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All the Way Home[1]: Assessing the Constitutionality of Juvenile Curfew Laws

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Abstract

Juvenile curfew laws are a popular means of dealing with juvenile delinquency. However, there is a potential conflict between the restrictions imposed on juveniles by these statutes and the civil liberties of juveniles. Because the United States Supreme Court has not provided direction on this issue, lower courts have been left to decide the constitutionality of these laws. In this study, we examine the existing federal and state court decisions involving juvenile curfew laws. Our findings reveal inconsistency both in how the courts have reviewed and decided the constitutionality of juvenile curfew laws.

1. BRUCE SPRINGSTEEN, *All the Way Home*, *on* DEVILS & DUST (Columbia Records 2005).

I. Introduction

Juvenile curfews are local ordinances that prohibit minors within a statutorily specified age range from occupying public areas and streets during particular times unless they are accompanied by an adult or engaged in a legitimate activity.[2] The age range and time period addressed by juvenile curfew laws vary to some extent, although most laws target individuals under sixteen years of age and the nighttime hours of the day (e.g., 11:00 p.m. to 6:00 a.m.).[3] The proscribed exceptions to these laws also vary, but frequently include activities perceived as legitimate such as church or school events.[4] Juvenile curfew laws have existed for over a century, but in the last thirty years a number of jurisdictions have enacted these laws in an effort to control juvenile crime and victimization.[5] By restricting the specific hours during which unsupervised juveniles can be in public places, opportunities for delinquency and victimization are seemingly reduced.[6] Yet, despite their popularity and proposed usefulness, the constitutionality of these laws remains in question.[7]

How minors should be treated by the justice system is often the heart of the debate concerning the constitutionality of juvenile curfew laws.[8] Increases in arrests for juvenile crime, particularly violent juvenile crime, in the 1980s and early 1990s,[9] coupled with increased fear of crime more generally has contributed to the perception among crime control advocates that juvenile delinquency is a growing threat that needs to be neutralized through more punitive or restrictive legislation (e.g., curfew laws), juvenile waivers to adult courts, and harsher sentencing laws.[10] In contrast, due process advocates have argued that the narrowing distinction in the severity of punishment meted out in the juvenile versus adult criminal justice system should correspond with a narrowing of the legal distinctions between juveniles and adults; juveniles should be given the same constitution-

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2. Craig Hemmens & Katherine Bennett, *Juvenile Curfews and the Courts: Judicial Response to a Not-so-New Crime Control Strategy*, 45 CRIME & DELINQ. 99, 101 (1999).

3. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, CURFEW: AN ANSWER TO JUVENILE DELINQUENCY AND VICTIMIZATION? 1 (1996), *available at* https://www.ncjrs.gov/pdffiles/curfew.pdf.

4. *See* Hemmens & Bennett, *supra* note 2, at 101 (explaining that most curfews provide for "a number of exceptions to the general rule, allowing juveniles out past curfew for emergencies or to go to work or to a legitimate social function" among other exceptions).

5. Kenneth Adams, *The Effectiveness of Juvenile Curfews at Crime Prevention*, 587 ANNALS AM. ACAD. POL. & SOC. SCI. 136, 138–39 (2003).

6. Andra J. Bannister et al., *A National Police Survey on the Use of Juvenile Curfews*, 29 J. CRIM. JUST. 233, 234 (2001); Hemmens & Bennett, *supra* note 2, at 101–02; David McDowall et al., *The Impact of Youth Curfew Laws on Juvenile Crime Rates*, 46 CRIME & DELINQ. 76, 77 (2000).

7. Hemmens & Bennett, *supra* note 2, at 103–04.

8. *Id.* at 104.

9. HOWARD N. SNYDER & MELISSA SICKMUND, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 132 (2006), *available at* http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf.

10. JAMES C. HOWELL, JUVENILE JUSTICE AND YOUTH VIOLENCE 20–23 (C. Terry Hendrix et al. eds., 1997); FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 11–15 (1998).

al protections as adults and additional protections because of their youth.[11] That is, juvenile defendants should be provided sufficient safeguards so that they are not unfairly steamrolled into a punitive correctional system that no longer focuses on the best interests of the child.[12]

Similar to other status offenses (e.g., truancy laws), juvenile curfew laws are an outgrowth of the undergirding philosophy of the Progressive Era juvenile justice system; these laws seemingly attend to the best interests of the child, while also providing social control over delinquents.[13] Unlike other facets of the juvenile justice system, however, the United States Supreme Court has remained silent with regard to the constitutionality of curfew laws.[14] Thus, legislatures have been left with little guidance regarding how to draft such legislation, and courts have received little direction regarding how to determine the legality of existing laws.[15]

Lack of definitive answers from the United States Supreme Court has left the decision regarding the constitutionality of juvenile curfew laws to the lower courts, which has resulted in nebulous, ill-defined guidelines for legislative bodies to follow. This study systematically reviews the decisions of the lower courts in order to examine how this lack of intervention from the Supreme Court has created a judicial landscape where courts apply different standards of review and different constitutional doctrines for similar cases. The outcomes of these cases assign or withhold various rights from juveniles. By examining the existing case law pertaining to juvenile curfews, we illuminate how the courts have balanced the rights of juveniles against other competing interests (e.g., public safety and parental rights) under substantive due process, and provide insight into how minors are viewed under the law according to equal protection analysis.

A. Purpose and Theory Underlying Juvenile Curfew Laws

Juvenile curfew laws were created in order to prevent juvenile delinquency and victimization, as well as maintain parental authority.[16] In theory, juvenile curfew laws limit the opportunities juveniles have to engage in delinquent activity; the idea being that the opportunity structure—the times and places where juveniles could commit crime and get into mischief—could be manipulated or pruned away, leaving juveniles with fewer opportunity structures in which to engage in delinquent or disruptive activi-

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11. Barry C. Feld, *Juvenile (In)Justice and the Criminal Court Alternative*, 39 CRIME & DELINQ. 403, 420 (1993).

12. *See id.* at 405 (discussing the Court's repeated holding that juveniles are entitled to certain procedural safeguards).

13. *See* ANTHONY M. PLATT, THE CHILD SAVERS 43 (1969) (documenting how progressive reformers argued that "crime would diminish if children were controlled within their homes").

14. Hemmens & Bennett, *supra* note 2, at 108.

15. *See id.* at 108–09 (noting that the "crucial factor" in juvenile curfew cases "is whether the court applies rational basis or strict scrutiny review").

16. ROLANDO V. DEL CARMEN ET AL., BRIEFS OF LEADING CASES IN JUVENILE JUSTICE 51 (Elisabeth Roszmann Ebben & Elizabeth A. Shipp eds., 1998); Hemmens & Bennett, *supra* note 2, at 101.

ties.[17] Curfew laws could also reduce opportunities for youth to become victims of criminal acts by manipulating juveniles' routines and limiting the opportunity structures; if no juveniles were outside during these "risky" twilight hours, then they would not be as likely to encounter the predations of more experienced offenders.[18] Thus, juvenile curfew laws reflect the dual role children have in society: they are seen as a vulnerable population in need of protection, but also as a group of impulsive, potential predators that need to be controlled.[19]

Juvenile curfew laws also facilitate greater parental control and supervision over children.[20] Adolescents often challenge parental authority by testing boundaries in an effort to carve out their own identities. Delinquent activities, particularly status offenses, are a hallmark of adolescence.[21] By restricting the hours during which youth can be legally free of parental supervision, juvenile curfew laws can give parents a lending hand during adolescents' development by providing formal guardianship over juveniles via the threat of formal sanctions.[22]

An additional, albeit unintended, corollary of juvenile curfew laws is an increase in the power of the police.[23] Curfew laws give law enforcement the legal authority to stop and question youthful-appearing individuals whom the police reasonably believe are in violation of a curfew law.[24] Although the threat of being stopped may act as a deterrent to some delinquent behavior or a means to detect delinquent or criminal behavior that would have otherwise gone unchecked, critics argue that these gains are outweighed by intrusion on young people's privacy that results from the reduced burden law enforcement has to meet to detain individuals who may fall under the purview of a juvenile curfew law.[25]

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17. Danny Cole, *The Effect of a Curfew Law on Juvenile Crime in Washington, D.C.*, 27 AM. J. CRIM. JUST. 217, 218–19 (2003). *But see* Hemmens & Bennett, *supra* note 2, at 103 (finding that studies suggest curfews "simply cause temporal or geographic crime displacement").

18. Adams, *supra* note 5, at 139; Carrie S. Fried, *Juvenile Curfews: Are they an Effective and Constitutional Means of Combating Juvenile Violence?*, 19 BEHAV. SCI. & L. 127, 129 (2001).

19. *See* PLATT, *supra* note 13, at 54 ("[children] . . . need to be removed from their environment and imprisoned for their own good and protection"); DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE 225 (1980) (referring to juvenile court as the "bridge between" the "intemperance" of the child and the "careful nurture of the child"); Adams, *supra* note 5, at 138 (comparing how conservatives view curfew laws as a means of "more vigorous law enforcement, increased social controls, and harsher punishments," while liberals view curfew laws as a means to rehabilitate juveniles and prevent victimization).

20. Adams, *supra* note 5, at 138–39.

21. Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993); *see also* JOSEPH B. SANBORN, JR. & ANTHONY W. SALERNO, THE JUVENILE JUSTICE SYSTEM: LAW AND PROCESS 203 (Dawn VanDercreek et al. eds., 2004) (charting the growing number of status offenses).

22. Alexander K. Marketos, *The Constitutionality of Juvenile Curfews*, 46 JUV. & FAM. CT. J. 17, 20 (1995); *see also* McDowall et al., *supra* note 6, at 77 ("[C]urfew laws may strengthen the control that parents can exert over their children's activities.").

23. Adams, *supra* note 5, at 139.

24. *Id.*

25. *See* Marketos, *supra* note 22, at 26 (arguing that juvenile curfew laws are unconstitutional part-

B. Effectiveness of Juvenile Curfew Laws

Crime reduction, alongside parental control and increased juvenile safety, is one of the most commonly stated goals of juvenile curfew laws.[26] Whether or not these laws are actually effective can be relevant when discussing the constitutionality in the sense that they attenuate or strengthen arguments that such laws meet their stated goals. Social science research, however, is often imperfect as a means to direct these debates. Many of the studies disagree as to whether juvenile curfew laws have no effect, moderate effects, effects within certain situations or when targeting certain crimes, or can be paired with other behavioral interventions for increased effect.[27] While scattered studies show some deterrent effect in one capacity or another, the body of literature as a whole indicates that juvenile curfew laws are ineffective as a crime reduction strategy.[28]

Juvenile curfew laws are not widely studied within social science; one of the most current comprehensive reviews was written in 2003.[29] This review states that juvenile curfews fail to meet most of their stated goals, such as crime reduction and safer streets; however, impacts on specific types of crime—such as traffic violations—might be curtailed by targeted curfews. For this reason, the author urges future research to focus on "conditions and circumstances under which curfews might be effective."[30] Additionally, the author states that what little existing research we have on juvenile curfews suffers from a wide variety of methodological errors and most studies do not have rigorous designs; this makes generalizing claims of effectiveness or ineffectiveness tenuous either way.[31]

One of the more favorable reviews of juvenile curfews was written in 2011 and asserts that curfews "reduce arrest rates of juveniles below the curfew age by approximately 10 percent in the five years following enactment."[32] The author further goes on to explain that he cannot pinpoint exactly how curfews reduce crime nor is it clear that such policies are cost effective.[33] Additionally, he suggests that parents might play a larger role than police in the enforcement of curfews and that parental involvement along with limited fines or arrests could do much to change behavior.[34] The author suggests both areas, cost analysis and parental involvement, as secondary topics of research to test the impacts or effectiveness of juvenile curfew

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ly because they allow police to stop anyone who "looks underage").

26. Adams, *supra* note 5, at 155; Hemmens & Bennett, *supra* note 2, at 101.

27. Adams, *supra* note 5, at 141–50.

28. *Id.*

29. *Id.*

30. *Id.* at 156.

31. *Id.* at 155–57.

32. Patrick Kline, *The Impact of Juvenile Curfew Laws on Arrest of Youth and Adults*, 14 AM. L. & ECON. REV. 44, 60 (2012).

33. *Id.* at 60–61.

34. *Id.* at 61.

laws.[35]

For the purpose of this analysis of juvenile curfew laws, effectiveness is only relevant within the context of intermediate scrutiny and strict scrutiny review. When statistical evidence was used to demonstrate a nexus, the city typically provided its own analysis.[36] In one case, the court flat-out rejected data collected from other cities, stating, "Nor can defendants simply rely on the studies and statistics of other municipalities with juvenile curfews without showing how the decrease in juvenile crime in those other cities is pertinent."[37]

It is important to report the empirical nature and the current state of the social science research for a more detailed perspective of the juvenile crime problem and particular solutions; however, courts generally do not use such research or—when they do—the statistics or data analysis is specific to the geographic location in which the law is being implemented.[38] Generally, however, the research can point to trends or point to effective or ineffective crime reduction strategies.[39]

C. Constitutional Issues

Movement is inextricably linked to many other fundamental rights (e.g. speech, exercise of religion, assembly).[40] Restricting movement to the point where a person cannot engage in protected activities without "violating the law is equivalent to a denial of those rights."[41] Without the ability to freely move, citizens could not attend political events, go to church, or freely associate with other individuals.[42] Indeed, movement was often cited as one of the most important rights by the courts that reviewed juvenile curfew ordinances: there were many variations of the same sentiment that no other right was more "sacred" or "carefully guarded" than the right to be "free from restraint or interference by the state."[43] Even aimless forms of movement such as "night walking, loafing, or strolling" were deemed a part of the "amenities of life as we know them."[44] Thus, movement is part of our

35. *Id.*

36. *See, e.g.*, Hutchins v. District of Columbia, 188 F.3d 531, 568 (D.C. Cir. 1999) ("[T]he city supplemented evidence of the effects of curfews in other cities with specific analysis relating these studies to local circumstances.").

37. Anonymous v. City of Rochester, 915 N.E.2d 593, 655 (N.Y. 2009).

38. *See, e.g.*, *Hutchins*, 188 F.3d at 568 (discussing the city introducing studies specifically targeted to "local circumstances").

39. *Compare* Cole, *supra* note 17, at 218–19 (discussing the effectiveness of juvenile curfew laws providing less opportunity for criminal conduct by minors), *with* Hemmens & Bennett, *supra* note 2, at 103 (noting that studies suggest that curfews "simply cause temporal or geographic crime displacement").

40. City of Maquoketa v. Russell, 484 N.W.2d 179, 183 (Iowa 1992).

41. *Id.*

42. *Id.*

43. Bykofsky v. Borough of Middleton, 401 F. Supp. 1242, 1255 (M.D. Pa. 1975).

44. McCollester v. City of Keene, 586 F. Supp. 1381, 1384 (D.N.H. 1984) (citation omitted) (internal quotation marks omitted).

political, personal, and social identities as well as a basic human need.

But to what extent do juveniles have this right? The United States Supreme Court has long recognized that juveniles do not have the same rights as adults.[45] Within the *Bellotti* decision, the United States Supreme Court acknowledged that while juveniles have rights that warrant consideration from the courts, the state has a special obligation to protect children.[46] The Court noted three justifications for allowing states to infringe to a greater degree on juveniles' rights: (1) the vulnerability of children; (2) the lack of emotional maturity and decision-making power of children; and (3) the importance of parental guardianship in child rearing.[47] Some lower courts have used these rationales to create a three pronged "*Bellotti* test" to determine the constitutionality of juvenile curfew laws,[48] despite the fact that *Bellotti* dealt exclusively with abortion rights.[49] There is, in fact, "no reason to believe the [C]ourt intended *Bellotti* to be the new doctrine of juvenile rights."[50]

Regardless of the Court's intended scope for the *Bellotti* ruling, most courts that reviewed juvenile curfew ordinances still used the decision as supporting case law. Some courts used *Bellotti* to reason that movement was not a fundamental right for juveniles; therefore, these courts used a rational basis standard of review.[51] While other courts used *Bellotti* to attenuate the scope of juvenile fundamental rights by virtue of the juvenile's status as a minor; these courts used an intermediate standard of review.[52] Numerous courts that reviewed juvenile curfew ordinances under strict scrutiny used *Bellotti* to assert that the state's interests were more compelling given the status of minors (as opposed to the right being less fundamental).[53] At least one federal district court used *Bellotti* to support an argument that juvenile curfew laws did not justify a "basis for treating juveniles differently than adults."[54]

The constitutional rights of juveniles were usually attenuated due to the "vulnerable nature" of juveniles and the state's interest in protecting

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45. *See* Bellotti v. Baird, 443 U.S. 622, 633–34 (1979) ("[T]he Court long has recognized that the status of minors under the law is unique in many respects.").

46. *Id.* at 633.

47. *Id.* at 634.

48. Jeremy Toth, Note, *Juvenile Curfew: Legal Perspectives and Beyond*, 14 IN PUB. INT. 39, 54–55 (1995).

49. *Id.* at 57.

50. *Id.* at 58–59.

51. *In re* J.M., 768 P.2d 219, 223 (Colo. 1989) (en banc); City of Panora v. Simmons, 445 N.W.2d 363, 368–69 (Iowa 1989).

52. Ramos v. Town of Vernon, 353 F.3d 171, 180–81 (2d Cir. 2003); Hutchins v. District of Columbia, 188 F.3d 531, 541 (D.C. Cir. 1999); Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998); *In re* A.G., 113 Cal. Rptr. 3d 593, 605–06 (Ca. Ct. App. 2010); Anonymous v. City of Rochester, 915 N.E.2d 593, 598 (N.Y. 2009).

53. Nunez v. City of San Diego, 114 F.3d 935, 945–46 (9th Cir. 1997); Commonwealth v. Weston W., 913 N.E.2d 832, 842 (Mass. 2009).

