery: federal and state courts have applied different standards of scrutiny to an equal protection challenge to juvenile curfews.

#### 4. *Inconsistent Analyses of Juvenile Curfew Ordinances*

The Supreme Court has never heard a constitutional challenge to a juvenile curfew ordinance on any grounds.<sup>247</sup> Nevertheless, lower federal courts and state courts alike have upheld or invalidated juvenile curfews under all three standards of review.<sup>248</sup> Some courts have argued a form of strict scrutiny

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<sup>239</sup> See, e.g., *Romer*, 517 U.S. at 635-36 (applying rational basis review, but striking down a law which disadvantaged homosexuals); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-49 (1985) (opinion of White, J.) (applying rational basis review, but striking down a law which disadvantaged the mentally disabled); *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (opinion of Brennan, J.) (applying rational basis review, but striking down a law which disadvantaged households with an individual unrelated to any other person in the household).

<sup>240</sup> 517 U.S. 620 (1996).

<sup>241</sup> *Id.* at 624.

<sup>242</sup> *Id.* at 635.

<sup>243</sup> *Id.* (concluding the challenged law “inflict[ed] . . . immediate, continuing, and real injuries that outrun and belie any legitimate justifications.”).

<sup>244</sup> *Id.* at 634-35 (concluding the challenged law was “born of animosity toward [homosexuals]”). See also *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring) (hypothesizing that a Texas law which criminalized homosexual activity violated the Equal Protection Clause “under any standard of review.”).

<sup>245</sup> 539 U.S. 558 (2003).

<sup>246</sup> Cf. *Conaway v. Deane*, 401 Md. 219, 270, 932 A.2d 571, 601 (2007) (opinion of Harrell, J.) (“The test to evaluate whether a facially gender-neutral statute discriminates on the basis of sex is whether the law can be traced to a discriminatory purpose.”) (citations omitted) (internal quotation marks omitted).

<sup>247</sup> See *Privor*, *supra* note 202, at 418-19.

<sup>248</sup> See *Chudy*, *supra* note 202, at 555 & n.290.

should be applied;<sup>249</sup> others have advocated for rational basis review,<sup>250</sup> and some commentators have argued intermediate scrutiny is the appropriate standard.<sup>251</sup>

B. THE CURFEW'S AGE-BASED CLASSIFICATIONS: COMPARING RATIONAL BASIS REVIEW AGAINST INTERMEDIATE SCRUTINY

Supreme Court precedent dictates that rational basis review is the appropriate standard to which Baltimore City's juvenile curfew ordinance must be subjected, insofar as the curfew facially classifies on the basis of age.<sup>252</sup> The threshold argument, therefore, centers on whether the curfew's age-based classification should be subject to a form of rational basis review or intermediate scrutiny.<sup>253</sup> The appropriate standard of scrutiny to apply to the curfew's age-based classification is an important issue,<sup>254</sup> it likely will determine the curfew's constitutional validity.

1. *Legitimate and Important Government Interests: Reducing Juvenile Crime and Victimization*

The Supreme Court has recognized that minors' well-being is a compelling state interest.<sup>255</sup> Within the context of a juvenile curfew, protecting a minor's "well-being" can be narrowed to mean reducing juvenile crime and juvenile

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<sup>249</sup> See, e.g., *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997); *In re Appeal in Maricopa Cnty.*, 887 P.2d 599 (Ariz. Ct. App. 1994); *City of Maquoketa v. Russell*, 484 N.W. 2d 179 (Iowa 1992); *Brown v. Ashton*, 93 Md. App. 25, 611 A.2d 599 (1992), *rev'd*, 339 Md. 70, 660 A.2d 447 (1995). See also Benjamin C. Sasse, Note, *Curfew Laws, Freedom of Movement, and the Rights of Juveniles*, 50 CASE W. RES. L. REV. 681, 711 (2000) (citations omitted).

<sup>250</sup> See, e.g., *In re J.M.*, 768 P.2d 219 (Col. 1989); *City of Panora v. Simmons*, 445 N.W. 2d 363 (Iowa 1989).

<sup>251</sup> See, e.g. Chudy, *supra* note 202, at 569-76.

<sup>252</sup> See cases cited *supra* note 232.

<sup>253</sup> Cf. Chudy, *supra* note 202, at 569-76.

<sup>254</sup> See *id.* at 554.

<sup>255</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747, 775-76 (1982) (opinion of White, J.) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'") (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)); *Ginsburg v. New York*, 390 U.S. 629, 640-41 (1968) (opinion of Brennan, J.) ("[T]he State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' which might prevent their 'growth into free and independent well-developed men and citizens.'") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)); *Prince*, 321 U.S. at 168 ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.").

victimization.<sup>256</sup> Thus, the Baltimore City Council's interest in reducing juvenile crime and juvenile victimization is a significant and legitimate state interest under intermediate scrutiny and rational basis review, respectively.<sup>257</sup>

The sole relevant issue, then, is to what degree does the curfew's age classification achieves its legislative purpose? Still, the City Council's "claim of paternal concern should not deter the courts from critically examining" the curfew's age-based classification.<sup>258</sup>

## 2. *Applying Rational Basis Review*

The curfew baldly asserts the high volume and increase in severity of crimes committed by juveniles,<sup>259</sup> but the legislative history does not substantiate this claim. Moreover, studies which demonstrate the effects of a juvenile curfew on juvenile crime and victimization are few.<sup>260</sup> Nevertheless, the City Council's assertion that it "suffer[s] from rampant juvenile crime and victimization . . . may not appear entirely unfounded."<sup>261</sup>

Contrarily, anchoring the curfew's age-based classifications to the statistical propensity for minors to commit crimes or become victims of them creates a dangerous prospect that the curfew will be selectively enforced.<sup>262</sup> African-Americans, for example, commit a statistically disproportionate percentage of crimes.<sup>263</sup> Nevertheless, the few courts<sup>264</sup> which have decided an equal protection challenge to a juvenile curfew under rational basis review have upheld the curfew.<sup>265</sup>

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<sup>256</sup> See Chudy, *supra* note 202, at 557.

<sup>257</sup> See Privor, *supra* note 202, at 455 ("The community's desire to reduce juvenile crime and victimization provides curfew ordinances with an unassailable objective.").

<sup>258</sup> *Assessing the Scope*, *supra* note 201, at 1168-69 (citing Irene Merker Rosenberg, *The Constitutional Rights of Children Charged with Crime: Proposal for a Return to the Not so Distant Past*, 27 UCLA L. REV. 656, 703-05 (1980)).