54. Waters v. Barry, 711 F. Supp. 1125, 1136–137 (D.D.C. 1989).

them under the doctrine of *parens patriae*.[55] Very few courts that reviewed juvenile curfew ordinances recognized that juveniles had fundamental rights equal to those of adults.[56] *Commonwealth v. Weston W.* was one of the rare exceptions: the court did not qualify fundamental rights for juveniles, stating that an analysis of juvenile rights should consider the juvenile's vulnerabilities only to determine "whether the state's interests may be more compelling" and not to determine "whether the rights involved are less fundamental."[57] Here, the court rejected the notion that the rights of juveniles were not equal to those of adults; it reasoned that "[m]inors possess fully formed constitutional rights."[58] This case was a rare exception, however. Even courts that used strict scrutiny analysis were often loath to totally collapse the two systems; these courts cited *Bellotti* to support a constitutional distinction between adults and minors and to argue that the "state has somewhat broader authority to regulate the activities of children than of adults."[59]

Parents also raised constitutional issues regarding curfew laws.[60] Laws that dictated where their children should be were argued too restrictive for parents who wanted to allow their children greater freedom so that they were better prepared for the real world.[61] Parental rights to raise their children free from state control (within reason) was a right generally acknowledged by the courts; however, it was also said that "parental rights are not absolute and are subject to reasonable regulation."[62] The court in *Hutchins v. District of Columbia* reasoned that allowing a juvenile out on the street at night was not an "intimate" enough family decision to trigger protection as a parental fundamental right.[63] Although ordinances without a parental permission exemption were often deemed too restrictive as they did not offer parents enough "flexibility or autonomy in supervising their children."[64]

Taken together, these cases demonstrate a gray area in the law when it comes to juveniles, an area where the courts vacillate between upholding the Progressive ideal that minors have special status under the law and eroding this special status by making juvenile proceedings mirror those

55. *Hutchins*, 188 F.3d at 539, 541; *In re A.G.*, 113 Cal. Rptr. 3d at 605.

56. *See Waters*, 711 F. Supp. at 1137 ("Applying the *Bellotti* factors, the Court thus holds that the context in which the District seeks to enforce the Act does not justify differentiating between the constitutional rights of minors and adults.").

57. *Weston W.*, 913 N.E.2d at 842 (citations omitted) (internal quotation marks omitted).

58. *Id.* at 841.

59. *Nunez*, 114 F.3d at 945.

60. *E.g.*, Anonymous v. City of Rochester, 915 N.E.2d 593, 600 (N.Y. 2009).

61. *See id.* at 601 (discussing that under the ordinance "parents cannot allow their children to function independently at night, which some parents may believe is part of the process of growing up" and would intrude in their parental rights).

62. *Id.* at 598–99.

63. Hutchins v. District of Columbia, 188 F.3d 531, 541 (D.C. Cir. 1999).

64. *Nunez*, 114 F.3d at 952; *Anonymous*, 915 N.E.2d at 600–01.

of adults.[65] The wavering is seemingly driven by competing interests: the need to maintain and protect the special status of juveniles, who are not seen as fully functioning or culpable adults under the law;[66] the perception that juvenile delinquents represent a threat to communities and that laws must therefore be passed to control the behavior of juveniles (i.e., curfew laws);[67] and the arguments that these laws might be at odds with the constitutional rights of minors.[68]

II. Methods

This study involved an examination of the courts' stances regarding the constitutionality of juvenile curfew laws in the United States. Issues of constitutional validity for municipal and state legislation, such as juvenile curfew laws, are typically settled at the appellate court level, and so this systematic review focused only on state and federal appellate court cases. Trial level cases were excluded from this analysis.

Cases were obtained via a search on Westlaw's "ALLCASES" database, which includes all federal and state cases dating back to 1658 and gives the broadest search parameters of all the databases used for court cases. The search term "juvenile curfew" initially revealed 208 cases for review. We reviewed each case to determine if it addressed the constitutionality of a juvenile curfew law. Cases that dealt with other legal issues were excluded from this analysis.[69]

The remaining cases in the list (N=65) were state and federal appellate court cases that focused on the constitutionality of juvenile curfew laws. However, cases were often appealed multiple times (e.g., *Hodgkins v. Peterson*), and appeals from a variety of different individuals were frequently heard as a single claim (e.g., *State vs. J.P.*). For these cases, only the final disposition of the case was used. After the "duplicate" cases were removed, we were left with thirty unique cases that involved the constitutionality of juvenile curfew laws.[70]

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65. Feld, *supra* note 11, at 406 (finding that the Court has abandoned the "Progressive conception" of juvenile justice in favor of "criminal procedural regularity").

66. *See* PLATT, *supra* note 13, at 54 (noting that children "need to be removed from their environment and imprisoned for their own good and protection" with a combination of "love and guidance with firmness and restraint"); *see also* Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998) ("[C]hildren's rights are not coextensive with those of adults.").

67. Hemmens & Bennett, *supra* note 2, at 100–01; *see also* Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1258 (M.D. Pa. 1975) (concluding that juvenile curfew laws are "a reasonable exercise by [a state] of its police power to advance and protect the safety and welfare of the general community and the minors").

68. Fried, *supra* note 18, at 129–30.

69. For example, juvenile curfew laws are often used by law enforcement to establish the reasonable suspicion necessary to justify a stop of a juvenile. These cases may mention a juvenile curfew law in the fact pattern, but the constitutionality of the law itself is not discussed.

70. The total amount of cases reflects a search that was accurate as of December 16, 2012. *Ramos v. Town of Vernon* was included twice because Vernon's juvenile curfew law was reviewed in both state and federal court. Ramos *ex rel.* Ramos v. Town of Vernon, 48 F. Supp. 2d 176, 188 (D. Conn. 1999),

III. Results and Discussion

The thirty lower court cases that addressed the constitutionality of juvenile curfew laws mostly involved some type of equal protection claim.[71] The Equal Protection Clause of the Fourteenth Amendment prohibits states from treating citizens in an arbitrary and discriminatory manner based on the state classifying a person as a member of a particular group.[72] This does not mean that all disparate treatment is unconstitutional; rather, the state may not treat people differently without a valid reason.[73]

Substantive due process involves the protection of fundamental rights that are "deeply rooted in this Nation's history and tradition" including the right "to marry," "to have children," "to direct the education and upbringing of one's children," and "to abortion."[74] Movement was argued to be the primary right implicated in juvenile curfew cases reviewed under the substantive due process doctrine.[75] Plaintiffs also argued limiting the movement of juveniles circumvented their ability to engage in activities protected by the First Amendment including: speech, assembly, and association.[76]

The challenges raised by juvenile curfews involve restrictions of conditions that inhibit the juvenile to practice First Amendment protections.[77] Because of this, many of the First Amendment issues involving juvenile curfew cases implicate "overbreadth" and "void for vagueness doctrines."[78]

The overbreadth doctrine was used in cases where juvenile curfew laws "[swept] within [their] ambit" activities that were protected by the First Amendment or otherwise harmless.[79] Most often concerned with First Amendment challenges, the overbreadth doctrine attempts to strike a balance between allowing lawmakers to abridge some forms of speech while still protecting First Amendment interests.[80]

In a few cases, juvenile curfew laws were also contested as being

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certified question answered sub nom. Ramos v. Town of Vernon, 761 A.2d 705, 710 (Conn. 2000), *rev'd sub nom.* Ramos v. Town of Vernon, 353 F.3d 171, 187 (2d Cir. 2003).

71. *See, e.g.*, *Ramos*, 353 F.3d at 176–77 (discussing that courts review juvenile curfew laws under the equal protection doctrine using three different standards: rational basis, intermediate scrutiny, and strict scrutiny).

72. Loving v. Virginia, 388 U.S. 1, 10 (1967).

73. *See* Plyler v. Doe, 457 U.S. 202, 216 (1982) (citations omitted) (internal quotation marks omitted) ("[T]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.").

74. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations omitted) (internal quotation marks omitted).

75. Waters v. Barry, 711 F. Supp. 1125, 1134 (D.D.C. 1989).

76. *Id.*

77. *E.g.*, State v. Doe, 231 P.3d 1016, 1022 (Idaho 2010).

78. *Id.*

79. *E.g.*, Johnson v. City of Opelousas, 658 F.2d 1065, 1074 (5th Cir. 1981).

80. *See id.* at 1071 (discussing that the government has a legitimate need to legislate that must be narrowly tailored when it infringes upon fundamental rights).

unconstitutionally vague.[81] Laws are generally considered void for vagueness when "a person of ordinary intelligence" cannot discern what conduct is being prohibited, what persons or classifications the law impacts, or what punishments might be imposed.[82] For example, in *Naprstek v. City of Norwich*, the court found the ordinance to be unconstitutionally vague because it did not specify when the curfew ended.[83] Therefore, a reasonable person would not know when it was once again permissible to be outside.[84]

A. Standard of Review

In deciding equal protection or substantive due process claims, courts apply "rational basis," "intermediate scrutiny,"[85] or "strict scrutiny" review.[86] The most stringent level of review under the equal protection doctrine, strict scrutiny, is applied to laws that impact classifications affecting fundamental rights or suspect classifications.[87] Fundamental rights are those rights without which neither liberty nor justice would exist; in other words, a fundamental right is one that is "explicitly or implicitly protected by the Constitution."[88] Suspect classifications are those that involve certain personal characteristics, such as race.[89] Discrimination on the basis of a suspect classification is considered "inherently suspect and subject to close judicial scrutiny."[90] To date, the Supreme Court has held that only race, national origin, and religion are suspect classifications in all circumstances.[91] Notably, age is not a suspect classification.[92]

The equal protection doctrine protects "classifications affecting fundamental rights;"[93] while the substantive due process doctrine, derived from the Due Process Clause, protects "against government interference with certain fundamental rights and liberty interests" such as the right to

81. Naprstek v. City of Norwich, 545 F.2d 815, 818 (2d Cir. 1976).

82. *Id.*

83. *Id.*

84. *See id.* ("Parents and minors subject to the ordinance are not given fair notice of when children under the age of seventeen are permitted to return to the streets.").

85. It is worth noting that intermediate scrutiny is not typically a standard used in substantive due process. However, many of the juvenile curfew cases reviewed in subsequent sections utilize intermediate scrutiny when examining juvenile rights.

86. Clark v. Jeter, 486 U.S. 456, 461 (1988) (equal protection claims); Waters v. Barry, 711 F. Supp. 1125, 1135–137 (D.D.C. 1989) (strict scrutiny standard under substantive due process claim); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1256–258 (M.D. Pa. 1975) (rational basis standard under substantive due process claim); Anonymous v. City of Rochester, 915 N.E.2d 593, 597 98 (N.Y. 2009) (intermediate scrutiny standard under substantive due process claim).

87. *Clark*, 486 U.S. at 461.

88. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

89. *Clark*, 486 U.S. at 461.

90. Graham v. Richardson, 403 U.S. 365, 372 (1971).

91. *Clark*, 486 U.S. at 461 (race and national origin); City of New Orleans v. Dukes, 427 U.S. 297, 304 (1976) (religion).

92. Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

93. *Clark*, 486 U.S. at 461.

marry, have children, and to have an abortion.[94] The United States Supreme Court has established the "two primary features" of fundamental rights under the substantive due process doctrine.[95] First, substantive due process protects "fundamental rights and liberties" that are "deeply rooted in this Nation's history and tradition."[96] Second, these fundamental rights protected by the substantive due process doctrine require a "careful description of the asserted fundamental liberty interest."[97] Courts have also strict scrutiny to review claims brought under the substantive due process doctrine.[98]

Under the equal protection doctrine, rational basis review is applied to laws that do not burden a classification that affects fundamental rights or implicate suspect classifications.[99] Under the substantive due process doctrine, if the asserted right is not a fundamental right protected by the Due Process Clause then the law must still be "rationally related to legitimate government interests."[100] In order to pass constitutional muster under rational basis, a law must simply be rationally related to a legitimate governmental goal.[101] In short, the legislation under evaluation is presumed to be valid and the burden of persuasion on the plaintiff.[102] This standard of review is the easiest to pass[103] because courts do not scrutinize the effects of the legislation; instead, the courts merely inquire whether the "classification drawn by the statute is rationally related to a legitimate state interest."[104] Courts only look for a logical connection between the stated goals and the means for achieving them without questioning the wisdom of the legislation, which is "presumed to be valid."[105]

Under the equal protection doctrine, intermediate scrutiny is a level of review in between the two extremes of strict scrutiny and rational basis review, and it is reserved for classifications that are not seen as inherently suspect such as gender.[106] Intermediate scrutiny has also been used as the standard of review in substantive due process claims.[107] For example, in *Anonymous v. City of Rochester*, the New York Court of Appeals first found that the right to movement was a fundamental right under the sub-

94. Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

95. *Id.*

96. *Id.* at 720–21 (citations omitted) (internal quotation marks omitted).

97. *Id.* at 721 (citations omitted) (internal quotation marks omitted).

98. *E.g.*, Waters v. Barry, 711 F. Supp. 1125, 1135–136 (D.D.C. 1989).

99. Romer v. Evans, 517 U.S. 620, 631 (1996).

100. *Glucksberg*, 521 U.S. at 728.

101. Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124, 128 (1999) (citations omitted) (internal quotation marks omitted).

102. Heller v. Doe, 509 U.S. 312, 319–20 (1993).

103. *See* Gregory v. Ashcroft, 501 U.S. 452, 471 (citation omitted) (internal quotation marks omitted) (noting that "courts are quite reluctant to overturn governmental action" when applying rational basis review).

104. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

105. *Id.*

106. Clark v. Jeter, 486 U.S. 456, 461 (1988).

107. Anonymous v. City of Rochester, 915 N.E.2d 593, 597–98 (N.Y. 2009).

stantive due process doctrine.[108] Next, the court used *Bellotti* to reason that while the right to movement is a fundamental right under the substantive due process doctrine, intermediate scrutiny, rather than strict scrutiny, is the appropriate standard of review because of the "vulnerabilities particular to minors."[109]

To withstand intermediate scrutiny, a law must "serve important governmental objectives and must be substantially related to achievement of those objectives."[110] Under intermediate scrutiny the goals of state action are subjected to higher levels of scrutiny when compared to rational basis.[111] The goals of the legislation must be "genuine" and "not hypothesized or invented post hoc in response to litigation."[112] Additionally, the connection, or nexus, between the law (means) and the stated objective (goal) must be "substantially related."[113] For example, in *Untied States v. Virginia*, the United States Supreme Court struck down single sex education practices of the Virginia Military Institute due to a lack of an "exceedingly persuasive justification" for the method of pedagogy.[114] Similarly, the Court struck down an Oklahoma statute that discriminated based on gender finding a lack of justification in the social science evidence presented by Oklahoma.[115] The Court stated that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause"[116] and that "the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups."[117] As the above analysis demonstrates, the government bears the burden of demonstrating that the law serves some important governmental purpose.[118]

In order to survive strict scrutiny, the government must prove: (1) it has a compelling interest which justifies restricting the fundamental right or suspect and (2) the legislation is "narrowly tailored" so that the fundamental right is not abridged more than is absolutely necessary to effectuate the state's compelling interest.[119] Under the strict scrutiny standard of review, there is no presumption that the law is constitutional.[120] For the legislation

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108. *Id.* at 597.

109. *Id.* at 598.

110. Craig v. Boren, 429 U.S. 190, 197 (1976).

111. *Clark*, 486 U.S. at 461.

112. United States v. Virginia, 518 U.S. 515, 533 (1996).

113. *Id.*

114. *Id.* at 534–35 (internal quotation marks omitted).

115. *Craig*, 429 U.S. at 208–09.

116. *Id.* at 204.

117. *Id.* at 208–09.

118. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

119. Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993) (strict scrutiny standard in equal protection claims); Waters v. Barry, 711 F. Supp. 1125, 1135 (D.D.C. 1989) (strict scrutiny standard in substantive due process claim).

120. *Qutb*, 11 F.3d at 492.

to be narrowly tailored there must be a sufficient nexus between the legislative body's stated interest and either the classification drawn or the means chosen to advance the state's compelling interest.[121] For example, in *Zablocki v. Redhail*, the United States Supreme Court struck down a Wisconsin statute that prohibited residents with financial obligations to minor children who were not in their care from marrying unless court approval had been obtained.[122] The Court determined that while protecting the welfare of out of custody children was a compelling state goal, the methods of this law were overbroad as other methods could achieve the same result with less infringement on the fundamental right to marry.[123] In short, the statute "unnecessarily impinge[d] on the right to marry."[124] The concurring opinion by Justice Powell noted that the majority was intertwining the right to marry under the equal protection doctrine and the substantive due process doctrine without deciding which doctrine should apply; however, in Justice Powell's opinion the law did "not pass muster under either due process or equal protection standards."[125] In these cases involving strict scrutiny, the Court closely examines the purpose and effect of the legislation and does not merely accept the government's claim that the legislation is needed.[126]

Given the differences in these standards of review, it is not surprising that the outcome of a case is often influenced by the standard of review used by the court as much as the facts of the case.[127] Because age is not a suspect classification under the equal protection doctrine, the key questions are (1) whether the freedom of movement is a fundamental right protected by the substantive due process clause; (2) whether the classification of juveniles affects fundamental rights under the equal protection doctrine; and if either or both of these doctrines are used by the court reviewing the juvenile curfew law, what is the appropriate standard of review in juvenile curfew cases?[128]

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121. *Id.* at 493.

122. Zablocki v. Redhail, 434 U.S. 374, 389–90 (1978).

123. *Id.*

124. *Id.* at 388.

125. *Id.* 398, 400 (Powell, J., concurring).

126. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–505 (1989) (plurality opinion) (internal quotation marks omitted) ("[T]he purpose of strict scrutiny is to smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

127. *See, e.g.*, Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998) (upholding curfew law under intermediate scrutiny review); Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993) (upholding curfew law under strict scrutiny review); *In re* Spagnoletti, 702 N.E.2d 917, 920 (Ohio 1997) (overturning curfew law under rational basis review).