<sup>259</sup> "An emergency has been created by a substantial increase in the number and in the seriousness of crimes committed by minors against persons and property within the City, and this has created a menace to the preservation of public peace, safety, health, morals, and welfare." BALT., MD. CODE – UNREVISED ARTICLES art. 19, § 34-2.

<sup>260</sup> See Privor, *supra* note 202, at 464.

<sup>261</sup> See *id.* at 457 ("The community's desire to reduce juvenile crime and victimization provides curfew ordinances with an unassailable objective.").

<sup>262</sup> See discussion *infra* Part II.C.3.

<sup>263</sup> Privor, *supra* note 202, at 461 & n.263 (stating that, in 1995, African-Americans were arrested for 35.7 percent of all serious crimes while accounting for a mere 12.6 percent of the population in the United States) (citations omitted).

<sup>264</sup> See Brown, *supra* note 211, at 662 ("Few courts have used the rational basis standard to review juvenile curfew ordinances.").

<sup>265</sup> See, e.g., *Bykofsky*, 401 F. Supp. at 1266; *In re J.M.*, 768 P.2d at 223-24; *City of Panora*, 445 N.W. 2d at 368-70.

Given the lack of empirical evidence demonstrating that curfews are rationally related to reducing juvenile crime and victimization, and the persuasive authority from federal and state courts, a Maryland court likely will uphold Baltimore's juvenile curfew ordinance under rational basis review. However, doubt remains that the curfew will be effective in achieving its stated legislative purposes.<sup>266</sup> Whether Baltimore's curfew satisfies intermediate scrutiny is less clear.

### 3. *Applying Intermediate Scrutiny*

Some commentators have suggested the time restrictions and age classifications do not correlate with reducing juvenile crime or juvenile victimization.<sup>267</sup> For example, the court in *Nunez v. City of San Diego*<sup>268</sup> considered evidence of juvenile crime and victimization for the year in which San Diego began to enforce its curfew more aggressively.<sup>269</sup> The evidence demonstrated that merely fifteen percent of arrests were for violent juvenile crimes, and that juvenile victimization increased, during curfew hours.<sup>270</sup> The court in *Nunez* struck down the curfew under strict scrutiny,<sup>271</sup> holding the curfew was "not narrowly tailored to minimize the burden on minors' fundamental constitutional rights."<sup>272</sup> The *Nunez* court further concluded that the City of San Diego "established *some nexus* between the curfew and its compelling interest of reducing juvenile crime and victimization."<sup>273</sup>

In contrast to *Nunez*, the court in *Schleifer v. City of Charlottesville*,<sup>274</sup> considered evidence of a high juvenile crime rate and a substantial increase in juvenile victimization. In Charlottesville, Virginia, juveniles committed eighty-five percent of serious crimes in 1996.<sup>275</sup> Moreover, juvenile crime between 11 p.m. and 6 p.m. increased by thirty-eight percent in 1995, and by an additional ten percent in 1996.<sup>276</sup> The court in *Schleifer* upheld the curfew under intermediate scrutiny,<sup>277</sup> holding the curfew "represent[ed] the least

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<sup>266</sup> See *Assessing the Scope*, *supra* note 201, at 1177 n.69 ("[T]here is considerable doubt that juvenile curfews are actually effective in reducing juvenile crime.") (citations omitted).

<sup>267</sup> See, e.g., Chudy, *supra* note 202, at 558 (discussing defects in "time dimension" and "age classifications").

<sup>268</sup> 114 F.3d 935 (9th Cir. 1997).

<sup>269</sup> In 1994, San Diego adopted a resolution to aggressively enforce its curfew, which it had enacted in 1947. *Id.* at 946, 938-39.

<sup>270</sup> *Id.* at 947.

<sup>271</sup> *Id.* at 946.

<sup>272</sup> *Id.* at 952.

<sup>273</sup> *Id.* at 948 (emphasis added).

<sup>274</sup> 159 F.3d 843 (4th Cir. 1998).

<sup>275</sup> *Id.* at 850.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 847.

restrictive means to advance Charlottesville's" interest in reducing juvenile crime and victimization.<sup>278</sup> Accordingly, the court posited that the curfew also would satisfy strict scrutiny.<sup>279</sup>

The *Nunez* and *Schleifer* courts reached opposite holdings under different standards of scrutiny. Perhaps the stark contrast in statistical data demonstrating the rate of juvenile crime and victimization can reconcile these two holdings. Nevertheless, "statistical problems related to age classifications" undermine the position that juvenile curfews effectively reduce juvenile crime.<sup>280</sup>

In *Hutchins v. District of Columbia*,<sup>281</sup> for example, the court considered reports demonstrating juveniles to whom a Washington, D.C., curfew did not apply—those who were at least seventeen years old—comprised forty-two percent of all "juvenile referrals" between 1990 and 1994.<sup>282</sup> The presumption is, therefore, that juveniles who were sixteen years and under comprised fifty-eight percent of the city's juvenile referrals. The reports, however, failed to indicate the percentage of the city's population which the curfew affected.<sup>283</sup>

The alarming rates of juvenile crime and victimization constitutionally justified the imposition of a curfew in *Schleifer*. But statistical evidence which demonstrates a more tenuous relationship between a curfew's age-based classification and a reduction in juvenile crime and victimization may not be "substantially related" to the extent that it satisfies intermediate scrutiny.

#### 4. *Assessing the Curfew's Effects on Reducing Juvenile Crime and Victimization*

The Mayor's Office on Criminal Justice reported 398 curfew violations—226 for the daytime curfew and 172 for the nighttime curfew—in the first seven months since the curfew took effect.<sup>284</sup> Among the 398 total violations, only twenty-seven were repeat offenses<sup>285</sup>—a recidivism rate of only 7.3 percent. Moreover, the Office of the Mayor reported 120 curfew violations during the first month in which the curfew was enforced,<sup>286</sup> but just 278

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<sup>278</sup> *Id.* at 852.

<sup>279</sup> *Id.*

<sup>280</sup> Chudy, *supra* note 202, at 558.

<sup>281</sup> 188 F.3d 531 (D.C. Cir. 1998).

<sup>282</sup> *Id.* at 542-45.

<sup>283</sup> *Id.*

<sup>284</sup> E-mail from Sulakshana Bhattacharya, Program Coordinator, Mayor's Office on Criminal Justice, City of Balt. to author (Feb. 26, 2015, 10:29 EST) (on file with author).