128. In *Bykofsky v. Borough of Middletown*, the federal district court analyzed the substantive due process and equal protection claim separately; it held that the right to movement was a right "protected by the due process clause." Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975). However, the court used a rational basis standard of review to compare the state's interest in protecting juveniles and the juvenile's liberty interest in movement and found that the curfew was constitutional. *Id.* at 1257–58. In its equal protection analysis, the court held that age is not a suspect classification and that the curfew does not infringe upon a fundamental right. *Id.* at 1265. Therefore, it also used a rational basis standard of review under the equal protection claim and found the law constitutional. *Id.* at

The courts have reviewed juvenile curfew laws using all three standards of review under both substantive due process and equal protection claims.[129] In nine cases, the court reviewed the relevant curfew law under the rational basis test; six of these laws were upheld, while three were struck down. The courts applied an intermediate scrutiny review in five cases; two laws were upheld and three were struck down. A strict scrutiny review was applied in 12 cases. The reviewing courts struck down nine of the laws and upheld three.

B. Cases Reviewed under Rational Basis Test

Table 1 contains the nine cases reviewed under the rational basis test. Some courts simply asserted that the right to movement, while fundamental to adults, was not fundamental for minors who are restricted in many ways merely because of their youth.[130]

In two cases reviewed under rational basis, the plaintiffs asserted equal protections claims: *Sale v. Goldman* and *Bykofsky v. Borough of Middletown*.[131] These claims were rejected by the courts, which held that juveniles are not a suspect class.[132] In *Sale*, the court directly refused to consider giving juveniles greater protection stating: "Although the Sales invite this Court to extend the realm of suspect classifications to include 'youth,' we decline to do so."[133]

For this reason, courts reviewing juvenile curfew laws under rational basis primarily focused on the substantive due process rights of juveniles and parents. *Bykofsky v. Borough of Middletown*, *In re J.M.*, *Ramos v. Town of Vernon*, *Sale v. Goldman*, *City of Panora v. Simmons*, and *In re Spagnoletti* are all instances where the courts applied substantive due process doctrine.[134]

The courts in *In re J.M.* and *City of Panora v. Simmons* used *Bellot-*

1265–266. The above analysis shows that the both the doctrine the court applies, as well as the standard of review it chooses to use, will determine the constitutionality of the curfew law in question.

129. Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998) (intermediate scrutiny under equal protection doctrine); Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993) (strict scrutiny under equal protection doctrine); Waters v. Barry, 711 F. Supp. 1125, 1135–137 (D.D.C. 1989) (strict scrutiny standard under substantive due process claim); *Bykofsky*, 401 F. Supp. at 1254, 1265 (rational basis under both substantive due process and equal protection doctrine); Anonymous v. City of Rochester, 915 N.E.2d 593, 597–98 (N.Y. 2009) (intermediate scrutiny standard under substantive due process claim).

130. *In re* J.M., 768 P.2d 219, 223 (Colo. 1989) (en banc); *see also* Schall v. Martin, 467 U.S. 253, 265 (1984) (citations omitted) ("[J]uveniles, unlike adults, are always in some form of custody.").

131. *Bykofsky*, 401 F. Supp. at 1264; Sale v. Goldman, 539 S.E.2d 446, 457 (W. Va. 2000).

132. *Bykofsky*, 401 F. Supp. at 1265; *Sale*, 539 S.E.2d at 457.

133. *Sale*, 539 S.E.2d at 457.

134. *Bykofsky*, 401 F. Supp. at 1265; *In re J.M.*, 768 P.2d at 223; Ramos v. Town of Vernon, 761 A.2d 705, 729 (Conn. 2000); City of Panora v. Simmons, 445 N.W.2d 363, 369 (Iowa 1989); *Sale*, 539 S.E.2d at 454–56; *see also In re* Spagnoletti, 702 N.E.2d 917, 920 (Ohio Ct. App. 1997) (assuming, without deciding, that under substantive due process doctrine if freedom of movement is not a fundamental right, the ordinance in question would still be unconstitutional under a rational basis standard of review).

ti's three-prong test to justify the use of rational basis,[135] the Supreme Court of Colorado cited the vulnerability of minors out at night being prone to "crime and peer pressure," the immaturity of minors that might cause them to "commit delinquent acts," and the ways in which a curfew ordinance "encourages parents to take an active role in supervising their children."[136] Therefore, according to these courts, rational basis was the appropriate level of review given the state's power to curtail the rights of juveniles under circumstances in which the special needs of children warrant such action.[137]

Table 1: Juvenile Curfew Laws Evaluated Under Rational Basis Review

Case	*Jurisdiction*	*Ages*	*Hours**	*Exemptions*‡	*Alleged Violation*	*Violation Found*
Bykofsky v. Borough of Middletown (1975)	Federal (PA)	< 12 12-13 14-17	10:00-6:00 10:30-6:00 11:00-6:00	1, 2, 3, 4, 5, 6, 9	1st, 14th Amendments, right to travel, parental rights of childrearing, vagueness	Yes, vagueness
People in Interest of J.M. (1989)	State (CO)	< 18	10:00-6:00	1	freedom of movement, overbroad	No
City of Panora v. Simmons (1989)	State (IA)	< 18	10:00-5:00	1, 4, 5, 10	vagueness, right to travel	No
In re Spagnoletti (1997)	State (OH)	16-17	12:00-5:00	1	14th Amendment, overbroad	Yes, overbroad
Ramos v. Town of Vernon (2000)	State (CT)	< 18	11:00-5:00 (12:01-5:00)	1, 2, 4, 5, 7, 8	1st, 4th Amendments, parental substantive due process, vagueness	No
Sale v. Goldman (2000)	State (WV)	< 18	10:00-6:00 (12:01-6:00)	1, 2, 4, 5, 7, 8, 9, 10	substantive due process, vagueness, parental rights of childrearing	No

Notes:* Weekend hours in parentheses if different from weekday hours.
‡1 = accompanied by guardian; 2 = for exercise of 1st Amendment rights; 3 = sidewalk adjacent to home; 4 = travel to/from approved school, religious, government, or civic functions; 5 = travel to/from legitimate employment; 6 = interstate travel; 7 = emergencies; 8 = errands for parents/guardians; 9 = with a special permit from governmental agency/group; 10 = emancipated or married juveniles; 11 = travel to/from public entertainment establishments (e.g., theatre, library); 12 = travel by automobile.

Perhaps the clearest articulation for using rational basis review came from the court in *Bykofsky v. Middletown*, in which the court articu-

135. *In re J.M.*, 768 P.2d at 223; *Simmons*, 445 N.W.2d at 368–69.

136. *In re J.M.*, 768 P.2d at 223.

137. Many courts that reviewed ordinances using rational basis did not consider intermediate scrutiny as an option, often suggesting the decision was dichotomous between rational basis and strict scrutiny. *See, e.g.*, *Simmons*, 445 N.W.2d at 369 (using the rational of *Bellotti* to conclude that the freedom of movement is "not a fundamental right for due process purposes;" therefore, the rational basis test rather than the strict scrutiny test applies in reviewing the ordinance).

lated that rational basis was the appropriate standard of review because the "ordinance does not impinge on the exercise of 'fundamental' rights" and age is not considered a suspect classification.[138] The court subsequently concluded rational basis was the proper test "in determining the constitutionality of the ordinance."[139] Curiously, the court in *Sale v. Goldman* used similar logic to support using rational basis but cited *Hutchins*, a case decided under intermediate scrutiny review, as supporting case law.[140] According to the court, the *Hutchins* decision determined that juveniles do not have a "right to freedom of movement," and "accordingly, the rational basis test is the proper tool for determining whether or not the ordinance infringes upon the Sales' freedom of movement."[141] A statement that, in and of itself, seems oddly contradictory.

Bykofsky v. Middletown, *In re J.M.*, *City of Panora v. Simmons*, and *Sale v. Goldman* were all focused on similar government goals.[142] The stated governmental goals in all cases revolved around four basic claims: (1) juvenile curfew laws protect children; (2) juvenile curfew laws protect citizens from juvenile crime; (3) juvenile curfew laws reduce juvenile crime; and (4) juvenile curfew laws increase parental control over children.[143] Each case varied in which stated goals it used—some justified the law using all four goals and others only used one or two of the goals to justify the curfew law.[144] Regardless of the number of goals stated, courts found all of these goals to be important and rationally related to the stated interests and upheld the juvenile curfew laws based on these factors under both the equal protection and the substantive due process doctrine.[145]

For example, the court in *Simmons* found the curfew to be a "legitimate exercise of Panora's powers designed to protect the safety and welfare of its children . . . ."[146] And the court in *Sale v. Goldman* stated that the government's evidence of juvenile crime and victimization statistics

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138. *Bykofsky*, 401 F. Supp. at 1265.

139. *Id.*

140. Hutchins v. District of Columbia, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc) (plurality opinion); Sale v. Goldman, 539 S.E.2d 446, 456 (W. Va. 2000).

141. *Sale*, 539 S.E.2d at 455–56.

142. *Bykofsky*, 401 F. Supp. at 1258 (noting that juvenile curfew laws "protect the safety and welfare of the general community and the minors"); *In re J.M.*, 768 P.2d at 223–24 (stating that curfew laws protect children, prevent crime against citizens, prevent crime against juveniles, and increase parental control); City of Panora v. Simmons, 445 N.W.2d 363, 369 (Iowa 1989) (noting curfew laws protect children); *Sale*, 539 S.E.2d at 456–57 (noting curfew laws protect children).

143. *E.g.*, *In re J.M.*, 768 P.2d at 223–24.

144. *Id.* (all four goals); *Bykofsky*, 401 F. Supp. at 1258 (one goal).

145. *Bykofsky*, 401 F. Supp. at 1256–257, 1265 (upholding juvenile curfew law using rational basis standard under both substantive due process and equal protection doctrine); *In re J.M.*, 768 P.2d at 223–24 (upholding juvenile curfew using rational basis standard under equal protection doctrine); City of Panora v. Simmons, 445 N.W.2d 363, 369 (Iowa 1989) (upholding juvenile curfew law using rational basis standard under substantive due process doctrine); *Sale*, 539 S.E.2d at 456–57 (upholding juvenile curfew law using rational basis standard under the substantive due process doctrine and determining that the rational basis standard was the proper standard under the equal protection doctrine).

146. *Simmons*, 445 N.W.2d at 369.

demonstrated a necessity for a curfew ordinance and was "rationally related to the City's legitimate interest in [juveniles'] welfare."[147]

Exceptions to the juvenile curfew ordinance were also relevant in decision making for cases reviewed under rational basis.[148] For example, the court in *In re J.M.* made a distinction between ordinances "proscribing 'presence'" and ordinances "proscribing 'loitering.'"[149] The difference, according to the court, was that those that prohibit presence "have been held unconstitutional" as an "overly broad restriction" whereas those that "prohibit indirect or aimless activity . . . but which allow the minor to participate fully in employment, religious, civic, and social activities, have been upheld."[150] Holding true to this pattern, one of the few cases ruled unconstitutional under rational basis review did not include enough exceptions, which made the amount of "innocuous" activities prohibited by the ordinance "too many to list."[151]

Parental rights were also reviewed in many of the cases discussed in this section. While there was general agreement that such parental rights existed and that "parents have the primary role in child-rearing,"[152] the courts determined that the stated governmental goals outweighed these rights, which, according to most courts, were not restricted to the point of being an "unconstitutional infringement."[153] In some cases, the court argued that the curfew actually strengthened parental rights. For example, *Simmons* stated that the "curfew ordinance acts to make parents the primary agent of enforcement" and promoted family life by "encouraging children to be at home."[154] Other courts took a less cheery view and simply stated that parents who sent their children out on errands at 3:00 a.m. were neglectful and such errands were "unreasonable;" further, an "arrest of a minor under these circumstances would alert the state to the possible need for investigation by Child Protective Services."[155] In other words, a curfew ordinance would help weed out bad parents and allow the state to intervene in such cases.

The courts in *Bykofsky v. Middletown* and *In re Spagnoletti* were two of the few courts that did not dismiss vagueness claims under the rational basis standard. In *Bykofsky v. Middletown* the court found a great deal of the wording used in the ordinance to be "unconstitutionally vague" and gave the mayor "virtually unbridled discretion" in some cases.[156] Words like "normal" (in the context of night-time activities) and phrases like "con-

147. *Sale*, 539 S.E.2d at 456–57.

148. *E.g.*, *In re J.M.*, 768 P.2d at 224; *In re* Spagnoletti, 702 N.E.2d 917, 920 (Ohio Ct. App. 1997).

149. *In re J.M.*, 768 P.2d at 224.

150. *Id.*

151. *In re Spagnoletti*, 702 N.E.2d at 920.

152. City of Panora v. Simmons, 445 N.W.2d 363, 369 (Iowa 1989).

153. *E.g.*, *Sale*, 539 S.E.2d at 459.

154. *Simmons*, 445 N.W.2d at 370 (citation omitted).

155. *In re* Maricopa County, 887 P.2d 599, 608 (Ariz. Ct. App. 1994).

156. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1251 (M.D. Pa. 1975).

sistent with public interest," "degree of maturity," and "incentive to and recognition of approaching maturity" were all deemed problematically vague.[157] However, the court still ruled in favor of the city and only required that they delete such words and phrases from the ordinance.[158] All of the other challenges to the ordinance were rejected, allowing the ordinance to stand as constitutional.[159] According to the court, the city's reasons for wanting an ordinance—the rise in juvenile crime, disorderly behavior, and aimless roaming—were reasonable and there was a "rational relation between the end sought and the means chosen."[160] The ordinance satisfied the standards of rational basis review and was upheld.

Not all cases reviewed under rational basis were upheld. For example, the juvenile curfew law reviewed in *In re Spagnoletti* only provided only one exemption: the juvenile had to be accompanied by a parent in order to be out after the curfew.[161] The lack of exceptions, according to the Ohio Court of Appeals, forbade too many "innocuous" activities.[162] The curfew law, the court held, was unconstitutionally broad.[163]

C. Cases Reviewed under Intermediate Scrutiny Test

The five cases reviewed under intermediate scrutiny are contained in Table 2. Courts that used intermediate scrutiny determined that rational basis review was inappropriate because of its lack of rigor yet strict scrutiny was too restrictive given juveniles have special status under the law due to their immaturity and vulnerability.[164] Two cases were cited consistently to support this conclusion: *Bellotti v. Baird*, which determined that juveniles have rights but that these rights are not coextensive to those of adults,[165] and *Schall v. Martin*, which noted that a juvenile's right to movement is inherently restricted because juveniles are "always under some form of custody."[166] Further, many courts found that the United States Supreme Court has already determined that state or city laws can limit the freedoms of minors without implicating fundamental rights in many circumstances.[167] Therefore, courts using intermediate scrutiny review have acknowledged

157. *Id.* at 1251.

158. *Id.* at 1252.

159. *Id.* at 1266.

160. *Id.* at 1255–56.

161. *In re* Spagnoletti, 702 N.E.2d 917, 918 (Ohio Ct. App. 1997).

162. *Id.* at 920.

163. *Id.* ("[T]here is no rational relationship between the ends sought and the means chosen.").

164. *See, e.g.*, Hutchins v. District of Columbia, 188 F.3d 531, 541 (D.C. Cir. 1999) (en banc) (holding that the constitutional rights of children are "not coextensive with those of adults," and therefore intermediate scrutiny review "is appropriate when evaluating restrictions on minors' activities where their unique vulnerability, immaturity, and need for parental guidance warrant increased state oversight").

165. Bellotti v. Baird, 443 U.S. 622, 634–35 (1979).

166. Schall v. Martin, 467 U.S. 253, 265 (1984).

167. *E.g.*, Anonymous v. City of Rochester, 915 N.E.2d 593, 605 (N.Y. 2009).

that juveniles have rights and interests deserving of protection, while still being flexible enough to accommodate legislation.[168]

Table 2: Juvenile Curfew Cases Evaluated Under Intermediate Scrutiny Review

Case	*Jurisdiction*	*Ages*	*Hours**	*Exemptions†*	*Alleged Violation*	*Violation Found*
Schleifer v. City of Charlottesville (1998)	Federal (4th Circuit)	< 17	12:01-5:00 (1:00-5:00)	1, 2, 3, 4, 5, 6, 7, 8, 10	14th Amendment, vagueness, parental rights of childrearing	No
Hutchins v. District of Columbia, (1999)	Federal (DC Circuit)	< 17	11:00-6:00 (12:00-6:00)	1, 2, 3, 4, 5, 6, 7, 8, 10	1st, 4th, 14th Amendments, vagueness, parental rights of child rearing	No
Ramos v. Town of Vernon (2003)	Federal (2d Circuit)	< 18	11:00-5:00 (12:01-5:00)	1, 2, 4, 5, 7, 8	14th Amendment	Yes
Anonymous v. City of Rochester (2009)	State (NY)	< 17	11:00-5:00 (12:00-5:00)	1, 2, 4, 5, 6, 7, 10	1st, 14th Amendment, right of movement, parental rights of childrearing	Yes, right of movement
In re A.G. (2010)	State (CA)	< 18	10:00-6:00	1, 2, 3, 4, 5, 6, 7, 8, 10	1st and 14th Amendment, right to movement	Yes, 1st Amendment, right to movement

Notes: * Weekend hours in parentheses if different from weekday hours.
† 1 = accompanied by guardian; 2 = for exercise of 1st Amendment rights; 3 = sidewalk adjacent to home; 4 = travel to/from approved school, religious, government, or civic functions; 5 = travel to/from legitimate employment; 6 = interstate travel; 7 = emergencies; 8 = errands for parents/guardians; 9 = with a special permit from governmental agency/group; 10 = emancipated or married juveniles; 11 = travel to/from public entertainment establishments (e.g., theatre, library); 12 = travel by automobile.

To survive intermediate scrutiny analysis, the government has the burden of proof and must establish that the contested law is "substantially related" to an important government purpose.[169] The stated goals of the ordinances reviewed under intermediate scrutiny were similar in each case, as they were with all other juvenile curfew cases, to protect juveniles from becoming victims of crime, to reduce juvenile crime in the community, and to increase parental responsibility.[170] With the exception of "increasing paren-

168. *See, e.g., id.* at 598 (recognizing the right to movement and travel); *In re A.G.*, 104 Cal. Rptr. 3d 863, 873 (Cal. Ct. App. 2010), *reh'g granted, rev'd on other grounds* (finding children general have same constitutional guarantees of adults, but they may be limited).

169. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that under intermediate scrutiny, justifications must be substantially related to the objectives of the differentiated treatment).

170. Ramos v. Town of Vernon, 353 F.3d 171, 172 (2d Cir. 2003); Hutchins v. District of Columbia, 188 F.3d 531, 535 (D.C. Cir. 1999); Schleifer v. City of Charlottesville, 159 F.3d 843, 846 (4th Cir. 1998); *In re* A.G., 104 Cal. Rptr. 3d 863, 874 (Cal. Ct. App. 2010), *reh'g granted, rev'd on other*

tal responsibly," no issue was taken with any of the stated goals. However, in *Ramos* the court felt there was an "irony" in increasing parental responsibility by allowing the state to usurp the role of the parent only to exercise "that authority itself."[171]

Out of the five cases reviewed using intermediate scrutiny analysis, *In re A.G* and *Ramos v. Town of Vernon* utilized equal protections doctrine.[172] *Hutchins v. District of Columbia*, *Schleifer v. City of Charlottesville*, and *Anonymous v. City of Rochester* used a substantive due process analysis.[173]

Courts that struck down juvenile curfews under intermediate scrutiny review tended to do so for two primary reasons: (1) evidence presented to the court failed to support its claim that the law was substantially related to the purpose or (2) the city failed to provide enough exceptions. Regarding the second, *In re A.G.* clarified that the government did not have to demonstrate it used the "least restrictive means," which is a requirement reserved for strict scrutiny; rather, the government simply had to demonstrate a "reasonable fit between the government's purpose and the means chosen to achieve it."[174] The exceptions, in other words, simply had to provide enough reasonable accommodations so that the ordinances did not conflict with the stated goals.

Lack of proper exceptions was the downfall of the curfew ordinance reviewed in *In re A.G.* The court stated that, while the ordinance provided many of the necessary exceptions found in upheld curfew laws, it "part[ed] company, and in significant ways" from its intended purpose: (1) the curfew ordinance did not allow "travel to or from" sanctioned activities after 10:00 p.m., even with parental permission; (2) the curfew ordinance's protection of First Amendment rights was "hollow" because the minor could not travel to such activities, with or without parental permission after 10:00 p.m.; and (3) the ordinance did not have an exception to allow travel "from one exempt location to another."[175] The lack of exceptions, the court claimed, prevented juveniles from engaging in activities that were "benign" or even "laudable" and restricting such activities fell outside the stated purpose of the ordinance.[176]

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grounds, 113 Cal. Rptr. 3d 593, 596, 602 (Cal. Ct. App. 2010); Anonymous v. City of Rochester, 915 N.E.2d 593, 595 (N.Y. 2009).

171. *Ramos*, 353 F.3d at 182.

172. *In re A.G.*, 104 Ca. Rptr. 3d at 870–73; *Ramos*, 353 F.3d at 178.

173. *Hutchins*, 188 F.3d 540–41; *Schleifer*, 159 F.3d at 846–47; *Anonymous*, 915 N.E.2d at 597–98.

174. *In re* A.G., 104 Cal. Rptr. 3d at 873 ("The court has clarified that the last part of the test—determining whether the regulation is not more extensive than 'necessary'—does not require the government to adopt the least restrictive means, but instead requires only a 'reasonable fit' between the government's purpose and the means chosen to achieve it." (citing Kasky v. Nike, Inc. 45 P.3d 243, 251 (Cal. 2002))).

175. *Id.* at 876.

176. *Id.* ("Thus, the ordinance sweeps within its ambit entirely benign (or even laudable) conduct, and the People offer not articulation of how circumscribing such benign conduct directly and materially

Lack of parental exceptions was also a noted issue in *Anonymous v. City of Rochester*. Here, the court held that the lack of a parental exception failed "to offer parents enough flexibility or autonomy in supervising their children" and noted that having such an exception would have made it a "closer case" as it would have been "only minimally intrusive upon the parent's due process rights."[177] This oversight, according to the court, actually undermined the stated goal of promoting parental supervision.[178] Some parents believe allowing their children to go outside unsupervised during "nighttime hours" is part of "growing up," that letting children be on their own encourages independence and growth.[179] The ordinance did not provide a parental permission exception, as did other ordinances on which this one was based; therefore, the court determined that the curfew was "not substantially related to the stated goals of promoting parental supervision."[180]

The court in *Anonymous* found the state's evidence regarding its other stated goals unconvincing. First, the city ordinance in question came about after the murder of three teenagers, two of whom were "killed during hours outside the curfew," and the third was already under a court mandated "individualized curfew."[181] These deaths, while tragic, "[did not] provide the necessary nexus between the curfew and the ordinance's stated purpose."[182] This was problematic for the ordinance because city officials reacted to these murders by establishing a need for a juvenile curfew.[183]

Crime statistics presented to the court were also found lacking as evidence for three reasons: (1) data indicated that juveniles were "far more likely to commit or be victims of crime outside of curfew hours," (2) adults were committing the "vast majority" of violent crime, and (3) the curfew was less restrictive on weekends despite the fact that statistics showed juveniles were far more likely to be both victims and perpetrators of crime during the weekend.[184] Based on these findings, the court concluded that, "no effort was made by the city to ensure that the population targeted by the ordinance represented that part of the population causing trouble or that was being victimized."[185] It also rejected data collected from other cities to support the use of a curfew in Rochester, stating that the city could not use such data without first demonstrating how it would be relevant to Rochester.[186] Therefore, since the city's own empirical data did not support its

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furthers the underlying governmental interests of preventing crime and victimization.").

177. *Anonymous*, 915 N.E.2d at 600–01.

178. *Id.*

179. *Id.* at 601.

180. *Id.*

181. *Id.* at 600.

182. *Id.*

183. *Id.* at 599–600.

184. *Id.* at 600.

185. *Id.*

186. *Id.*

claims, the court found there was not a substantial relationship between the curfew and the goals of reducing juvenile crime and victimization during nighttime hours."[187]

The court in Ramos also dismissed support used to establish curfew laws in other municipalities; the city had to demonstrate that "*this* ordinance, which restricts constitutional rights, is the product of 'reasoned analysis.'"[188] Unfortunately, the evidence the city provided to support its own claim was insufficient to establish that the city's curfew law was substantially related to the government's interest, and the court determined that the city's law did not pass the test given the "equivocal nature of the evidence."[189]

First, the construction and adoption of the ordinance were partly predicated on the murder of a sixteen-year-old who may have been involved in a gang altercation or robbery.[190] Again, the court found that the murder would not have been prevented by the ordinance as it occurred "inside the victim's home in the afternoon."[191] The court therefore agreed with the city's expert witness' characterization of the adoption of the curfew as a "knee-jerk" reaction.[192] Second, testimony from of one of the defense's witnesses, deputy mayor Steven Wakefield, that juveniles would gather in certain areas of the town were "primarily at hours that were not covered by the curfew," which actually demonstrated a "disconnect between the proof of purportedly problem hours and the curfew hours set out in the ordinance."[193] Third, the court found that the city made little effort to target the population that was being victimized or causing crime; the court stated "for all [it] knew" the problem population "might have been mostly over 18 years old."[194] Lastly, the court stated that the survey used in defense of the ordinance did not identify any hours as particularly dangerous nor did it establish children were more likely to be victims or perpetrators of crime as compared to adults.[195] Because the evidence was so lacking, the court determined that the city had not sufficiently demonstrated that its laws were substantially related to the government's interest in protecting juveniles or reducing juvenile crime.[196] The court did not address the other claims by the plaintiff because it found the equal protection claim sufficient to declare the law unconstitutional.[197]

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187. *Id.*

188. Ramos v. Town of Vernon, 353 F.3d 171, 183 (2d Cir. 2003).

189. *Id.* at 187.

190. *Id.* at 184–85.

191. *Id.* at 186.

192. *See id.* at 187 (quoting the defendant's expert witness stating, "[t]he adoption of the curfew itself probably could be considered a knee jerk reaction").

193. *Id.* at 184, 186.

194. *Id.*

195. *Id.*

196. *Id.* at 187.

197. *Id.*

Two of five ordinances reviewed under intermediate scrutiny were upheld as constitutional in *Schleifer v. City of Charlottesville* and *Hutchins v. District of Columbia*.[198] In both these cases, the exceptions provided were thought to be sufficiently protective of both the rights of minors and the rights of parents.[199] Both curfews had parental permission exceptions for errands, which was often lacking in ordinances found unconstitutional, and both allowed minors out after curfew when accompanied by an adult.[200] Additionally, both ordinances had exceptions for emergencies, employment, the exercise of First Amendment rights, interstate travel in a vehicle, and spaces abutting their parents' residence.[201] The number of exceptions distinguished these two cases from those in which the ordinances were found unconstitutional. Having a "comprehensive list of exceptions," according to the court in *Schleifer*, would even allow the ordinance to survive "strict scrutiny review if that were the appropriate standard of review."[202] Indeed, the ordinance "carefully mirror[ed]" the Dallas city ordinance that passed strict scrutiny review in *Qutb*.[203]

Similar to previous cases in which the curfew laws were struck down, plaintiffs in *Schleifer* called into question the rigor and applicability of the evidence presented to the court.[204] However, the court determined that scientific or statistical proof to validate the claims was not necessary. Indeed, the court thought it was unrealistic for judiciary or state officials to be aware of research methodology.[205] The evidence the city presented was subsequently found adequate, and the court determined that the City of Charlottesville was "constitutionally justified" in its assumption that the curfew ordinance would address the issue of juvenile violence and crime.[206] Based on this finding, the court rejected four primary objections from the appellants: (1) a claim that the ordinance was "impermissibly underinclusive" because it did not include seventeen-year-olds, who were "responsible for one-third of all crimes committed by juveniles nationwide," (2) a claim

198. Hutchins v. District of Columbia, 188 F.3d 531, 546–47 (D.C. Cir. 1999) (en banc) (holding that the ordinance is not overbroad when the First Amendment activity defense, the responsible entity defense, the sidewalk defense, and the emergency defense are "sufficiently definite" that "a person of ordinary intelligence would have a reasonable probability to know what is prohibited"); Schleifer v. City of Charlottesville, 159 F.3d 843, 853 (4th Cir. 1998) (finding the ordinance was not overbroad because the First Amendment activity defense, civic organization defense, and emergency defense established "minimal guidelines to govern law enforcement" and gave "reasonable notice of the proscribed conduct").

199. *Hutchins*, 188 F.3d at 552; *Schleifer*, 159 F.3d at 853–54.

200. *Hutchins*, 188 F.3d at 545 46; *Schleifer*, 159 F.3d at 846.

201. *Hutchins*, 188 F.3d at 535; *Schleifer*, 159 F.3d at 845–46.

202. *Schleifer*, 159 F.3d at 852.

203. *Id.*

204. *Id.* at 849–51.

205. *Id.* at 849 ("It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statics is a dubious business." (quoting Craig v. Boren, 429 U.S. 190, 204 (1976))).

206. *Id.* ("Charlottesville was constitutionally justified in believing that its curfew would materially assist its first stated interest that of reducing juvenile violence and crime.").

that more juvenile crime occurs outside of curfew hours and that the curfew therefore does not address the real problem hours, (3) a claim that juveniles are in more danger at home and during daytime hours, and (4) the claim that the curfew undermines parental authority.[207]

Regarding the statistical claims, the court found that the city's data adequately addressed all the issues.[208] Using the statistical information, the court determined that the data, "document[ed] a serious problem of crime among younger juveniles," so that the exclusion of seventeen-year-olds was not especially crippling.[209] It also confirmed that "the most serious crimes occurred during curfew hours," and the court stated that the ordinance did not have to prevent all types of juvenile crime or victimization in order to be substantively related to the government's interests.[210] Further, the court found that the Constitution did not require lawmakers to solve "the entirety of a social problem or no part of it at all."[211] To satisfy intermediate scrutiny, it was enough that the city demonstrated that its curfew ordinance was substantially related to its goals; it did not have to be a perfect fit.[212] The court determined that the City of Charlottesville's ordinance met this standard.[213]

Regarding parental rights, the court found that the United States Supreme Court has not given parents unilateral rights to raise their children in any way they please—that they are not free of "governmental regulation of their children's conduct."[214] Rather, it stated that governments are "given a wide range of power for limiting parental freedom" in order to secure the child's welfare.[215] The court also determined that the exemptions, that allowed children to run errands at a parent's behest or go outdoors during nighttime hours with a guardian, accommodated the rights of parents.[216]

This sentiment was echoed in the *Hutchins* case, wherein the court determined that the exceptions to the ordinance gave parents a great deal of flexibility in exercising their authority and almost unlimited control over their children's activities during curfew hours since there were no restrictions if the child was in the company of a recognized guardian over the age of twenty-one.[217] For this reason, the court determined that parental rights were not inhibited by the curfew.[218]

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207. *Id.* at 849–51.

208. *Id.*

209. *Id.* at 849.

210. *Id.* at 849–50.

211. *Id.* at 851.

212. *Id.* at 847.

213. *Id.* at 851.

214. *See id.* at 852 ("The Supreme Court has rejected the view that parents possess an unqualified right to raise children that trumps any government regulation of their children's conduct.").

215. *Id.* ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." (quoting Prince v. Massachusetts, 321 U.S. 158, 167 (1944))).

216. *Id.* at 853.

217. Hutchins v. District of Columbia, 188 F.3d 531, 545 (D.C. Cir. 1999).

218. *Id.* at 540 ("We disagree, not because we think that no such fundamental right exists in any

The court in *Hutchins* also failed to find a constitutional issue elsewhere in the ordinance.[219] Appellants argued that D.C. improperly used statistics from other cities to support its claims, that the testimony regarding the effectiveness of the curfew was unreliable, and that the statistical data provided by D.C. was flawed because it included arrest records of seventeen-year-olds who were not covered by the curfew law.[220] Further, they argued that the city's statistics did not demonstrate that there was a problem specifically with juvenile crime or that crimes or victimization against juveniles occurred in public places.[221] Similar to the court in *Schleifer,* the court in *Hutchins* determined that, while there might be issues with some of the evidence provided by the city, it was not necessary to "prove a precise fit between the nature of the problem and the legislative remedy—just a substantial relation."[222] Moreover, the court stated it would have been folly for D.C. to not look to other cities for model curfews and "legislatures are not obligated to insist on scientific methodology."[223] For these reasons, the evidence D.C. provided, according to the court, met the standards of review and established the necessary substantial link between the law and its stated goals.[224]

D. Cases Reviewed under Strict Scrutiny Test

Table 3 contains the cases reviewed under strict scrutiny. Courts applied strict scrutiny after holding that curfew laws "impinge[] upon a fundamental right."[225] These rights include, but are not limited to, a juvenile's rights to freedom of movement and intra-state travel, freedom of speech, freedom of assembly, freedom of association, and a parent's right to raise his or her children free of governmental interference.[226]

Table 3: Juvenile Curfew Cases Evaluated Under Strict Scrutiny Review

Case	*Jurisdiction*	*Ages*	*Hours**	*Exemptions†*	*Alleged Violation*	*Violation Found*
McCollester v. City of Keene (1984)	Federal (NH)	< 16	10:00-5:00	1, 2, 4, 5, 11	1st, 14th Amendments, overbroad	Yes, overbroad

dimension, but rather we think it not implicated by the curfew.").

219. *Id.* at 546–48.

220. *Id.* at 542.

221. *Id.*

222. *Id.* at 543.

223. *Id.* at 544.

224. *Id.* at 544–45.

225. *E.g.*, Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993).

226. *See* discussion in Part I.C. The limits of what comprises a "fundamental right" remain somewhat unclear. *See, e.g.*, *Qutb*, 11 F.3d at 492 ("For purposes of our analysis, we assume without deciding that the right to move about freely is a fundamental right. We are mindful, however, that this ordinance is directed solely at the activities of juveniles, and under certain circumstances, minors may be treated differently from adults.").

Case	*Jurisdiction*	*Ages*	*Hours**	*Exemptions*[i]	*Alleged Violation*	*Violation Found*
Waters v. Barry (1989)	Federal (DC)	< 18	11:00-6:00 (11:59-6:00)	1, 4, 5, 7, 12	1st, 4th, 5th Amendments, overbroad	Yes, 1st, 5th Amendments, overbroad
City of Maquoketa v. Russell (1992)	State (IA)	< 18	11:00-6:00	1, 4, 5	1st Amendment, overbroad	Yes, overbroad
Qutb v. Strauss (1993)	Federal (5th Circuit)	< 17	11:00-6:00 (12:00-6:00)	1, 2, 3, 4, 5, 6, 7, 8, 10	1st, 4th, 5th, 14th Amendments, vagueness, overbroad	No
Nunez v. City of San Diego (1997)	Federal (9th Circuit)	< 18	10:00-daylight	1, 4, 5, 7	1st Amendment, vagueness, parental rights of childrearing	Yes
Gaffney v. Allentown (1997)	Federal (PA)	< 18	12:00-5:30	1, 2, 3, 4, 5, 6, 7, 9, 10	14th Amendment	Yes
Hodgkins v. Peterson (2004)	Federal (IA)	< 14 15-17	11:00-5:00 11:00-5:00 (1:00-5:00)	1, 2, 4, 5, 6, 7, 10	parental rights of childrearing	Yes
Treacy v. Municipality of Anchorage (2004)	State (AK)	< 18	11:00-5:00 (1:00-5:00)	1, 2, 3, 4, 5, 7, 8, 10	14th Amendment, right to privacy, right of movement parental rights of childrearing, vagueness	No
State v. J.P; State v. T.M. (2004)	State (FL)	< 18 (Pin. Pk.) < 17 (Tampa)	11:00-5:00 (12:01-5:00)	1, 2, 3, 4, 5, 6, 7, 10, 11	1st, 14th Amendment, privacy, freedom of movement, parental rights of childrearing	Yes, ordinances do not use least restrictive means
Commonwealth v. Weston (2009)	State (MA)	< 17	11:00-5:00	1, 2, 3, 4, 5, 6, 7, 8, 10	Equal protection, right of movement	Yes, criminal sanctions not least restrictive means
State v. Doe (2010)	State (ID)	< 18	11:00-5:00	1, 7, 8	14th Amendment, right of movement vagueness, overbroad, parental rights of childrearing	No

Notes: *Weekend hours in parentheses if different from weekday hours.
† 1 = accompanied by guardian; 2 = for exercise of 1st Amendment rights; 3 = sidewalk adjacent to home; 4 = travel to/from approved school, religious, government, or civic functions; 5 = travel to/from legitimate employment; 6 = interstate travel; 7 = emergencies; 8 = errands for parents/guardians; 9 = with a special permit from governmental agency/group; 10 = emancipated or married juveniles; 11 = travel to/from public entertainment establishments (e.g., theatre, library); 12 = travel by automobile.

As Table 3 illustrates, curfew laws were only upheld in three cases: *Qutb v. Strauss*, *State v. Doe*, and *Treacy v. Municipality of Anchorage*. In each case, the reviewing court found that—similar to the cases reviewed under rational basis and intermediate scrutiny—the goals revolved around reducing crime, protecting juveniles, protecting citizens from victimization, and increasing parental control.[227] The courts found these to be compelling goals.[228]

Out of the twelve cases reviewed using strict scrutiny, six utilized substantive due process doctrine: *Hodgkins v. Peterson*, *Gaffney v. City of Allentown*, *Waters v. Barry*, *McCollester v. City of Keene*, *Treacy v. Municipality of Anchorage*, *State v. J.P.*, and *State v. Doe*.[229] Five used equal protections doctrine: *Nunez v. City of San Diego*, *Qutb v. Strauss*, *Gaffney v. City of Allentown*, *Treacy v. Anchorage*, and *Commonwealth v. Weston*.[230] And four used First Amendment doctrine: *State v. Doe*, *City of Maquoketa v. Russell* and *State v. J.P.*[231] Curiously, many courts claimed to apply an equal protections analysis despite the fact that juveniles are not a suspect class.[232] While the courts claimed their analysis fell under the realm of equal protection, arguments often centered on rights.[233] In *Doe*, the court points out this discrepancy, citing that the court in *Nunez* inappropriately labeled its analysis as equal protections:

> Doe argues that the ordinance is unconstitutional because it denies him equal protection of the laws in violation of the Fourteenth Amendment; however, his basis for this claim is unclear.

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227. State v. Doe, 231 P.3d 1016, 1024 (Idaho 2010) (reducing crime, protecting juveniles, protecting citizens from victimization, and increasing parental control); *see also* Qutb, 11 F.3d at 493 (reducing crime and protecting juveniles); Treacy v. Municipality of Anchorage, 91 P.3d 252, 256 (Alaska 2004) (same).

228. *Qutb*, 11 F.3d at 493; *Treacy*, 91 P.3d at 256; *Doe*, 231 P.3d at 1024.

229. Hodgkins v. Peterson, No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194, at *6 (S.D. Ind. July 23, 2004); Gaffney v. City of Allentown, No. CIV A. 97-4455, 1997 WL 597989, at *3 (E.D. Pa. Sept. 17, 1997); Waters v. Barry, 711 F. Supp. 1125, 1134 (D.D.C. 1989); McCollester v. City of Keene, 586 F. Supp. 1381, 1385 (D.N.H. 1984); *Treacy*, 91 P.3d at 268; State v. J.P., 907 So.2d 1101, 1113–15 (Florida 2004); *Doe*, 231 P.3d at 1030–31.

230. Nunez v. City of Santiago, 114 F.3d 935, 944 (9th Cir. 1997); *Qutb*, 11 F.3d at 492; *Gaffney*, 1997 WL 597989, at *3; *Treacy*, 91 P.3d at 264–65; Commonwealth v. Weston W., 913 N.E.2d 832, 838–39 (Mass. 2009).

231. *Doe*, 231 P.3d at 1021; City of Maquoketa v. Russell, 484 N.W.2d 179, 181–82 (Iowa 1992); *see also J.P.*, 907 So.2d at 1111 (reasoning that the First Amendment would apply if the rights it protects were not excluded from the ordinance).

232. *See, e.g.*, *Nunez*, 114 F.3d at 944–46 (noting that age is not a suspect classification but then using a strict scrutiny standard of review because the ordinance "impinges a 'fundamental right'").

233. *See Doe*, 231 P.3d at 1030 (noting that substantive due process that focuses on fundamental rights is the proper doctrine to use rather than equal protection, which focuses on classifications).

> Doe's apparent justification for this challenge is based on its restriction of a minor's right of free movement. This theory appears to be drawn from the *Nunez* case, where the Ninth Circuit found that because age was not a suspect classification, the only way strict scrutiny review could apply would be through infringement on the fundamental right of free movement. While this is true, it is incorrect to label this analysis as an equal protection analysis. Instead, the issue should be approached as a substantive due process issue because it involves the denial of fundamental rights.[234]

Courts subjecting juvenile curfew ordinances to strict scrutiny review agreed that many of the rights in question—the right to movement, speech, and privacy chiefly—are fundamental regardless of age, rejecting arguments that the case should be reviewed with a less rigorous test.[235] For example, in *Treacy*, the City of Anchorage asked that the ordinance be reviewed under intermediate scrutiny "because the rights of children are not coextensive with those of adults and are entitled to less protections"; the court rejected this argument stating that it would "not create a false dichotomy by classifying some fundamental rights as more deserving of protection than others."[236] This being the case, the courts instead focused on whether or not the least restrictive means were used to achieve the stated goals of the ordinances.[237]

Under strict scrutiny review, laws must be narrowly tailored so that "there are no less restrictive means available to effectuate the desired end."[238] In each of these cases, the court focused heavily on the exemptions provided in the curfew laws, which included activities such as running errands, attending to emergencies, attending school events, attending political events, engaging in employment, attending religious activities, exercising First Amendment rights, and staying at a neighbor's home.[239] The breadth of exemptions, coupled with the limited hours to which the curfew laws applied, established that the curfew laws in question were narrowly tailored.[240]

Upheld juvenile curfew statutes reviewed under strict scrutiny provided many exemptions to allow for legitimate activities but were also worded in a way that limited discretion or arbitrary decision making when it came to enforcement.[241] For example, in *Doe* the city ordinance specified the times in which juveniles were not allowed in public places, 11:00 p.m. to 5:00 a.m., making it markedly different from ordinances where the

234. State v. Doe, 231 P.3d 1016, 1030 (Idaho 2010) (citing Nunez v. City of San Diego, 114 F.3d 935, 944 (9th Cir. 1997)).

235. *Treacy*, 91 P.3d at 264.

236. *Id.* at 265.

237. *Id.* at 266.

238. *Qutb*, 11 F.3d at 492; *see also Treacy*, 91 P.3d at 266–67; *Doe*, 231 P.3d at 1025–026.

239. *Qutb*, 11 F.3d at 490; *Treacy*, 91 P.3d at 258; *Doe*, 231 P.3d at 1023.

240. *Qutb*, 11 F.3d at 496; *Treacy*, 91 P.3d at 267; *Doe*, 231 P.3d at 1024.

241. *E.g.*, *Doe*, 231 P.3d at 1030.

"scope of the prohibition was subject to question."[242] Similar logic was used in *Treacy*, wherein the court found the ordinance was not void for vagueness due to the clarity in its language that would allow "ordinary people [to] understand what conduct is prohibited."[243]

Courts that struck down curfew laws under strict scrutiny typically did so after finding that the laws were overly broad,[244] that a fundamental right was involved (usually the fundamental right to movement or First Amendment rights)[245] and that the rights of juveniles were coextensive with those of adults in most circumstances.[246] For example, in *Russell*, the Iowa Supreme Court struck down a juvenile curfew ordinance that was modeled after the law upheld, under rational basis review, in *City of Panora v. Simmons*.[247] After finding that the curfew law infringed upon fundamental rights,[248] the court applied strict scrutiny and held that the law was not narrowly tailored, as it would prevent juveniles from taking part in a variety of legitimate activities, such as attending political events.[249] Therefore, the law was insufficiently tailored to achieve the stated goals, unduly infringing upon juveniles' constitutional rights.[250]

The Supreme Court of Florida applied similar logic in *State v. J.P.* when it held that the curfew law did not have sufficient exceptions and that minors would be prohibited from attending a variety of wholesome activities.[251] Further, the court held that the use of criminal sanctions to enforce the curfew law was more broad than necessary to accomplish its stated goals; the legislature had not, in other words, used the least restrictive means.[252]

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242. *Id.*

243. *Treacy*, 91 P.3d at 260–61.

244. *See, e.g.*, Nunez v. City of Santiago, 114 F.3d 935, 949–50 (9th Cir. 1997) (holding that "the ordinance is not narrowly tailored because it does not sufficiently exempt legitimate First Amendment activities"); State v. J.P., 907 So.2d 1101, 1118 (Florida 2004) (finding "the ordinances to be overbroad"); City of Maquoketa v. Russell, 484 N.W.2d 179, 181 (Iowa 1992) (same).

245. *See Nunez*, 114 F.3d at 949 (holding that the ordinance "not only excessively burdens minors' right to free movement, but it also excessively burdens their right to free speech"); *J.P.*, 907 So.2d at 1110 (holding that "[t]he fundamental rights to privacy and freedom of movement are implicated by these ordinances"); *Russell*, 484 N.W.2d at 184 ("Political expression and *political association* are likewise fundamental rights under the First Amendment.").

246. *See Nunez*, 114 F.3d at 945 (9th Cir. 1997) (holding that, under *Bellotti*, children's rights are fundamental and therefore the juvenile curfew law must withstand strict scrutiny; however, "strict scrutiny in the context of minors may allow greater burdens on minors than would be permissible on adults as a result of the unique interests implicated in regulating minors"); *J.P.*, 907 So.2d at 1110–111 (Fla. 2004) (holding that, under *Bellotti*, children possess constitutional rights; however, "the rights of minors may be treated differently from the rights of adults" because of children's vulnerability and immaturity); *Russell*, 484 N.W.2d at 183–84 (Iowa 1992) (holding that even though minors possess fundamental constitutional rights, their "'minors' constitutional rights are not always coextensive with those of adults").

247. *Russell*, 484 N.W.2d at 181, 186.

248. *Id.* at 184.

249. *Id.* at 184–85.

250. *Id.* at 186.

251. *J.P.*, 907 So.2d at 1117–118.

252. *Id.* at 1119; *see also* Commonwealth v. Weston W., 913 N.E.2d 832, 846 (Mass. 2009) ("[T]he Commonwealth has failed to meet its burden to show that the use of criminal penalties provides

In *Nunez v. City of Santiago*, the United States Court of Appeals for the Ninth Circuit struck down a curfew law because when "construed in a way that avoids unconstitutional vagueness, it [was] not narrowly tailored to minimize the burden on minors' fundamental constitutional rights."[253] Under the law, which was crafted in 1947, loitering, wandering, idling, strolling, and playing were all forbidden activities, assuming they were being performed in public areas or buildings.[254] The court held that these phrases were unclear to juveniles and police officers alike, giving police officers excessive discretion with respect to how and when to enforce the law without providing juveniles with "reasonable notice of what conduct is illegal."[255] After construing the statute as "prohibiting all juvenile nocturnal presence" in order to avoid rendering it unconstitutionally vague,[256] the court went on to hold that the statute was not narrowly tailored because it failed to "provide exceptions for many legitimate activities"[257] and it provided for "sweeping state control" of parental rights.[258]

E. Other Challenges

Table 4 contains cases in which the court did not explicitly adopt any of the previously discussed standards of review. In *People v. Walton*, a California Court of Appeal upheld a juvenile curfew law that expressly forbid "remaining" and "loitering" on the ground that it was not so broad as to constitute an "undue invasion" of "personal liberty."[259] In *City of Sumner v. Walsh*, the Washington Supreme Court held that a city ordinance preventing any parent from knowingly allowing a juvenile to "remain in any public place . . . during curfew hours"[260] was unconstitutional, as the city's definition of "remain" rendered the ordinance unconstitutionally vague.[261]

Table 4: Juvenile Curfew Cases Evaluated Under Other Constitutional Issues

Case	*Jurisdiction*	*Ages*	*Hours**	*Exemptions†*	*Alleged Violation*	*Violation Found*
Ex Parte McCarver (1898)	State (TX)	< 21	9:00	1, 7	parental rights, personal liberty, legislative authority	Yes

an increased benefit over the civil enforcement mechanisms of the ordinance.").

253. Nunez v. City of Santiago, 114 F.3d 935, 952 (9th Cir. 1997).

254. *Id.* at 938.

255. *Id.* at 943.

256. *Id.*

257. *Id.* at 948.

258. *Id.* at 952; *see also* Hodgkins v. Peterson, No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194, at *14 (S.D. Ind. July 23, 2004) (holding that the curfew law "unconstitutionally impinged" on the fundamental rights of parents).

259. People v. Walton, 161 P.2d 498, 501–02 (Cal. App. Dep't Super. Ct. 1945).

260. City of Sumner v. Walsh, 61 P.3d 1111, 1111–12 (Wash. 2003) (en banc).

261. *Id.* at 1115–17.

Case	*Jurisdiction*	*Ages*	*Hours***	*Exemptions*†	*Alleged Violation*	*Violation Found*
People v. Walton (1945)	State (CA)	< 18	9:00-4:00	1, 9	legislative authority, overbroad, void for vagueness.	No
Betancourt v. Town of West New York (2001)	State (NJ)	< 18	10:00-6:00	1, 4, 5, 7	vagueness, parental rights	Yes
City of Sumner v. Walsh (2003)	State (WA)	Not Given	Not Given	4, 5, 6	vagueness	Yes

Notes:** Weekend hours in parentheses if different from weekday hours.
†1 = accompanied by guardian; 2 = for exercise of 1st Amendment rights; 3 = sidewalk adjacent to home; 4 = travel to/from approved school, religious, government, or civic functions; 5 = travel to/from legitimate employment; 6 = interstate travel; 7 = emergencies; 8 = errands for parents/guardians; 9 = with a special permit from governmental agency/group; 10 = emancipated or married juveniles; 11 = travel to/from public entertainment establishments (e.g., theatre, library); 12 = travel by automobile.

Betancourt v. Town of West New York declared another curfew law void for vagueness because many of its exemptions were not "broad enough to recognize the right of parents to permit their children to participate in many legitimate activities."[262] Finally, in *Ex parte McCarver*, the court struck down a curfew law that forbid "persons under the age of twenty-one years from remaining or being found upon the streets . . . after nine o'clock at night."[263] In so doing, the court succinctly framed the debate that continues today:

> It may be that there are some bad boys in our cities and towns whose parents do not properly control them at home, and who prowl about the streets and alleys during the nighttime and commit offenses. Of course, whenever they do, they are amenable to the law. But [that does not allow the] government to restrain them and keep them off the streets when they are committing no offense, and when they may be on not only legitimate errands, but engaged in some necessary business.[264]

IV. Conclusions

Protecting children from victimization and the community from juvenile crime are the overarching reasons behind limiting or abridging juvenile rights under certain circumstances.[265] The Supreme Court has established that juveniles are legally different from adults and that state or local

262. Betancourt v. Town of West New York, 769 A.2d 1065, 1068 (N.J. Super. Ct. App. Div. 2001).

263. *Ex parte* McCarver, 46 S.W. 936, 936 (Tex. Crim. App. 1898).

264. *Id.* at 937.

265. Adams, *supra* note 5, at 138; Fried, *supra* note 18, at 127; Richard D. Sutphen & Janet Ford, *The Effectiveness and Enforcement of a Teen Curfew Law*, 28 J. SOC. & SOC. WELFARE 55, 59 (2001).

governments can therefore create legislation that limit the freedoms of juveniles in ways that could not constitutionally be applied to adults.[266] Juvenile curfew laws are a prime example of such legislation.

Proponents of juvenile curfew laws view them as a necessary and even advantageous way to allow law enforcement and parents to gain control over errant youth, whose rapidly changing bodies and developing mental capacities render them especially vulnerable as both targets and perpetrators of criminal acts.[267] Critics contend that juvenile curfew laws are "a quick fix to the juvenile crime problem, with little concrete support for their effectiveness."[268]

We reviewed lower court cases pertaining to the constitutionality of juvenile curfew laws and observed very little consistency in the lower court rulings. First, we found that the lower courts use different standards of review when they hear challenges to curfew laws. The standard of review used seems to impact the reviewing court's holding. Generally speaking, the level of rigor associated with the standard of review seemed to correspond to the outcome: three out of nine cases reviewed under rational basis (33.33 percent) were stuck down, three of five cases reviewed under intermediate scrutiny (60 percent) were struck down, and nine out of 12 cases reviewed under strict scrutiny (75 percent) were struck down. Further, some of the courts even indicated that—had a different test been used—the outcome of the case would have been different.[269]

Second, despite the apparent link between the standard of review and the case outcome, we also found variability in outcomes across cases where courts applied the same standard of review. Courts that applied the same standard of review reached different conclusions regarding the constitutionality of similar juvenile curfew laws based largely on the wording of the law's provided exceptions. Even more frustrating is the fact that no discernible patterns within the language of these curfew laws (e.g., number of exceptions) can account for the variation.[270] Thus, lack of clear direction from the United States Supreme Court has left the constitutional issue of freedom of movement in public spaces (as it pertains to juveniles) in limbo; juveniles enjoy this right in some jurisdictions, but it is restricted during

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266. Hemmens & Bennett, *supra* note 2, at 104.

267. *See* PLATT, *supra* note 13, at 54 (noting that children "need to be removed from their environment and imprisoned for their own good and protection" with a combination of "love and guidance with firmness and restraint").

268. Adams, *supra* note 5, at 137.

269. *See, e.g.*, Anonymous v. City of Rochester, 915 N.E.2d 593, 606 (N.Y. 2009) (Pigott, J., dissenting) (arguing that the majority should have applied a rational basis review standard, under which the court would have upheld the statute).