<sup>285</sup> *Id.*

<sup>286</sup> Press Release, Office of the Mayor of Balt. City, Mayor Rawlings-Blake Releases Curfew Violation Numbers (Sept. 11, 2014) (on file with author), *available at* <http://mayor.baltimorecity.gov/news/press-releases/2014-09-11-curfew-violation-numbers-released>.

violations during the subsequent six months<sup>287</sup>—a 61.4 percent decline in the rate at which minors are violating the curfew. The low recidivism rate and a marked drop-off in the quantity of curfew violations suggests the curfew effectively keeps children off the streets.

These figures, however, are not necessarily indicative of the curfew's efficacy. They do not account for the number of juveniles who violate the curfew during the commission of a crime. In such instances, police will charge the minor with a crime, but will not issue a citation for violating the curfew.<sup>288</sup>

Moreover, these figures, though facially indicative of a reduction in the quantity of curfew violations, do not represent the degree or quality of parental supervision. Assuming the curfew was enacted—at least in part—to encourage or compel parents to take a more active role in raising their children, these figures do not demonstrate the degree to which enforcing the curfew has succeeded.<sup>289</sup>

Analyzing the curfew's age-based classification under rational basis review and intermediate scrutiny hinge on whether the daytime and night curfews will achieve the Baltimore City Council's interests in reducing juvenile crime and delinquency. Strict scrutiny, however, requires a more searching inquiry into the curfew's underlying purposes.

#### C. THE CURFEW'S RACE-BASED CLASSIFICATIONS: TRIGGERING STRICT SCRUTINY

Chief among the Fourteenth Amendment's purposes "is the prevention of official conduct discriminating on the basis of race."<sup>290</sup> Baltimore City's juvenile curfew is facially neutral with respect to race,<sup>291</sup> but there is a possibility that it is "racist in intent or execution, or at least unfairly burdensome to racial minorities."<sup>292</sup>

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<sup>287</sup> Compare *id.*, with E-mail from Sulakshana Bhattacharya, *supra* note 284.

<sup>288</sup> Telephone Interview with Angela Johnese, Dir., Mayor's Office on Criminal Justice, City of Balt., and Sulakshana Bhattacharya, Program Coordinator, Mayor's Office on Criminal Justice, City of Balt. (Feb. 25, 2015).

<sup>289</sup> See *supra* notes 171, 194 and accompanying text.

<sup>290</sup> *Washington v. Davis*, 426 U.S. 229, 239 (1976) (opinion of White, J.). See also *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."); *In re Legislative Districting of State*, 299 Md. 658, 673, 475 A.2d 428, 435 (1982) (per curiam).

<sup>291</sup> See generally BALT., MD., CODE - UNREVISED ARTICLES art. 19, subtit. 34.

<sup>292</sup> In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), Justice Matthews stated:

Though the law itself be fair on its face and impartial in appearance, . . . if it is applied and administered . . . with an evil eye and an unequal hand, so as practically to make unjust and

*I. Triggering Strict Scrutiny for Facially Neutral Laws*

There are two components to triggering strict scrutiny for a facially neutral law: proving the law's purpose and its effects are racially discriminatory.<sup>293</sup> The Supreme Court has not expressly stated that triggering strict scrutiny requires demonstrating a facially neutral law's racially discriminatory purposes *and* effects.<sup>294</sup> However, *Washington v. Davis*<sup>295</sup> and *Palmer v. Thompson*,<sup>296</sup> read together, suggest that demonstrating both discriminatory purpose and effects is necessary to trigger strict scrutiny.<sup>297</sup> Yet, such a

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illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

*Id.* at 373-374. See also Note, *Juvenile Curfews and the Major Confusion Over Minor Rights*, 118 HARV. L. REV. 2400, 2404 (2005) (citing *Privor*, *supra* note 202, at 420-21 (“[S]ome courts may be only a small step away from accepting selective enforcement of effectively race-based curfews[.]”)); Note, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 HARV. L. REV. 1693, 1707 (1994) (“Once curfews are imposed, the burden falls disproportionately on minority individuals and communities.”).

<sup>293</sup> Compare *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987) (opinion of Powell, J.) (stating a defendant eligible to receive the death penalty “would have to prove the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”) (emphasis in original), and *Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (opinion of Stewart, J.) (“[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection Clause.”) (citations omitted), with *Davis*, 426 U.S. at 242 (“Disproportionate impact is not irrelevant[.]”), and *Palmer v. Thompson*, 403 U.S. 217, 266 (1971) (White, J., dissenting) (“[T]he reality is that the impact of the city's act falls on the minority. . . . [T]here are deep and troubling effects on the racial minority that should give us all pause.”).

<sup>294</sup> CHEMERINSKY, *supra* note 222, at 730.

<sup>295</sup> 426 U.S. 229 (1976).

<sup>296</sup> 403 U.S. 217 (1971) (opinion of Black, J.).

<sup>297</sup> In *Davis*, Justice White stated: “Disproportionate impact . . . is not the sole touchstone of an invidious racial discrimination[.] . . . Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny[.] . . .” *Davis*, 426 U.S. at 242.

In *Palmer*, Justice Black stated:

[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it. . . . If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

distillation of *Davis* and *Palmer*,<sup>298</sup> undermines the original purpose of the Equal Protection Clause—to prevent government action from discriminating on the basis of race.<sup>299</sup>

The Equal Protection Clause forbids purposeful discrimination. Accordingly, a law is constitutionally invalid when its race-based classifications are unnecessary to achieve a compelling state interest.<sup>300</sup> Thus, a legislative body cannot have a compelling state interest in a law when the law's purpose is to discriminate on the basis of race, rather than to use a race-based classification to achieve some other compelling state interest.<sup>301</sup>

Even if the face of a law does not reveal a racially discriminatory purpose, the law's racially disproportionate effects are prima facie evidence of a legislative body's constitutionally impermissible objective.<sup>302</sup> Because the distinctions between the two are vague,<sup>303</sup> proving a racially discriminatory purpose presents its own challenges.<sup>304</sup>

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*Palmer*, 403 U.S. at 224-25.

<sup>298</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (opinion of Rehnquist, C.J.) (stating that “[t]he claimant must demonstrate” discriminatory effect and purpose of the race-based prosecution to prove an equal protection violation).

<sup>299</sup> See cases cited *supra* notes 290, 292, and accompanying text.

<sup>300</sup> See CHEMERINSKY, *supra* note 222, at 730.