270. *Compare* Hutchins v. D.C., 188 F.3d 531, 545 (D.C. Cir. 1999) (listing the exceptions that allow the ordinance to satisfy intermediate scrutiny), *and* Schleifer v. City of Charlottesville, 159 F.3d 843, 852 (4th Cir. 1998) (listing the exceptions that allow the ordinance to satisfy intermediate scrutiny), *with In re* A.G., 104 Cal. Rptr. 3d 863, 876 (Cal. Ct. App. 2010) (holding that the ordinance cannot withstand intermediate scrutiny because its exceptions, which essentially mirrored those provided in *Hutchins* and *Schleifer*, would not permit a minor "*to travel to or from* [school, religious, or other recreational] activities after 10:00 p.m. without being accompanied by an adult").

particular times and in particular places in other jurisdictions.

We also found inconsistent application of guiding precedent. As stated previously, the *Bellotti* test was utilized to justify the standard of review for rational basis as well as for intermediate and strict scrutiny.[271] Courts, in other words, used the same tool—one of the only tools given by the Supreme Court—but came to vastly different conclusions within their analysis.[272] Indeed, the court in *City of Panora v. Simmons* actively disagreed with previous applications of the test within opinions: "We believe the federal district court in *Waters* erred in its application of the *Bellotti* rationale."[273] The *Simmons* court reasoned it was "common knowledge" that juvenile involvement in drug usage had reached "epidemic dimensions," and concluded the court in *Waters* did not see the problem as juvenile-specific.[274]

Lastly, we found that many of the doctrines were inappropriately used by courts or blended to the degree it was difficult to discern what test was being utilized.[275] Courts used substantive due process and equal protections almost interchangeably in some circumstances.[276]

Similarly situated cases being assessed under the same instrument should ideally be similar in result. Otherwise, the perceived validity of the process might be called into question. More than that, it results in an outcome where the fundamental rights of juveniles are subject to change based on something as trivial and arbitrary as geographic location (i.e. juveniles in one state may have the fundamental right to movement whereas juveniles in another would not) leaving one to question just how fundamental such a right could possibly be if it was subject to such wonton restriction.

Lack of clear direction from the United States Supreme Court—which has yet to determine whether *Bellotti*[277] can be extended beyond its original context and has not given clear direction on juvenile curfew laws—has allowed lower courts to vary in both the standards under which they review curfew laws, their decisions regarding the constitutionality of these laws, and whether or not juveniles have such fundamental rights as movement. In *Kent v. United States*, the Court asked whether the juveniles were

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271. *Compare* Ramos v. Town of Vernon, 353 F.3d 171, 180–81 (2d Cir. 2003) (using *Bellotti* to justify intermediate scrutiny), *and* Nunez v. City of San Diego, 114 F.3d 935, 945–46 (9th Cir. 1997) (using *Bellotti* to justify strict scrutiny), *with* City of Panora v. Simmons, 445 N.W.2d 363, 369 (Iowa 1989) (using *Bellotti* to justify rational basis).

272. *Simmons*, 445 N.W.2d at 369.

273. *Id.*

274. *Id.*

275. *See* State v. Doe, 231 P.3d 1016, 1030 (Idaho 2010) (noting that other courts have blended equal protection and substantive due process (citing *Nunez*, 114 F.3d at 944)).

276. *See* Hutchins v. District of Columbia, 188 F.3d 531, 556 (D.C. Cir. 1999) (noting that the majority opinion blurs substantive due process and equal protection); *see also* Gaffney v. City of Allentown, No. CIV A. 97-4455, 1997 WL 597989, at *3 (E.D. Pa. Sept. 17, 1997) (analyzing the ordinance under both due process and equal protection under the same heading).

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

getting the worst of both worlds under the current juvenile court system,[278] noting that juveniles get "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[279] Unfortunately, the answer is all too clear. Juvenile curfew laws do little to reform or reintegrate juvenile offenders. They merely serve to control them.

278. Kent v. United States, 383 U.S. 541, 556 (1966).

279. *Id.* at 566.

Article

When the Batterer Wears a Badge: Regulating Officer-Involved Domestic Violence as a Line-of-Duty Crime

Alejandra Ávila

I. Introduction

In 2010, Michelle O'Connell (a 24-year-old St. Augustine, Florida resident and mother of a 4-year-old girl) was found dying in her household from a gunshot in the mouth.[1] Her boyfriend, Jeremy Banks, was a deputy sheriff for St. Johns County in St. Augustine.[2] Banks, who had been drink-

1. Walt Bogdanich & Glenn Silber, *Two Gunshots in a Summer Night: A Deputy's Pistol, a Dead Girlfriend, a Flawed Inquiry*, N.Y. TIMES, Nov. 23, 2013, http://www.nytimes.com/projects/2013/two-gunshots/.

2. *Id.*

ing, called 911 to report the shooting.[3] He identified himself as a deputy sheriff and alleged that O'Connell had shot herself with his duty weapon.[4] A few minutes later, the police arrived at the crime scene and found Banks's semiautomatic firearm next to O'Connell's body.[5] Officers quickly escorted Banks out of the house and asked him to sober up.[6] "When you hear it's one of your own—adrenaline's pumping," recalled Deputy Debra Maynard.[7] A detective then interviewed Banks in a police car, and Banks recounted again that O'Connell had killed herself.[8] The sheriff then faced a critical decision: "have his office investigate the case itself or, as is often done when an officer may be involved in a suspicious shooting, call in independent investigators from the Florida Department of Law Enforcement [FDLE]."[9] He chose the former.[10]

After conducting its investigation, the sheriff's office concluded O'Connell had taken her own life.[11] The medical examiner opined this was a clear case of suicide.[12] New York Times investigative reporters concluded that because police investigators were "so certain in their judgment" and "concluded so quickly that the shooting was a suicide," they "never tested the forensic evidence collected after the shooting" and "failed to perform the police work that is standard in suspicious shootings," including interviewing witnesses, such as the neighbors.[13] In fact, officers rebuffed an attempt by O'Connell's sister to testify that Banks had subjected O'Connell to domestic abuse a few months prior to the incident.[14] When *The New York Times* and *Frontline* examined the case, they found the investigation was critically mishandled, "not just by the sheriff and his officers, but also by medical examiners, who espoused scientifically suspect theories that went unchallenged by prosecutors."[15]

O'Connell's family, recalling that O'Connell was ecstatic over a new full-time job and was a loving mother, was immediately suspicious of the sheriff's findings and called for an independent investigation.[16] However, they received what the *New York Times* called "a starkly different reception from the authorities."[17] The sheriff's office was troubled by the family's request and told the family that the FDLE could not adequately

3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* (internal quotation marks omitted).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

investigate the case:

> "To be honest with you," [said Lt. Charles Bradley], according to a recording of the meeting, "my investigators are far and above better than what F.D.L.E. is ever going to give you. . . . ." "I feel like this is a damned inquisition on me . . . I haven't done anything wrong, guys. The sheriff's office hasn't done anything wrong."[18]

Nonetheless, after the family continued to exert pressure, the sheriff asked the FDLE to re-examine the case.[19] The FDLE found two witnesses, neighbors who testified they had "heard a woman screaming for help that night, followed by gunshots."[20] The neighbors' accounts "prompted the medical examiner to revise his opinion from suicide to homicide."[21] The governor subsequently appointed a special prosecutor, who ultimately decided there was insufficient evidence to prosecute and closed the case.[22] When the FDLE "asked for a special inquest into the death, saying significant questions remained," the sheriff struck back in support of Banks, "prompting an extraordinary conflict between two powerful law enforcement agencies."[23] Only after the media shed light onto the case, over two years after O'Connell's death, did the sheriff recognize that "his investigators 'prematurely embraced the mind-set' that [O'Connell] had killed herself."[24] The O'Connell family continuously believed that "the sheriff's office . . . blinded itself to the possibility that the shooting was a fatal case of domestic violence" by one of its own.[25]

The O'Connell case, which became the subject of a *Frontline/New York Times* documentary,[26] is by no means an outlier; a number of similar case studies available suggest that mishandling of officer-involved domestic violence (OIDV) investigations is systemic, occurring frequently all around the country.[27] Further, the incident highlights how terribly a case can go

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *E.g.*, Gina Barton, *Police Department Ignores National Standards for Officers Accused of Domestic Violence*, MILWAUKEE WIS. J. SENTINEL (Oct. 30, 2011), http://www.jsonline.com/watchdog/watchdogreports/police-department-ignores-national-standards-for-officers-accused-of-domestic-violence-132868198.html; Sarah Cohen, Rebecca R. Ruiz & Sarah Childress, *Departments are Slow to Police Their Own Abusers*, N.Y. TIMES (Nov. 23, 2013), http://www.nytimes.com/projects/2013/police-domestic-abuse/??version=meter+at+5&region=FixedCenter&pgtype=Article&priority=true&module=RegiWall-Regi&action=click; *Girlfriend of Police Chief's son Knew she Couldn't Call Police - and the "Nonpublic" Domestic Violence Policy at Brookline PD*, BEHIND THE BLUE WALL BLOG (Aug. 18, 2011), http://behindthebluewall.blogspot.com/2011/08/nh-girlfriend-of-police-chiefs-son-knew.html.

when a police department, lacking clear guidelines and effective and independent oversight, is confronted with a domestic violence allegation involving one of its officers. This paper argues that mishandled and corrupted OIDV investigations are not only a crime-control problem, but are also, more broadly speaking, a threat to the integrity and legitimacy of police departments and their officers. The paper calls for a more focused regulatory framework, one that facilitates unbiased and objective investigations. Specifically, it proposes that departments adopt internal protocols that treat OIDV as a line-of-duty crime and subject investigations to external oversight.

Part II looks at the science and psychology of domestic violence and the distinctions of OIDV. Part III discusses the lack of OIDV-focused regulation. Specifically, Sections III.A– III.C analyze the lack of policy development, while Section III.D discusses judicial approaches to civil liability for OIDV and how these approaches have negatively affected adoption of guidelines by individual departments. Part IV explains the regulatory framework for handling investigations of officer-involved shootings and compares it to protocols under OIDV model policies. Lastly, Part V argues that, in order to tackle systemic mishandling of OIDV investigations and address the harms associated with OIDV, departments should adopt OIDV policies that provide investigations with a higher level of impartiality and objectivity, similar to those applied to investigations of line-of-duty shootings. Part V then outlines a specific set of recommended protocols. Part VI concludes.

II. When the Batterer Wears a Badge: The Special Case of Officer-Involved Domestic Violence

A. The Role of Power and Control in Domestic Violence

Domestic violence transpires widely in varying forms and degrees. Abuse can be "physical, sexual, emotional, economic, or psychological," often including actions that "intimidate, manipulate, humiliate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound" the victim.[28] However, research suggests that domestic violence and its associated consequences derive primarily from the cyclical nature of the involved abuse, which psychologically disables victims from leaving their abusers.[29] Indeed, while domestic violence may occasionally involve isolated incidents of abuse (as recognized in some civil and criminal statutes), the "clinical and behavioral definition of domestic violence is 'a *pattern* of

28. *Domestic Violence*, U.S DEP'T JUST., http://www.ovw.usdoj.gov/domviolence.htm (last updated Oct. 6, 2015).

29. *E.g.*, Debra Umberson et al., *Domestic Violence, Personal Control, and Gender*, 60 J. MARRIAGE & FAM. 442, 442–44 (1998); *see also* H. LIEN BRAGG, CHILD PROTECTION IN FAMILIES EXPERIENCING DOMESTIC VIOLENCE, U.S. DEP'T HEALTH & HUMAN SERVS. OFFICE OF CHILD ABUSE AND NEGLECT 15 (2003) (noting that "[d]omestic violence is not typically a singular event").

assaultive and/or coercive behaviors . . . that adults and adolescents use against their *intimate* partners.'"[30]

Studies examining the psychology of both victim and perpetrator behavior suggest that recurrent abuse stems primarily from the dynamics of power and control in abusive relationships.[31] Perpetrators are characterized by a "high need for control that plays a role in triggering violent episodes . . . ."[32] In other words, they use violence to dominate their victims and establish and maintain their authority in abusive relationships.[33] Abusers utilize a variety of tactics such as "physical, sexual, verbal," and emotional abuse to "instill fear in and dominance over their partners" and to "establish a pattern of desired behaviors from their victims."[34] These manipulative techniques disable victims from leaving abusive relationships; perpetrators build psychological and material barriers to exit, including economic coercion, threats and intimidation, and physical constraints.[35]

From the victims' standpoint, the progressive, psychological effects of these abusive tactics fit a typical profile. "At first, victims stay because they love or care about their abusers . . . they believe violence is temporary and/or caused by unusual circumstances," which is typically reinforced by the abuser's occasional displays of affection and respect.[36] Subsequently, they experience self-blame; they convince themselves that they failed in their spousal or nurturer role, in holding the family together, in meeting the abuser's expectations, etc.[37] Victims then learn that they cannot predict the outcome of their behavior and experience an increasingly diminished sense of control that leads to powerlessness and helplessness.[38] Lastly, victims start to believe in the omnipotence of the abuser and experience low self-esteem, thereby increasing their isolation and dependency.[39] At this point, victims may even act to protect their abusers, since any threat to the abuser is perceived as a personal threat.[40] In the victims' mind, they need their partners to get by in this world, even if their

30. CHILD WELFARE INFO. GATEWAY, DEFINITIONS OF DOMESTIC VIOLENCE 1 (2013), https://www.childwelfare.gov/pubPDFs/defdomvio.pdf (quoting SUSAN SCHECHTER & JEFFREY L. EDLESON, NAT'L COUNCIL OF JUVENILE AND FAM. COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE & CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE 122–23 (1999) (emphasis added)).

31. Umberson et al., *supra* note 29, at 442; DEBBIE MCDANIEL CARTER ET AL., TEX. COUNCIL ON FAMILY VIOLENCE, TO PROTECT AND SERVE: LAW ENFORCEMENT'S RESPONSE TO FAMILY VIOLENCE app. U at 1 (Robert T. Jarvis et al. eds., 2003).

32. Umberson et al., *supra* note 29, at 443.

33. BRAGG, *supra* note 29, at 29.

34. *Id.* at 15 (citation omitted) (internal quotation marks omitted).

35. *Id.* at 17–18; CARTER ET AL, *supra* note 31, app. U at 1 (outlining common tactics of power and control used by batterers).

36. CARTER ET AL., *supra* note 31, app. U at 1.

37. *Id.*

38. Umberson et al., *supra* note 29, at 443–44.

39. *Id.*

40. CARTER ET AL., *supra* note 31, app. U at 1.

partners are abusive.[41] These effects make it particularly challenging for outsiders to detect domestic abuse. Additionally, though anyone can be a victim of domestic abuse, barriers to exit are intrinsically connected to perceptions of appropriate gender roles; age; cognitive, physical, or sensory disabilities; and immigration status.[42]

B. The Officer as the Abuser

The effects and consequences of domestic violence are further exacerbated when the perpetrator is a member of the police because the officer "comes additionally armed with the aura of official authority," which facilitates exerting control over the victim and reinforces the victim's already-existing belief in the omnipotence of the abuser.[43] This added aura of official authority is not limited to possessing a state-issued weapon; an abusive officer is a more dangerous perpetrator because he or she is clothed with *institutional* power.[44] Unique access to mechanisms of control (i.e., tracking and surveillance capabilities) and skills and training associated with wearing a police uniform (i.e., knowing how to exercise control in a hostile situation, interrogate suspects, and pursue and physically restrain suspects) can create a well-equipped and terrifying abuser.[45] Further, Mark Wynn, a veteran from the Nashville Metropolitan Police Department who trains departments on OIDV, says that investigating an abusive officer takes "a high degree of training and skill" because the victim is being manipulated by a trained officer who knows the law just as well as investigators do.[46]

Harms to the victim are also exacerbated when the controlling partner is not just a state agent, but also a member of the police, the male-oriented body charged with preventing crime.[47] This gender composition of

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41. *Id.*

42. CARTER ET AL., *supra* note 31, app. U at 3; MO. COAL. AGAINST DOMESTIC & SEXUAL VIOLENCE, UNDERSTANDING THE NATURE AND DYNAMIS OF DOMESTIC VIOLENCE 8 (2012); *What is Domestic Violence?*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, http://www.ncadv.org/need-help/what-is-domestic-violence (last visited Nov. 11, 2015).

43. Karen Oehme et al., *Protecting Lives, Careers, and Public Confidence: Florida's Efforts to Prevent Officer-Involved Domestic Violence*, 49 FAM. CT. REV. 84, 95 (2011).

44. Diane E. Wetendorf, *The Impact of Police-Perpetrated Domestic Violence*, *in* DOMESTIC VIOLENCE BY POLICE OFFICERS 375, 377 (Donald C. Sheehan ed., 2000).

45. *Id.*; Ochme et al., *supra* note 43, at 85 (citing Sandra S. Stone, *Barriers to Safety for Victims of Police Domestic Violence*, *in* DOMESTIC VIOLENCE BY POLICE OFFICERS 331, 334 35 (Donald C. Sheehan ed., 2000)); *see also* Barton, *supra* note 27 ("When [a Milwaukee officer's] wife left their home to escape [the] abuse, [the officer] used his Milwaukee police training - and his badge - to track her down."); Bogdanich & Silber, *supra* note 1 ("Taught to wield authority through control, threats or actual force, officers carry their training, their job stress and their guns home with them, amplifying the potential for abuse.").

46. *How to Combat Officer-Involved Domestic Violence*, PBS (Nov. 23, 2013, 4:04 PM), http://www.pbs.org/wgbh/pages/frontline/criminal-justice/death-in-st-augustine/how-to-combat-officer-involved-domestic-violence/.

47. *See* KIM LONSWAY ET AL., NAT'L CTR. FOR WOMEN & POLICING, EQUALITY DENIED: THE STATUS OF WOMEN IN POLICING: 2001 2 (2001) ("[W]omen represent only 11.2% of all sworn law enforcement personnel in the U.S. . . . .").

police forces is significant because, as discussed *infra*, women are more likely to experience domestic violence than men, which can further contribute to under-reporting and biased enforcement.[48] Additionally, many perceive the distinct culture of law enforcement as developing a "blue wall of silence" or "code of silence" among the ranks that dissuades officers from reporting and addressing misconduct by their colleagues.[49] Even when officers at any particular department are uncorrupted by such culture, this public perception tends to deter reporting by OIDV victims, who often fear "that [the abusive] officer's colleagues simply will not listen or understand, or that if they do, the abuser may be stripped of his weapon and ultimately his family's livelihood."[50] In the context of OIDV, this phenomenon is particularly significant because abuse "often occurs in private, and victims are [already] reluctant to report incidents to anyone because of shame or fear of reprisal" by their abusers.[51] Additionally, "[o]ne effective tactic abusers use to establish control over victims is to isolate them from any support system other than the primary intimate relationship."[52] It is therefore clear that misuse of institutional power by the police traps OIDV victims in a vicious cycle of under-reporting, which in turn leads to under-enforcement and risk of higher fatality rates.