<sup>301</sup> See *id.*

<sup>302</sup> See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (opinion of Powell, J.) (“The impact of the official action—whether it ‘bears more heavily on one race than another,’—may provide an important starting point.”) (quoting *Davis*, 426 U.S. at 242). See also Larry G. Simon, *Racially Prejudiced Government Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1111 (1978) (“[A] showing of significant disproportionate disadvantage to a racial minority group, without more, gives rise to an inference that the action may have been taken or at least maintained or continued with knowledge that such groups would be relatively disadvantaged. . . . [I]t raises a possibility sufficient to oblige the government to come forward with a credible explanation showing that the action was (or would have been) taken apart from prejudice.”).

<sup>303</sup> See *Davis*, 426 U.S. at 254 (Stevens, J., concurring) (“[T]he line between discriminatory purpose and discriminatory impact is not . . . bright.”).

<sup>304</sup> See *Palmer*, 403 U.S. at 224. “First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.” *Id.* (citing *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) (opinion of Warren, C.J.)). “Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters.” *Id.* at 225.

## 2. *Proving Racially Discriminatory Purpose*

A statistical pattern of racially discriminatory effect might be apparent to the extent that it cannot be explained “on grounds other than race,”<sup>305</sup> though “such cases are rare.”<sup>306</sup> The law’s historical background,<sup>307</sup> the “sequence of events leading up to”<sup>308</sup> its promulgation,<sup>309</sup> and the legislative or administrative history are relevant to proving a racially discriminatory purpose.<sup>310</sup>

A challenge to a law on the grounds of impermissible race discrimination that proves both racially discriminatory effect and purpose places the burden of proof on the government.<sup>311</sup> The government must then show it would have promulgated the challenged law absent a racially discriminatory purpose.<sup>312</sup> The legislative history of Baltimore’s curfew does not mention race;<sup>313</sup> therefore proving a racially discriminatory purpose underlies the curfew is exceedingly difficult, if not impossible. Thus, triggering strict scrutiny relies upon the curfew’s racially discriminatory effects.

## 3. *Proving Racially Discriminatory Impact*

- a. The Youth Connection Centers: “The pattern surrounding curfew laws has been to enact them in blighted, poor, urban areas[.]”<sup>314</sup>

Baltimore City operates two Youth Connection Centers.<sup>315</sup> The Lillian Jones Recreation Center<sup>316</sup> is located in the Sandtown-Winchester neighborhood in West Baltimore; Collington Square Community Recreation Center<sup>317</sup> is located in the Broadway East neighborhood in East Baltimore.

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<sup>305</sup> *Arlington Heights*, 429 U.S. at 266 (citations omitted).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 267 (citations omitted).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* (citations omitted).

<sup>310</sup> *Id.* at 267.

<sup>311</sup> *Arlington Heights*, 429 U.S. at 265-66 (“When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.”).

<sup>312</sup> *See id.* at 270 n.21 (stating in dicta that “[s]uch proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.”).

<sup>313</sup> *See generally* BALT., MD., CODE - UNREVISED ARTICLES art. 19, subtit. 34. *See also* sources cited *supra* notes 188-91.

<sup>314</sup> Orly Jashinsky, *Liberty for All? Juvenile Curfews: Always An Unconstitutional and Ineffective Solution*, 4 RUTGERS J.L. & PUB. POL’Y 546, 574 (2007).

<sup>315</sup> Press Release, Office of the Mayor of Balt. City, *supra* note 286.

<sup>316</sup> 1301 North Stricker Street. *Id.*

<sup>317</sup> 1409 North Patterson Park Avenue. *Id.*

Both neighborhoods are noted for their economic depression, high crime rates, and urban decay.

In Sandtown-Winchester and the eight bordering neighborhoods,<sup>318</sup> 97.9 percent of the residents are of a minority race, including 95.6 percent who are African-American; 2.1 percent are white; 25.6 percent are seventeen years old or younger; and a single parent is at the head of 34.7 percent of the households.<sup>319</sup> In Broadway East and the six bordering neighborhoods,<sup>320</sup> 96.5 percent of the residents are of a minority race, including 93.3 percent who are African-American; 3.5 percent are white; 26.7 percent are seventeen years old or younger; and a single parent is at the head of 34.6 percent of the households.<sup>321</sup> Collectively, in the two neighborhoods in which Baltimore City operates its Youth Connection Centers, 97.4 percent of the residents are of a minority race, including 94.8 percent who are African-American; 2.6 percent are white; 26.0 percent are seventeen years old or younger; and a single parent is at the head of 34.7 percent of the households.<sup>322</sup>

#### b. Enforcing the Curfew Against Minority Children

Any success the curfew might have in achieving its purposes is not without racial its disproportions. Among 371 unique curfew violators, 314 were black

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<sup>318</sup> Penn North, Druid Heights, Upton, Harlem Park, Midtown-Edmonson, Bridgewood/Greenlawn, Easterwood, and Mondawmin.

<sup>319</sup> See ALISA AMES ET AL., BALT. CITY HEALTH DEP'T, 2011 NEIGHBORHOOD HEALTH PROFILE: SANDTOWN-WINCHESTER/HARLEM PARK 3-4 (2011), available at <http://health.baltimorecity.gov/sites/default/files/47%20Sandtown.pdf>; ALISA AMES ET AL., BALT. CITY HEALTH DEP'T, 2011 NEIGHBORHOOD HEALTH PROFILE: PENN NORTH/RESERVOIR HILL 3-4 (2011), available at <http://health.baltimorecity.gov/sites/default/files/43%20Penn%20North.pdf>; ALISA AMES ET AL., BALT. CITY HEALTH DEP'T, 2011 NEIGHBORHOOD HEALTH PROFILE: GREATER MONDAWMIN 3-4 (2011), available at <http://health.baltimorecity.gov/sites/default/files/21%20Greater%20Mondawmin.pdf>; ALISA AMES ET AL., BALT. CITY HEALTH DEP'T, 2011 NEIGHBORHOOD HEALTH PROFILE: GREATER ROSEMONT 3-4 (2011), available at <http://health.baltimorecity.gov/sites/default/files/23%20Greater%20Rosemont.pdf>.

<sup>320</sup> Clifton Park, Berea, Biddle Street, Middle East, Gay Street, and Oliver.

<sup>321</sup> See ALISA AMES ET AL., BALT. CITY HEALTH DEP'T, 2011 NEIGHBORHOOD HEALTH PROFILE: GREENMOUNT EAST 3-4 (2011), available at <http://health.baltimorecity.gov/sites/default/files/24%20Greenmount.pdf>; ALISA AMES ET AL., BALT. CITY HEALTH DEP'T, 2011 NEIGHBORHOOD HEALTH PROFILE: CLIFTON-BEREA 3-4 (2011), available at <http://health.baltimorecity.gov/sites/default/files/10%20Clifton.pdf>; ALISA AMES ET AL., BALT. CITY HEALTH DEP'T, 2011 NEIGHBORHOOD HEALTH PROFILE: PERKINS/MIDDLE EAST 3-4 (2011), available at <http://health.baltimorecity.gov/sites/default/files/44%20Perkins.pdf>; ALISA AMES ET AL., BALT. CITY HEALTH DEP'T, 2011 NEIGHBORHOOD HEALTH PROFILE: MADISON/EAST END 3-4 (2011), available at <http://health.baltimorecity.gov/sites/default/files/33%20Madison.pdf>.

<sup>322</sup> See sources cited *supra* notes 319 and 321.

and forty were white.<sup>323</sup> Black curfew violators, therefore, account for 84.6 percent of all curfew violations, whereas white curfew violators account for only 10.8 percent.

The empirical evidence demonstrated is analogous to that in *Yick Wo v. Hopkins*.<sup>324</sup> The Supreme Court in *Yick Wo* struck down a San Francisco ordinance which prohibited laundries from being located in wooden buildings, unless a waiver was obtained.<sup>325</sup> All 240 Chinese-Americans who applied for the waiver were denied. Meanwhile, seventy-nine of eighty applications for waiver by non-Chinese individuals were accepted.

One reading of *Yick Wo* is that 99.6 percent of denied applications belonged to Chinese-Americans. Another reading of *Yick Wo* is that the restriction was enforced against 75.0 percent of those subject to the ordinance. The lower figure is more analogous to Baltimore City's curfew, which, the numbers demonstrate, is five times more likely to burden a black child than a child of another race.

Race neutrality on the curfew's face notwithstanding, the empirical disparities are—or should be, at least—sufficient to trigger strict scrutiny. Proving the curfew's racially discriminatory purpose from its effects on minorities, particularly African-Americans, is a heavy burden to carry. Indeed, more data is needed. Nevertheless, an inquiry into the issue, and into whether enforcing the curfew achieves the Baltimore City Council's interests, will ensure the curfew comports with the Equal Protection Clause.

### III. APPLYING THE EQUAL PROTECTION FRAMEWORK TO BALTIMORE CITY'S JUVENILE CURFEW

The constitutional validity of Baltimore City's curfew centers on the threshold issues for each of the curfew's classifications. First, whether the curfew's age-based classifications should be subject to intermediate scrutiny, rational basis review "with teeth," or traditional rational basis review. Second, whether the racially disproportionate effects apparent from the curfew's enforcement patterns trigger strict scrutiny. Judicial disposition of the threshold issue will all but dictate whether the curfew will survive an equal protection attack.<sup>326</sup>

The dispositive issue will be the degree to which the daytime and nighttime curfews advance or achieve the Baltimore City Council's explicit interests—reducing juvenile crime, victimization, and delinquency—and its implicit

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<sup>323</sup> E-mail from Sulakshana Bhattacharya, *supra* note 284. Seventeen violators were of an unidentified race. *Id.*

<sup>324</sup> 118 U.S. 356 (1886) (opinion of Matthews, J.).

<sup>325</sup> *Id.* at 374.

<sup>326</sup> See Patryk J. Chudy, Note, *Doctrinal Reconstruction: Reconciling Conflicting Standards in Adjudicating Juvenile Curfew Challenges*, 85 CORNELL L. REV. 518, 554 (2000).

interests—encouraging parents to take a more proactive role in raising their children.

A. RECONCILING THE CURFEW’S CLASSIFICATIONS WITH THE STANDARDS OF REVIEW

Determining the constitutional validity of the curfew’s age- and race-based classifications<sup>327</sup> are separate analyses.<sup>328</sup> Indeed, they are subject to different standards of scrutiny.<sup>329</sup> With respect to the curfew’s age-based classifications, a balance between traditional rational basis review and rational basis review “with teeth”<sup>330</sup> cannot discount the burdens and disadvantages that are unique to African-American children and their parents.<sup>331</sup>

Choosing the most appropriate standard of scrutiny to apply to the curfew’s age-based classifications requires more evidence of the curfew’s racially disproportionate effects.<sup>332</sup> Considering the empirical evidence currently

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<sup>327</sup> See discussion *supra* Parts II.B-C. See also BALT., MD., CODE - UNREVISED ARTICLES art. 19, §§ 34-1(d), 34-3(b), 34-3(c) (Balt. City Dep’t of Legislative Reference 2015), available at <http://archive.baltimorecity.gov/portals/0/charter%20and%20Codes/code/Art%2019%20-%20PoliceOrds.pdf>.

<sup>328</sup> See discussion *supra* Parts II.A.1-3.

<sup>329</sup> Compare discussion *supra* Part II.A.1., with discussion *supra* Part II.A.3.a..

<sup>330</sup> Compare discussion *supra* Part II.A.3.a., with discussion *supra* Part II.a.3.b.

<sup>331</sup> See Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and To Whom?*, 2006 UTAH L. REV. 5, 10 (“[C]ritics express concern that laws will be enforced mostly against poor, single parents, especially African-American women.”) (citations omitted). Cf. *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (opinion of Kennedy, J.).

<sup>332</sup> Section 34-10 provides:

The Mayor and City Council shall continue evaluating and updating this subtitle through methods including but not limited to:

(1) Annually, on or before February 1 of each year, the Police Commissioner must report to the Mayor and City Council:

(i) on the effect of this subtitle on crimes committed by and against minors;

(ii) the number of warnings issued and arrests of minors, parents, and operators hereunder; and

(iii) such other information as the Mayor and City Council may request.

(2) On a regular basis, the Mayor and City Council shall receive informal requests of all exceptional cases hereunder and advisory

available,<sup>333</sup> a heightened form of rational basis review is the most appropriate standard under which the curfew must be reviewed.<sup>334</sup> If, on the other hand, any additional evidence is sufficient to prove a racially discriminatory purpose behind the curfew, strict scrutiny is the appropriate—indeed, the required—standard.<sup>335</sup> Under any standard of review, the dispositive issue is the degree to which the classification advances the curfew’s purposes.

#### B. ACCURATELY ASSESSING REDUCTIONS IN JUVENILE CRIME AND VICTIMIZATION

The quantity of curfew violations has decreased markedly since the curfew took effect in August 2014.<sup>336</sup> However, the police department’s enforcement strategies do not include specifically targeting minors.<sup>337</sup> Instead, police detain a minor believed to be in violation of the curfew merely during the course of their routine patrol.<sup>338</sup>

Moreover, police have not issued a single citation to a parent,<sup>339</sup> nor does the city keep records of parents who voluntarily attend family counseling sessions.<sup>340</sup> The lack of data pertaining to the curfew’s enforcement creates two interrelated impossibilities.

First, ascertaining the “true” number of curfew violations on a daily, weekly, or monthly basis is impossible.<sup>341</sup> This failure, in addition to the City

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opinions for consideration in further updating and continuing evaluate of this subtitle.

BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-10.

The author’s repeated attempts to obtain information required to be submitted to the mayor have proved fruitless.

<sup>333</sup> See discussion *supra* Part II.B.4.

<sup>334</sup> Rational basis review “with teeth” reflects a compromise between traditional rational basis review and intermediate scrutiny. See Chudy, *supra* note 326, at 569-76 (arguing intermediate scrutiny is the standard of review applicable in the context of a juvenile curfew ordinance). See also discussion *supra* Parts II.A.2 and II.A.3.a.

<sup>335</sup> See discussion *supra* Part II.A.1.

<sup>336</sup> Compare Press Release, Office of the Mayor of Balt. City, Mayor Rawlings-Blake Releases Curfew Violation Numbers (Sept. 11, 2014) (on file with author), available at <http://mayor.baltimorecity.gov/news/press-releases/2014-09-11-curfew-violation-numbers-released>, with Telephone Interview with Angela Johnese, Dir., Mayor’s Office on Criminal Justice, City of Balt., and Sulakshana Bhattacharya, Program Coordinator, Mayor’s Office on Criminal Justice, City of Balt. (Feb. 25, 2015).

<sup>337</sup> Telephone Interview with Angela Johnese and Sulakshana Bhattacharya, *supra* note 336.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> See also Harris, *supra* note 331, at 22 (suggesting curfews are rarely or never

Council's implicit legislative policies,<sup>342</sup> further suggests the curfew is less about reductions in juvenile crime and victimization, and more about forcing parents to use city-approved resources.<sup>343</sup>

The true purpose behind the curfew inevitably links to the second impossibility inherent in the curfew's enforcement strategy. The city cannot determine the degree to which parental supervision has improved. Here, as with deciding on an appropriate standing of scrutiny, more data is needed, but is unavailable.<sup>344</sup>

The city, in order to assess accurately whether its curfew advances its explicit and implicit goals, must not rely on merely anecdotal evidence.<sup>345</sup> Instead, it must acquire conclusive data showing first, a pre- and post-curfew statistical comparison of the juvenile crime and victimization rates,<sup>346</sup> and the rate at which school-aged children are absent from school. Second, acquired data must conclusively show a clear point at which parents begin to take a more proactive role in raising their children.<sup>347</sup>

enforced).

<sup>342</sup> See discussion *supra* Part I.D.2.

<sup>343</sup> See Interview with Brandon Scott, Councilman, Balt. City Council, in Balt., Md. (Aug. 5, 2015) (notes on file with author); BALT., MD., CODE - UNREVISED ARTICLES art. 19, § 34-9(a)(1)(i).

<sup>344</sup> See Interview with Brandon Scott, *supra* note 343.

<sup>345</sup> "I've been there and seen the [four]-year-old come in. I've had a little child tell me they got caught on purpose so they can eat. I've seen how young these children are [who] come into the center [who] are out unaccompanied, and that is unacceptable." Julia Botero, *For Their Own Good? New Curfew Sends Baltimore Kids Home Early*, NPR (Aug. 31, 2014, 1:33 PM), <http://www.npr.org/2014/08/31/344643559/for-their-own-good-new-curfew-sends-baltimore-kids-home-early> (quoting Brandon Scott, the city councilman who sponsored the curfew bill).

<sup>346</sup> Violent crimes and juvenile arrests rates in Baltimore are declining. Lauren Gambino, *Outrage follows Baltimore's 'deeply flawed' youth curfew decision*, THE GUARDIAN (Aug. 12, 2014, 9:56 AM), <http://www.theguardian.com/world/2014/aug/12/-sp-baltimore-city-council-youth-curfew>. Nevertheless, high rates of drug crimes and gang violence—more pronounced in the city's minority and low-income neighborhoods—continue to plague the city. *Id.*

<sup>347</sup> Brian Privor, Article, *Dusk 'Til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 464 (1999) (explaining that empirical studies concluding whether juvenile curfews effectively reduce crime and victimization are scant).

For a current, comprehensive report showing juvenile crime and victimization data on a national scale, see NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT (Melissa Sickmund & Charles Puzzanchera eds., 2014) (providing the most reliable information available through 2010), *available at* <http://www.ncjj.org/pdf/NR2014.pdf>.

Such data, however, is useful only to the extent that an equal protection analysis of the curfew will subject it to a standard of review other than strict scrutiny. Indeed, the curfew is not the only means by which the city can reduce juvenile crime and victimization.

C. PROPOSING ALTERNATIVE MEANS TO ADVANCE OR ACHIEVE THE CURFEW'S UNDERLYING POLICIES

The few studies and other research that are available do little to show the effects of juvenile curfews on reducing juvenile crime and victimization.<sup>348</sup> One national study concluded violent crime will decrease by a mere ten percent in the first year, with only marginal decreases in subsequent years.<sup>349</sup> Other studies demonstrate that there is no correlation between curfews and a reduction in juvenile crime and victimization.<sup>350</sup> Given the uncertainties surrounding the efficacy of juvenile curfews, the Baltimore City Council must consider a host of alternative means by which it can more effectively advance or achieve its explicit and implicit interests.

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<sup>348</sup> See generally Kenneth Adams, Cynthia M. Lum, Anthony Petrosino, & David Weisburd, *Assessing Systematic Evidence in Crime and Justice: Methodological Concerns and Empirical Outcomes* (sec. 2), 587 ANNALS AM. ACAD. POL. & SOC. SCI. 136 (2003). See also Gambino, *supra* note 346 (“[Curfews] are a tool in a toolbox that needs to include social services, access to education, access to economic improvement and healthcare, because the youth who are most at risk for committing crimes are living in communities that are disenfranchised.”) (quoting Nadine Connell, assistant professor of criminology at the University of Texas at Dallas); Justin Worland, *Baltimore Tightens Curfew Amid Skepticism and Protests*, TIME (Aug. 8, 2014), <http://time.com/3089931/baltimore-curfew/> (“It does[ not] reduce crime. It does[ not] make communities safer. In fact what it might do is contribute to the negative relationship between law enforcement and the communities they[ are] looking to serve.”) (quoting Marie Williams, Executive Director of the Coalition for Juvenile Justice); Emma Fitzsimmons, *Baltimore Joins Cities Toughening Curfews, Citing Safety but Eliciting Concern*, N.Y. TIMES (June 21, 2014), <http://www.nytimes.com/2014/06/22/us/baltimore-joins-cities-toughening-curfews-citing-safety-but-eliciting-concern.html> (“These are usually short-term measures. They tend to have bursts of enforcement, and then they tend to give up.”) (quoting Patrick Kline, an economics professor at the University of California, Berkeley, who has studied curfew laws).

<sup>349</sup> See Botero, *supra* note 345.

<sup>350</sup> See Gambino, *supra* note 346; Yvonne Wenger & Colin Campbell, *Baltimore's new curfew takes effect Friday*, BALTIMORE SUN (Aug. 7, 2014), [http://articles.baltimoresun.com/2014-08-07/news/bs-md-ci-curfew-effective-20140806\\_1\\_curfew-collington-square-recreation-center-sandtown-winchester](http://articles.baltimoresun.com/2014-08-07/news/bs-md-ci-curfew-effective-20140806_1_curfew-collington-square-recreation-center-sandtown-winchester).

1. *Employing the Kids*

Baltimore City and “leaders of the business and philanthropic communities”<sup>351</sup> sponsor YouthWorks,<sup>352</sup> an initiative designed to offer summer jobs to the city’s youth.<sup>353</sup> The program’s popularity, wide-ranging opportunities, and its benefactors’ financial commitment ensure its continued success, which has been “nationally-recognized.”<sup>354</sup>

YouthWorks seeks to provide 5,000 of the city’s teenagers and young adults with paid summer employment opportunities.<sup>355</sup> In 2015, however, a record 8,000 hopeful participants registered.<sup>356</sup> Perhaps YouthWorks’ diversity of employment opportunities drives its popularity.

YouthWorks offers jobs in the professional and civil service industries, including in the health,<sup>357</sup> journalism,<sup>358</sup> legal,<sup>359</sup> and public sectors.<sup>360</sup> Other fields include construction,<sup>361</sup> higher education,<sup>362</sup> science and technology,<sup>363</sup> and tourism and hospitality.<sup>364</sup>

Moreover, eight city government agencies<sup>365</sup> and a number of private and non-profit business entities fund the program.<sup>366</sup> Thus, the joint financial commitment ensures the city-sponsored program will continue to operate.

<sup>351</sup> Press Release, Office of the Mayor, City of Balt., Mayor Rawlings-Blake Announces Expansion of Summer Jobs Program for Baltimore City Youth (June 24, 2015) (on file with author), *available at* <http://mayor.baltimorecity.gov/news/press-releases/2015-06-24-mayor-rawlings-blake-announces-expansion-summer-jobs-program>.

<sup>352</sup> For additional information about YouthWorks, see YOUTHWORKS, <https://youthworks.oedworks.com/>.

<sup>353</sup> See Press Release, Office of the Mayor, City of Balt., *supra* note 351.

<sup>354</sup> See *id.*

<sup>355</sup> See *id.*

<sup>356</sup> See *id.*

<sup>357</sup> Johns Hopkins Hospital and Health Systems, and Mercy Medical Center. See *id.*

<sup>358</sup> Baltimore Sun Media Group. See *id.*

<sup>359</sup> Law Firm of Schlachman, Belsky and Weiner. See Press Release, Office of the Mayor, City of Balt., *supra* note 351.

<sup>360</sup> Baltimore City Police Department and the Enoch Pratt Free Library. See *id.*

<sup>361</sup> Whiting Turner. See *id.*

<sup>362</sup> Johns Hopkins University and Maryland Institute College of Art. See *id.*

<sup>363</sup> Space Telescope Science Institute and the Maryland Department of Natural Resources. See *id.*

<sup>364</sup> Royal Sonesta Harbor Court Hotel and the National Aquarium. See *id.*

<sup>365</sup> Baltimore City Department of Public Works, Baltimore City Health Department, Baltimore City Housing Authority, Baltimore City Police Department, Office of Civil Rights and Wage Enforcement, Baltimore City Council President’s Office, Baltimore City Council Sharon Middleton District #6, and Baltimore City Council Helen Holton District #8. See Press Release, Office of the Mayor, City of Balt., *supra* note 351.

<sup>366</sup> See *id.*

## 2. *Incorporating the Curfew into the Juvenile Justice System*

Assuming that enforcement of Baltimore City's juvenile curfew cannot reduce juvenile crime and victimization, or decrease delinquency from school, then the juvenile crime, victimization, and delinquency rates will remain steady—or worse, they will rise. Those rates will continue to propel minors into the city's juvenile justice system, and courts inevitably will sentence them to a term of probation.

Imposing the curfew's daytime and nighttime restrictions as a condition of a juvenile's probation will not guarantee a drop in juvenile crime, victimization, or delinquency. More importantly, however, imposing the curfew's restrictions on a juvenile probationer will not unduly burden law-abiding children, who already live in an increasingly violent city,<sup>367</sup> and who regularly attend school.

## 3. *Continuing to Develop Robust Recreation Programs*

The Baltimore City Council must allocate money and other resources to support neighborhood recreation centers<sup>368</sup> and competitive sports leagues for children who want or need a constructive activity in which they can participate when they are not in school.

Baltimore City Councilman Carl Stokes, who voted against the curfew,<sup>369</sup> argued the city should place greater emphasis on developing programs rather than imposing punitive measures.<sup>370</sup> Competitive sports leagues, for example,

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<sup>367</sup> See *supra* note 177.

<sup>368</sup> Even though some are supportive of the policies underlying the curfew, they doubt it would be necessary if the city appropriated more resources to its recreation centers and after-school and summer activities for children. See Wenger & Campbell, *supra* note 350.

In 2013, Baltimore City mayor Stephanie Rawlings-Blake closed twenty of the city's fifty-five recreation centers. See Gary Gately, *Baltimore's Newly Approved Youth Curfew Among Strictest in Nation*, JUVENILE JUSTICE INFORMATION EXCHANGE (June 16, 2014), <http://jjie.org/baltimores-newly-approved-youth-curfew-among-strictest-in-nation/>. But cf. Yvonne Wenger, *Rawlings-Blake outlines four broad goals for remainder of term*, BALTIMORE SUN (Sept. 14, 2015 7:13 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-rawlings-blake-interview-20150914-story.html> (reporting mayor Rawlings-Blake's goal to finance \$136 million in improvements to community recreation centers and pools).

<sup>369</sup> See Luke Broadwater, *Council approves tough new curfew for city youths*, BALTIMORE SUN (May 12, 2014, 8:24 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-curfew-20140512-story.html>.

<sup>370</sup> See *Baltimore's Tough Curfew Law Takes Effect*, CBSLOCAL.COM (Aug. 8, 2014, 6:22 AM), <http://washington.cbslocal.com/2014/08/08/baltimores-tough-curfew-law-takes-effect-today/> (updated Aug. 9, 2014, 9:53 AM).

Stokes went on the record calling the curfew “a false effort to avoid the more obvious proactive methods we should be using to engage young people, encourage

are structured environments which would enrich the lives of the city's youth while simultaneously providing the adult supervision the curfew seeks to encourage.<sup>371</sup> These proposals, and others,<sup>372</sup> present little risk, because they have already proved to be effective.

#### 4. *Adopting Boston's Strategy*

Boston has reduced juvenile crime by creating a "community-based approach" to occupy minors' time with alternative activities.<sup>373</sup> Boston's model is a three-pronged attack on juvenile crime and victimization: prevention, intervention, and enforcement.<sup>374</sup>

Boston's prevention strategy, for example, operates programs which provide employment opportunities<sup>375</sup> for the city's youth.<sup>376</sup> Moreover, several of Boston's community-based initiatives target violent behavior among children, and seek to prevent and eliminate it.<sup>377</sup> When children find themselves in court after engaging in violent behavior, probation officers take a proactive approach to enforce the terms of juvenile offenders' probation.<sup>378</sup>

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them and give them opportunities for growth." *Id.* Stokes further pleaded "[t]he conversation should be about opportunities for young people, not about what punishment we give a few young people." See Lowell Melser, *New Baltimore curfew law sparks controversy*, WBALTV.COM (June 4, 2014, 7:40 AM), <http://www.wbal.tv.com/news/new-baltimore-curfew-law-sparks-controversy/26310430>.

<sup>371</sup> See Gately, *supra* note 368.

Marvin "Doc" Cheatham, a longtime civil rights leader in Baltimore, recognizes "[m]any of our adults need training; they do[ not] know how to be parents. . . . You[ have] got children raising children. . . . We have a problem with parental issues and we need programs to better teach our parents how to be better parents." *Id.* Cheatham advocates for the city to expand recreation opportunities for children, pointing out that men in the West Baltimore community for which he serves as president of the community association are willing to coach sports and teach children to read. *Id.*

<sup>372</sup> For additional proposals, see AM. CIVIL LIBERTIES UNION OF MD., SUPPORTING BALTIMORE'S YOUNG PEOPLE TO BE SAFE: AN ALTERNATE PLAN TO THE EXPANSION OF BALTIMORE'S YOUTH CURFEW (2014), available at [http://aclu-md.org/uploaded\\_files/0000/0527/baltimore\\_youth\\_alternate\\_plan\\_5\\_28\\_14.pdf](http://aclu-md.org/uploaded_files/0000/0527/baltimore_youth_alternate_plan_5_28_14.pdf).

<sup>373</sup> See Orly Jashinsky, *Liberty for All? Juvenile Curfews: Always An Unconstitutional and Ineffective Solution*, 4 RUTGERS J.L. & PUB. POL'Y 546, 547 n.192 (2007) (citing Boston Police Dep't & Partners, *The Boston Strategy to Prevent Youth Violence, Prevention, Intervention, and Enforcement* 12 (1997)).

<sup>374</sup> See Privor, *supra* note 347, at 476.

<sup>375</sup> See discussion *supra* Part III.C.1.

<sup>376</sup> See Privor, *supra* note 347, 481.

<sup>377</sup> See *id.* at 478.

<sup>378</sup> See *id.* at 477-78.

Boston's approach to reducing juvenile crime and victimization has proved to be successful<sup>379</sup> in a city which does not have a juvenile curfew in force.<sup>380</sup>

Notwithstanding the standard of scrutiny a court chooses to apply to an equal protection challenge to Baltimore City's juvenile curfew, the wisdom behind the curfew deserves to be tested. Better still, regardless of any challenge in court to the curfew, the city's chosen method of reducing juvenile crime, victimization, and delinquency, and encouraging parents to take a more proactive role in raising their children, must be challenged.

### CONCLUSION

The Baltimore City Council enacted a juvenile curfew ordinance, the language of which stated that its restrictions on a minor's presence in public during certain hours will reduce juvenile crime, victimization, and delinquency. The curfew's language did not state that it will incentivize parents to become more active in, and take more responsibility for, raising their children. Nevertheless, the City Council's interest in parents doing just that is no less than its interests in seeing a drop in the juvenile crime, victimization, and delinquency rates. That the City Council took pains to explicate its interests underlying the curfew, but did not explicate all of its interests, is worthy of concern.

The curfew's enforcement patterns result in racially disproportionate effects which disadvantage minorities, particularly African-Americans. More evidence is necessary to demonstrate that the curfew's two age-based classifications were intended to target minority children in their parents.

Moreover, such evidence is necessary, yet inexplicably unavailable, to prove the curfew's age-based classifications unduly burden minorities. The curfew will, therefore, survive an equal protection attack on grounds of age discrimination, even under a rational basis review "with teeth" standard. Still, the curfew is vulnerable to an equal protection attack on grounds of race discrimination.

Mounting a successful equal protection attack to the curfew's racially disproportionate effects hinges on triggering strict scrutiny. Because the curfew does not facially draw race-based distinctions, strict scrutiny will apply only upon proof of the curfew's racially discriminatory purpose and effects. The daytime and nighttime curfews can survive strict scrutiny only if they are necessary to reduce the juvenile crime, victimization, and delinquency rates, and to provide children with needed parental support.

However, what data and other objective evidence that are available does nothing to demonstrate that Baltimore City's juvenile crime, victimization, and delinquency rates have dropped, or that the curfew's restrictions have caused them to drop. Further still, the alternative means proposed in Part III,

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<sup>379</sup> See *id.* 475 (providing statistical data indicating a dramatic drop in juvenile victimization).

<sup>380</sup> See *id.* at 474 (citation omitted).

by which the City Council can more effectively reach the goals the curfew seeks to advance or achieve, show the curfew's restrictions are not necessary.

Thus, bringing a successful equal protection challenge to the curfew's racially disproportionate effects depends only on whether objective evidence of such effects are sufficient to prove a racially discriminatory purpose behind the curfew. Although already apparent from the curfew's enforcement patterns, more objective evidence of the curfew's racially disproportionate effects is needed to prove a racially discriminatory purpose. Once the evidence triggers strict scrutiny, the curfew's needlessness and ineffectiveness will keep it from surviving strict scrutiny.