Indeed, it must be emphasized that deficient approaches to OIDV affect not only victims but also police forces and the communities they serve; specifically, corrupted and deficient OIDV investigations negatively impact law enforcement goals, both general (e.g., detecting and solving crime) and specific (e.g., engaging the community base to address crime).[53]

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48. *See* discussion *infra* Part II.C.

49. *Compare* Blair v. City of Pomona, 223 F.3d 1074, 1081 (9th Cir. 2000) (discussing "code of silence" of Los Angeles Police Department), *and* Albert Samaha, *Breaking Baltimore's Blue Wall of Silence*, BUZZFEED (May 14, 2015 9:09 PM) http://www.buzzfeed.com/albertsamaha/breaking-baltimores-blue-wall-of-silence#.xyW1DXRPE (discussing "blue wall of silence" in Baltimore policing), *with* Craig E. Ferrell Jr., *Code of Silence: Fact or Fiction?*, THE POLICE CHIEF MAGAZINE (Nov. 2003) http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=148&issue_id=112003 (arguing that "[c]ontrary to the portrayal of police by Hollywood, it would be difficult to find police departments that have a significant number of officers who are willing to accept or ignore serious misconduct within their own ranks," but recognizing that a perception of a "blue wall" or "code of silence" by the public exists nonetheless).

50. Bogdanich & Silber, *supra* note 1.

51. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 1 (2007), *available at* http://www.bjs.gov/content/pub/pdf/ipvus.pdf.

52. BRAGG, *supra* note 29, at 25.

53. *See* Jack R. Green, *Community Policing in America: Changing the Nature, Structure, and Function of the Police*, 3 CRIM. JUST. 299, 308 (2000) ("Current trends in U.S. police reform, falling under the broad label of community policing . . . stress a contextual role for the police, one that emphasizes greater interaction with the community in resolving persistent neighborhood crime and disorder . . ."); IACP NAT'L LAW ENFORCEMENT POLICY CTR., INVESTIGATION OF OFFICER-INVOLVED SHOOTINGS 1 (1999) ("[A] law enforcement agency's reputation within the community and the credibility of its personnel are . . . largely dependent upon the degree of professionalism and impartiality that the agency can bring to [investigations of officer-involved shootings]. Superficial or cursory investigations of officer-involved shootings in general and particularly in where citizens are wounded or killed can have a devastating impact on the professional integrity and credibility of an entire law enforcement agency.").

As recognized by the National Law Enforcement Policy Center of the International Association of Chiefs of Police (IACP), the world's oldest and largest law enforcement executive association, "a law enforcement agency's reputation within the community and the credibility of its personnel are . . . largely dependent upon the degree of professionalism and impartiality that the agency [exercises]" when investigating officer-involved crime.[54] Thus, under-enforcement of OIDV and corrupted OIDV investigations can significantly erode public trust in the police and undermine the legitimacy of officers and municipalities, which in turn increases police-community tensions, particularly among groups disproportionately impacted by such abuse. For this reason, reforms aimed at increasing accountability for OIDV investigations and ending the systematic corruption and abuse in this area benefit not just victims, but law enforcement and the public in general.

C. National Epidemic

Precisely because domestic violence is significantly under-reported and under-enforced, it is difficult to measure the gravity and scope of the problem. However, it is no secret that domestic violence continuously affects numerous victims and communities around the country, despite the increasing attention researchers,[55] advocacy groups,[56] state agencies,[57] international organizations,[58] and policy-makers[59] have given to this issue over the years. This type of abuse continues to be a national epidemic, often resulting in the victim's death.

In Texas alone, for example, the total number of *reported* family violence incidents in 2014 was 185,817.[60] From those reported cases, only 6% of the incidents involved no weapons or physical force, but instead

54. IACP NAT'L LAW ENFORCEMENT POLICY CTR., *supra* note 53, at 1; *see also* INT'L ASS'N OF CHIEFS OF POLICE, DOMESTIC VIOLENCE BY POLICE OFFICERS MODEL POLICY (2003) (noting that proper investigation of OIDV incidents is "imperative to the integrity of the profession of policing and the sense of trust communities have in their local law enforcement agencies [and] leaders")

55. *See* Ivan Y. Sun, *Police Response to Victims of Domestic and Non-Domestic Violence*, 29 J. HEALTH & HUM. SERVICES ADMIN. 145, 145 (2006) (arguing that domestic violence has been one of the most researched issues in criminal justice since the 1970's).

56. *See* Lisa Colarossi & Mary Ann Forgey, *Evaluation Study of an Interdisciplinary Social Work and Law Curriculum for Domestic Violence*, 42 J. SOC. WORK EDUC. 307, 307 (2006) (detailing the growing recognition of the problem of domestic violence within the United States, which has resulted in "the development of an array of services delivered by different professional disciplines to address the legal, social service, and mental and physical health needs of survivors, perpetrators, and child witnesses").

57. *See, e.g.*, N.D. ATTORNEY GENERAL'S OFFICE, NORTH DAKOTA MODEL LAW ENFORCEMENT DOMESTIC VIOLENCE POLICY 1 (2012) (noting that this policy was part of a collaborative effort including endorsement from "the North Dakota Attorney General's Office, the North Dakota Chief's Association, and the North Dakota Sheriff's Association").

58. *See, e.g.*, Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993) (discussing the importance of protecting women from violence).

59. *See, e.g.*, Violence Against Women Act (VAWA) of 1994, 42 U.S.C. §§ 13701-14040 (1996).

60. TEX. DEP'T OF PUB. SAFETY, 2014 CRIME IN TEXAS 35 (2014).

threats and intimidation.[61] In contrast, physical force, through the use of hands, feet, and fists, was the most common (81%), followed by knives or cutting instruments (3%), blunt objects (2%) and firearms (2%).[62] In Harris County alone, it is estimated that approximately 1 out of 96,938 female residents dies because of domestic violence every year.[63]

It is also undisputed that, while both men and women experience domestic abuse every day at an alarming rate, domestic violence is disproportionally committed against female victims. The Bureau of Justice Statistics estimates that "[t]he majority of domestic violence [from 2003-2012] was committed against females (76%) compared to males (24%)."[64] Similarly, from 1994 to 2010, "about 4 in 5 victims of intimate partner violence were female."[65] According to a recent survey by the Division of Violence Prevention of the National Center for Injury Prevention and Control, approximately 22.3% of women in the United States have experienced at least one act of severe physical violence by an intimate partner during their lifetimes.[66] Further, the World Health Organization has recognized that "partner violence accounts for a significant number of deaths by murder among women," and studies show that approximately 40–70% of female murder victims are "killed by their husbands or boyfriends, frequently in the context of an ongoing abusive relationship."[67] The U.S. Department of Justice similarly estimates that intimate partners commit 33% of homicides of females in the United States.[68] The majority of domestic violence incidents happen at home, with approximately 3 million children witnessing, and often intervening in, domestic violence incidents every year.[69]

Because there is no central reporting system and departments rarely collect data on OIDV specifically, it is essentially impossible to measure

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61. *Id.* at 37.

62. *Id.*

63. TEX. COUNCIL ON FAMILY VIOLENCE, HONORING TEXAS VICTIMS: FAMILY VIOLENCE FATALITIES IN 2014 8 (2014).

64. JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NONFATAL DOMESTIC VIOLENCE, 2003–2012 1 (2014).

65. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2010 1 (2012).

66. MATTHEW J. BREIDING ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES, 2011 2 (2014); *see also* UN WOMEN, VIOLENCE AGAINST WOMEN PREVALENCE DATA: SURVEYS BY COUNTRY 8 (2012) (noting that 32.9% of women in the United States have suffered physical abuse from their partner during their lifetime as of 2010); *Domestic Violence: Statistics & Facts*, SAFE HORIZON, https://www.safehorizon.org/index/what-we-do-2/domestic-violence--abuse-53/domestic-violence-statistics--facts-195.html (last visited Nov. 11, 2015) (noting that "1 in every 4 women will experience domestic violence during [their] lifetime").

67. ETIENNE G. KRUG ET AL., WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 93 (2002).

68. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993–2001 1 (2003).

69. SAFE HORIZON, *supra* note 66.

the gravity of OIDV cases within the realm of domestic violence statistics.[70] The problem of lack of data is further exacerbated by the already-discussed factors increasing victims' reluctance to report domestic abuse, such as gender composition of police ranks and law enforcement culture. For example, one study by *The New York Times* of more than 29,000 credible complaints of misconduct against officers in Florida, a state with "one of the nation's most robust open records laws . . . strongly suggests that domestic abuse had been underreported to the state for years."[71] Further, sometimes the data regarding OIDV is hard to collect. "Some police agencies presumably maintain information on incident reports of domestic violence within the families of police employees, but these data are usually the property of internal affairs units and thus difficult or impossible to access."[72]

However, the limited research available suggests that OIDV is, indeed, quite pervasive and particularly corrosive. According to national studies, domestic violence is far "more common among police families than American families in general," and "at least 40% of police families are affected by domestic violence, as opposed to an estimated 10% in other households."[73] One pilot study of seven law enforcement agencies located in the Southeast and Midwest areas of the United States similarly revealed that "10 percent of respondents (148 candidates [out of 210]) admitted to having ever slapped, punched, or otherwise injured a spouse or romantic partner . . . ."[74] Indeed, the IACP estimates that the rate of domestic violence among the ranks is at least as common as that of the general population, and notes that "limited research to date indicates the possibility of higher incidence of domestic violence among law enforcement professionals."[75]

Additionally, documented cases suggest that bias, corruption, and favoritism in the domestic-violence context is significantly higher than in

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70. Cohen, Ruiz & Childress, *supra* note 27; *see also* Philip M. Stinson & John Liederbach, *Research in Brief: Officer-Involved Domestic Violence*, THE POLICE CHIEF MAGAZINE (Sept. 2012), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2752&issue_id=92012 (noting that "there are no comprehensive statistics on OIDV").

71. Cohen, Ruiz & Childress, *supra* note 27.

72. Philip Matthew Stinson & John Liederbach, *Fox in the Henhouse: A study of Police Officers Arrested for Crimes Associated with Domestic and/or Family Violence*, 24 CRIM. JUST. POL'Y REV. 601, 603 (2013).

73. *Police Family Violence Fact Sheet*, NAT'L CENTER FOR WOMEN & POLICING, http://womenandpolicing.com/violenceFS.asp#notes (last visited Nov. 11, 2015) (citation omitted) (citing *On the Front Lines: Police Stress and Family Well-Being: Hearing Before the H. Select Comm. on Children, Youth, and Families*, 102nd Cong. 34 (1991) (statement of Leanor Boulin Johnson, Associate Professor of Family Studies, Arizona State University); Peter H. Neidig et al., *Interspousal Aggression in Law Enforcement Families: A Preliminary Investigation*, 15 POLICE STUD.: INT'L REV. POLICE DEV. 30, 30–38 (1992)).

74. Andrew H. Ryan, Jr., *The Prevalence of Domestic Violence in Police Families*, *in* DOMESTIC VIOLENCE BY POLICE OFFICERS 297, 299–301 (Donald C. Sheehan ed., 2000).

75. IACP NAT'L LAW ENFORCEMENT POLICY CTR., DOMESTIC VIOLENCE BY POLICE OFFICERS 2 (2003).

other areas of officer-involved crime.[76] For example, departments often discharge officers who commit arguably less-harmful crimes, including theft and personal drug use,[77] but officers accused of domestic violence are rarely disciplined, let alone discharged, even when the domestic violence incident results in the victim's death.[78] "[Officers] see this as protecting their own, but it's corruption," said Judy Munaker, an attorney who spent five years training police officers about OIDV through the Office of Justice Assistance in Wisconsin.[79] She further stated, "[t]hey need to stop protecting their own and start protecting victims."[80] Additionally, in the context of OIDV, self-regulation is particularly deficient considering the prevailing code of silence in law enforcement culture, as well as the number of stories pointing to involvement of superior officers in domestic violence accusations.[81]

In sum, case studies suggest that even reported incidents of OIDV go largely unaddressed, further complicating the ability to assess the scope of the problem. As recognized by the IACP, available information makes it nonetheless difficult to dispute that "the problem exists at some serious level and deserves careful attention regardless of estimated occurrences."[82]

III. Lack of OIDV-Focused Regulation

A. Domestic Violence Offender Gun Ban

While federal and state legislative bodies have passed a number of laws addressing domestic violence, there has been little legislative movement at the national and local levels designed to address OIDV—an even more destructive form of abuse that calls for specific directives and objective oversight mechanisms. The largest OIDV legislative accomplishment

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76. *See* Barton, *supra* note 27 ("'They see it as protecting their own, but it's corruption . . . .'"); Bogdanich & Silber, *supra* note 1 ("[N]ationwide, interviews and documents show [that] police departments have been slow to recognize and discipline abusers in uniform, largely because of a predominantly male blue wall of silence."); Cohen, Ruiz & Childress, *supra* note 27 ("[N]early 30 percent of the officers accused of domestic violence were still working in the same agency a year later, compared with 1 percent of those who failed drug tests and 7 percent of those accused of theft."); BEHIND THE BLUE WALL BLOG, *supra* note 27 (indicating that police chief ordered police officer to not investigate domestic violence committed by his son, who is also a police officer).

77. A Florida analysis by the New York Times revealed that nearly 30% of officers accused of domestic violence were still working in the same agency a year later, compared with 1% of those who failed drug tests and 7% of those accused of theft. Cohen, Ruiz & Childress, *supra* note 27. Among major offenses tracked by the state, only driving under the influence was less likely to lead to a job loss. *Id.*

78. *Id.*; Barton, *supra* note 27 at 2–3; Bogdanich & Silber, *supra* note 27.

79. Barton, *supra* note 27 (internal quotation marks omitted).

80. *Id.* (internal quotation marks omitted).

81. *See, e.g.*, Bogdanich & Silber, *supra* note 1 (internal quotation marks omitted) (denoting Jeremy Banks as deputy sheriff for St. Johns County in St. Augustine); *Tacoma Police Chief Shoots Wife Before Killing Himself, Authorities Say*, N.Y. TIMES (Apr. 28, 2003), http://www.nytimes.com/2003/04/28/us/tacoma-police-chief-shoots-wife-before-killing-himself-authorities-say.html (denoting abuser as police chief).

82. IACP NAT'L LAW ENFORCEMENT POLICY CTR., *supra* note 75, at 2.

occurred in 1996 when Congress passed the Domestic Violence Offender Gun Ban, prohibiting individuals, including police officers, from owning or using a firearm if they have been convicted of a misdemeanor domestic violence offense or are subject to a qualifying protective order.[83] Today, several states have similar firearms laws.[84] Nonetheless, aside from the Gun Ban and related state versions of the law, there has been almost no policy development to address the special case of OIDV. Additionally, a large number of law enforcement officers are able to circumvent these laws, as well as other criminal penalties protecting against domestic violence in general, due in large part to existing under-enforcement of domestic violence,[85] corruption, "loopholes, preferential charges, and organizational failures to adequately punish convicted officers."[86] Investigators and prosecutors tend to absolve police officers of any crime by finding instances of suicide or homicide instead of OIDV, or at best treating OIDV more leniently than other forms of misconduct.[87] Further, the ban only marginally addresses issues relating to pre-conviction OIDV, such as reporting, victim safety, investigations, response protocols, and the like. In sum, the existing regulatory framework does not sufficiently hold abusive officers accountable or adequately protect OIDV victims and communities.

B. Model OIDV Policy

Responding to some of these challenges, the IACP published a comprehensive model policy establishing procedures for handling instances of OIDV in 1999,[88] which it later revised in 2003.[89] The association issued its policy by recognizing that, indeed, instances of OIDV are pervasive in the United States and there is great variation in departmental policies across

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83. 18 U.S.C. § 922(g)(8)–(9) (2012).

84. *E.g.*, TEX. PENAL CODE ANN. § 46.04(b)–(c) (West 2013).

85. *See* discussion *supra* Part II.B–C.

86. Stinson & Liederbach, *supra* note 70; *see also Domestic Violence Offender Gun Ban Fact Sheet*, NAT'L CENTER FOR WOMEN AND POLICING, http://womenandpolicing.com/gunban.asp (last visited Nov. 11, 2015) ("[A]n early analysis of the effect of the Domestic Violence Gun Ban on police officers shows that law enforcement officers have been able to circumvent the ban and retain their weapons . . . [at least in part since] police officers have their records expunged or plead to a charge other than domestic violence."). Another loophole is that "physical force or threatened use of a deadly weapon" is not always reflected in charging documents, plea agreements, and final court records. Stinson & Liederbach, *supra* note 70.

87. *See* Barton, *supra* note 27 ("Prosecutors often charge them with lesser crimes—or no crimes at all."); Bogdanich & Silber, *supra* note 1 ("[N]ationwide, interviews and documents show [that] police departments have been slow to recognize and discipline abusers in uniform, largely because of a predominantly male blue wall of silence."); Cohen, Ruiz & Childress, *supra* note 27 ("[N]early 30 percent of the officers accused of domestic violence were still working in the same agency a year later, compared with 1 percent of those who failed drug tests and 7 percent of those accused of theft."); BEHIND THE BLUE WALL BLOG, *supra* note 27 (indicating that police chief ordered police officer to not investigate domestic violence committed by his son, who is also a police officer).

88. INT'L ASS'N OF CHIEFS OF POLICE, POLICE OFFICER DOMESTIC VIOLENCE MODEL POLICY (1999), *available at* http://www.ncdsv.org/images/IACP_DV_policy.pdf.

89. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54.

the country.[90] Among other things, the IACP model policy details victim safety and protection guidelines, response protocols, and guidelines for administrative and criminal investigations and decisions:

> While prioritizing the safety of victims, this policy is designed to address prevention through hiring and training practices, provide direction to supervisors for intervention when warning signs of domestic violence are evident, institutionalize a structured response to reported incidents of domestic violence involving officers, and offer direction for conducting the subsequent administrative and criminal investigations.[91]

As to response protocols, the policy mandates that "[c]ommunications officers [and] dispatchers shall immediately notify the supervisor on duty and the dispatch supervisor of any domestic violence call received that involves, or appears to involve, a police officer . . . ."[92] It then instructs that the primary patrol unit "[u]pon arrival on the scene . . . immediately notify dispatch and request a supervisor of higher rank than the involved officer [to] report to the scene . . . ."[93] The patrol unit must also perform a series of on-scene tasks, such as obtaining needed medical assistance; addressing the immediate safety of all parties; securing the scene and preserving evidence; noting all excited utterances, admissions, and incriminating statements; and making an arrest if probable cause exists.[94] The higher ranking supervisor must then assume command and follow a series of protocols similar to those assigned to the primary patrol unit, except the policy also states that the supervisor must (1) ensure that all the evidence is collected, (2) "relieve the accused officer of all service weapons" if probable cause exists to arrest the officer, (3) inform the victim of his or her rights and protective services, and (4) notify the police chief and the accused officer's immediate supervisor that an OIDV incident occurred.[95] If the "reported incident involves the chief of police or commissioner, the supervisor [must] immediately notify the district [or] state's attorney and the individual in government who has direct oversight for the chief, for example, the mayor."[96]

The policy's directives for subsequent OIDV investigations are broad, guided by the requirement that departments initiate separate but parallel post-incident administrative and criminal investigations "in a manner that maintains the integrity of both investigations and promotes zero tolerance."[97] The policy rests the responsibility of conducting an administrative

90. IACP NAT'L LAW ENFORCEMENT POLICY CTR., *supra* note 75, at 1–2.

91. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54, at 2.

92. *Id.* at 4.

93. *Id.*

94. *Id.*

95. *Id.* at 4–5.

96. *Id.* at 5.

97. *Id.* at 6.

investigation on either the department's Internal Affairs Division or "an experienced investigator" appointed by the chief of police.[98] On the other hand, it renders the "domestic violence unit of the department, or in the event that no such unit exists, the criminal investigations unit or detective division" responsible for conducting the criminal investigation.[99]

However, as to the specific protocols to be followed in these investigations, the policy is rather vague, injecting discretion into a series of guidelines. This approach presumably allows varying types of departments to confront OIDV on a case-by-case basis, but it offers little to solve corruption stemming from lack of oversight or to provide uniformity across departments. For example, the policy mandates that "[t]he investigating official shall conduct criminal investigations *as would be the case for any other criminal violation*," including conducting "sufficient" interviews, "completely" investigating the case, and seeking prosecution when warranted.[100] "If the accused officer is assigned enforcement duties while the administrative and/or criminal investigations are under way," the policy encourages, but does not mandate or require, that those duties "not include response to domestic violence calls."[101] The policy also provides that "[t]he chief *may* ask an outside law enforcement agency to conduct [either] investigation."[102] In short, while the policy outlines mechanisms departments must follow and recognizes the importance of affording OIDV investigations some level of objectivity, such as by suggesting referral to an outside law enforcement agency or experienced investigator, the IACP policy also allows departments to exercise a great deal of discretion in executing the specifics of their on-scene responses and investigations.

C. State and Local Policies

Drafted with the intention of encouraging widespread adoption, and in an effort to provide officers nationwide with clearer mandates as to how they should handle OIDV cases, the IACP model policy comes close to a national, uniform standard for OIDV investigations.[103] Nonetheless, it has not been widely adopted or implemented.[104] While some states have adopted policies guided by the IACP model, most states around the country lack regulatory frameworks that address OIDV scenarios.[105] Only about ten

98. *Id.*

99. *Id.* at 7.

100. *Id.* (emphasis added).

101. *Id.*

102. *Id.* at 6–7 (emphasis added).

103. IACP NAT'L LAW ENFORCEMENT POLICY CTR., *supra* note 75, at 2–3.

104. Kimberly A. Lonsway, *Policies on Police Officer Domestic Violence: Prevalence and Specific Provisions within Large Police Agencies*, 9 POLICE Q. 397, 402 (2006).

105. A website hosted by Florida State University allows internet users to search all related policy by state, and this website shows that most states lack a regulatory framework that addresses OIDV scenarios. *The National Prevention Toolkit on Officer-Involved Domestic Violence: Policies on Officer-Involved Domestic Violence*, FLA. ST. U., http://nationaltoolkit.csw.fsu.edu/resources/policies/ (last vis-

states (including Florida,[106] Washington,[107] and New Jersey)[108] have OIDV model policies, and about nine others (including Texas) recognize OIDV as a special subcategory of domestic violence to some degree, but have not adopted a comprehensive OIDV policy.[109] Further, states with model policies do not bind individual law enforcement departments or mandate their adoption; state model policies merely serve as guidelines for agencies to create their own directives.[110]

This lack of state and national guidance has therefore left policy development in the hands of individual law enforcement agencies, which has proven to be an ineffective way of achieving uniformity and widespread adoption. A recent survey by Kimberly A. Lonsway, of the National Center for Women & Policing, reported that only about 29% of large police departments have adopted OIDV policies, and the study recognized that this number is likely to be "artificially high" because of a variety of factors.[111] For example, several agencies that reported having an OIDV policy did not produce a copy or describe any of its provisions.[112] It is consequently impossible to know whether these agencies were in fact referring to OIDV policies or some other related protocols, such as their *general* policies on domestic violence investigation or state model policies, which are not actual agency directives.[113] Additionally, while little is known about whether those agencies that do have OIDV policies in place are actually enforcing those policies, it is estimated that many agencies do not enforce these types of policies or inconsistently implement them.[114]

D. Judicial Approaches to OIDV Civil Liability and Their Effect on Policy Development

Aside from the lack of legislative reaction to the issue of OIDV, one possible explanation for the lack of accountability in the form of wide-

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106. THE LAW ENFORCEMENT FAMILIES P'SHIP INST. FOR FAMILY VIOLENCE STUDIES, FLORIDA'S MODEL POLICY ON OFFICER-INVOLVED DOMESTIC VIOLENCE (2010).

107. WASH. ASS'N OF SHERIFFS AND POLICE CHIEFS, MODEL POLICY: OFFICER-INVOLVED DOMESTIC VIOLENCE (2004), *available at* http://www.waspc.org/assets/ProfessionalServices/model policies/waspc_model_policy-oidv-final.pdf/.

108. OFFICE ON THE PREVENTION OF VIOLENCE AGAINST WOMEN, DIV. ON WOMEN, N.J. DEP'T OF CMTY. AFFAIRS, MODEL POLICY ON DOMESTIC VIOLENCE IN THE LAW ENFORCEMENT COMMUNITY (2006).

109. The Texas Council on Family Violence, for example, merely incorporated the 1999 IACP model policy as an attachment to its general Domestic Violence Law Enforcement Manual. CARTER ET AL., *supra* note 31, app. W.

110. *See* Lonsway, *supra* note 104, at 407 ("[T]he state guidelines were obviously written to encourage these agencies (and others) to create their own policy directives and not to serve as the agency's policy itself.").

111. *Id.*

112. *Id.*

113. *Id.* (emphasis added).

114. *See id.* at 408 ("[T]he people responsible for implementation were not familiar with it.").

spread adoption of policies and procedures by law enforcement departments is the courts' approaches to OIDV civil liability. Civil liability in the context of OIDV is limited due to a number of factors, including (i) the judiciary's reluctance to interfere with police discretion to investigate crime when evaluating constitutional challenges,[115] and (ii) some courts' efforts to significantly limit the spectrum of liability for OIDV under existing civil rights statutes.[116] Coupled with other factors affecting under-enforcement of domestic violence and systemic corruption in OIDV cases,[117] this judicial approach has naturally disincentivized departments from proactively regulating OIDV investigations.

While litigation has developed in some areas to allow victims of police abuse to access important legal remedies, courts have been reluctant to incorporate OIDV into their line-of-duty jurisprudence. Line-of-duty misconduct, or unlawful actions taken by the police in carrying out their official responsibilities, is commonly defined by statute as illegal activity conducted by police officers acting under "color of law."[118] Even before the Civil Rights Era, which opened the floodgates to federal litigation of officer misconduct cases,[119] courts have recognized that line-of-duty misconduct must be regulated distinctively because there is greater potential for misuse of power when the wrongdoer is "clothed" with the authority of state law.[120]

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115. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) (holding that an individual who has obtained a restraining order enforceable under state law does not have a constitutionally protected property interest in police enforcement of the order, even when the police have probable cause to believe it has been violated); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989) (finding that state has no constitutional duty to protect child from abusive father); Soto v. Flores, 103 F.3d 1056, 1065–066, 1072 (1st Cir. 1997) (holding there was insufficient evidence that discrimination against women was motivating factor behind police department's custom of providing less protection to women victims of domestic abuse, as required to establish equal protection violation); *see also* Elizabeth L. MacDowell, *When Courts Collide: Integrated Domestic Violence Courts and Court Pluralism*, 20 TEX. J. WOMEN & L. 95, 97–99 (2011) (arguing that "a fragmented court system . . . makes it difficult for [domestic violence] victims to access important legal remedies and leads to conflicting court orders, endangering victims and allowing perpetrators to evade accountability" and that "[u]nlike criminal courts, where state interests generally govern, civil courts are accessed voluntarily by victims of domestic violence, who determine when and how to present their cases and what remedies to seek within the confines of the law").

116. *See* Bonsignore v. City of New York, 683 F.2d 635, 638–39 (2d Cir. 1982) (finding that officer who used police handgun to shoot his wife and then commit suicide did not act under color of state law even though he was required to carry the police gun at all times); Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (alleged assault at police station by on-duty police chief was not under color of state law because the altercation arose out of an argument over a family matter and alleged victim was neither arrested nor threatened to be arrested).

117. *See* discussion *supra* Part II.A–B.

118. *E.g.*, 18 U.S.C. § 242 (2012); 42 U.S.C. § 1983 (2012); TEX. PENAL CODE ANN. § 39.02 (West 2013); TEX. LOC. GOV'T CODE ANN. § 21.022 (West 2013).

119. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 183, 187 (1961) (relaxing the color of law standard under Section 1983 and eliminating exhaustion of state remedies requirement).

120. *See* United States v. Classic, 313 U.S. 299, 326 (1941) (citations omitted) (internal quotation marks omitted) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law."); *see also* 28 U.S.C. § 2680(h) (2012) (emphasis added) (extending liability to officers "who [are] *empowered by law* to execute searches, to seize evidence, or to make arrests for violations of Federal law"); Wyatt v. Cole, 504 U.S. 158, 161 (1992) (citation omitted) ("The purpose of § 1983 is to deter state actors from

With these concerns in mind, there have been some judicial developments over the years expanding the scope of misconduct liability. For example, the U.S. Supreme Court has held that one who is without actual authority, but who purports to act according to official power, may also act under color of state law.[121] Additionally, the Court has found that a private individual may be liable as acting under color of law if he or she willfully participates in joint activity with state agents.[122] Appellate and district courts have similarly recognized that to act under color of law does not necessarily require that the accused officer be on duty.[123]

Nonetheless, in the context of domestic violence, courts have often declined to hold officers or police departments liable as acting under color of law.[124] This has resulted largely due to the personal and private nature of domestic abuse. As a general rule, "a police officer's purely private acts which are not furthered by any actual or purported state authority are not considered acts under color of state law."[125] In determining whether officers act in a private setting, litigation has resulted in a wide variation of fact-specific rulings, often favoring the police unless the officers clearly and expressly purport to be exercising their official authority.[126] To that end,

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using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.").

121. Screws v. United States, 325 U.S. 91, 111 (1945) (holding that "under 'color' of law means under 'pretense' of law"); *see also* United States v. Giordano, 442 F.3d 30, 43 (2d Cir. 2006) (citations omitted) (holding that "it is well-established that an official may act under color of law even when he or she encounters the victim outside the conduct of official business and acts for reasons unconnected to his or her office, so long as he or she employs the authority of the state in the commission" of the alleged civil rights violation).

122. Adickes v. S. H. Kress & Co., 398 U.S. 144, 151 (1970) (interpreting 18 U.S.C. § 1983); United States v. Price, 383 U.S. 787, 794–96 (1966) (interpreting 18 U.S.C. § 242, a criminal counterpart of 18 U.S.C. § 1983).

123. *E.g.*, Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975); Johnson v. Hackett, 284 F. Supp. 933, 937 (E.D. Pa. 1968).

124. *See, e.g.*, Bonsignore v. City of New York, 683 F.2d 635, 638–39 (2d Cir. 1982) (finding that officer who used police handgun to shoot his wife and then commit suicide did not act under color of state law even though he was required to carry the police gun at all times); Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (alleged assault at police station by on-duty police chief was not under color of state law because the altercation arose out of an argument over a family matter and alleged victim was neither arrested nor threatened to be arrested).

125. Barna v. City of Perth Amboy, 42 F.3d 809, 816 (3d Cir. 1994) (citations omitted).

126. *Compare* Lyons v. Adams, 257 F. Supp. 2d 1125, 1133 (N.D. Ill. 2003) (holding that officers were not acting under color of state law as required for a Section 1983 action when beating a civilian, where the officers did not identify themselves as such, were not wearing uniforms, and did not brandish handguns or purport to place the civilian under arrest), *and* Galliano v. Borough of Seaside Heights, No. 03-1463, 2007 WL 979850, at *11 (D.N.J. Mar. 30, 2007) ("Other than the use of an official weapon and the fact that Lutes was wearing a replica badge insignia on a necklace and ring at the time of the shootings, there are no other factors indicating that he cloaked himself with authority."), *and Delcambre*, 635 F.2d at 408 (holding that alleged assault by on-duty police chief at police station did not occur under color of state law because altercation with the plaintiff, defendant's sister-in-law, arose out of a family dispute and defendant neither arrested nor threatened to arrest the plaintiff), *with* United States v. Tarpley, 945 F.2d 806, 808–09 (5th Cir. 1991) (finding requirement under color of state law met where off-duty deputy sheriff assaulted wife's alleged ex-lover in a private vendetta but identified self as police officer, used service revolver, and intimated that he could use police authority to get away with the paramour's murder), *and Stengel*, 522 F.2d at 441 (finding evidence supported determination of "under col-

courts have consistently held that evidence that an officer used a state-issued weapon in the course of a wrongful but "private" act is not sufficient to impose liability absent "additional indicia of state authority," even though the weapon "'furthered' the [abuse of authority] in a literal sense . . . ."[127] Thus, though OIDV is particularly destructive because of the institutional resources available to abusive officers, including weapons and other police devices,[128] this judicial approach essentially forecloses any relief for OIDV scenarios like that involving Michelle O'Connell. For example, in *Bonsignore v. City of New York*, the Second Circuit found that an officer who used his police handgun to shoot his wife did not act under color of state law because he was off-duty and his actions occurred "in the ambit of his personal pursuits."[129] The court held so despite the finding that the New York Police Department required the officer to carry the involved gun at all times.[130]

Some courts have gone further. The Fifth Circuit, for example, has held that relief under federal civil rights laws can be foreclosed in a situation where an on-duty officer assaults a family member in official premises.[131] In a brief per curiam opinion, the court held so in *Delcambre v. Delcambre*, concluding that the officer was not acting under color of law because the altercation arose from a family dispute and the family member was neither arrested, nor threatened to be arrested.[132] Whatever the variation in case law and corresponding reasoning, current jurisprudence makes it difficult to challenge the under-enforcement of OIDV across departments, and significantly disfavors treatment of OIDV as line-of-duty misconduct triggering civil liability under civil rights statutes. This hands-off approach by the judiciary, whether or not a sound one in the eyes of critics, dissuades departments from adopting clearer procedures treating OIDV as line-of-duty crime, thereby further exacerbating the existing lack of accountability and, consequently, leading to more systemic abuse.[133]

IV. Special Protocols of Police Shootings as an Archetype of Effective Regulatory Framework

Having evaluated the existing OIDV regulatory framework, it is a useful exercise to contrast some agencies' approaches to officer-involved shootings (OISs) with cases of OIDV, particularly with those OIDV cases involving fatalities and state-issued firearms. In the context of OISs, de-

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or" where off-duty officer intervened in barroom brawl as required by relevant police department regulations).

127. *Barna*, 42 F.3d at 817.

128. *See* discussion *supra* Part II.B.

129. *Bonsignore*, 683 F.2d at 638–39 (citations omitted) (internal quotation marks omitted).

130. *Id.* at 636.

131. *Delcambre*, 635 F.2d at 408.

132. *Id.*

133. *Cf., e.g., id.* at 408 (upholding district court's decision to dismiss § 1983 action despite assault occurring in the police station).

partments have consistently recognized the need to safeguard the integrity of investigations concerning officer-involved crime. Allegations of OISs are considered by departments to be one of the most critical line-of-duty crime investigations that law enforcement is tasked with handling, mainly because of the serious harm implicated in these cases, not just to the victim, but also to police departments and involved officers.[134] As one District Attorney's Office asserted, "[c]onfrontations between the police and citizens where physical force or deadly physical force is used . . . have a significant impact on the relationship between law enforcement officers and the community they serve."[135] Even before the recent surge of police brutality headlines, law enforcement agencies have recognized that these types of allegations "bring media attention; citizen inquiries; liability issues; and, if handled incorrectly, possibly irreparable damage to the agency's reputation."[136] This sentiment resonates with the IACP's understanding that improper OIDV investigations can significantly damage public trust in the police.[137] Therefore, unlike with OIDV, most departments around the country have adopted very specific protocols to guide investigations of OISs,[138] often automatically triggering criminal and administrative proceedings.[139]

While many OIS protocols are similar to those delineated by the IACP model policy on OIDV, discussed *supra*, a large number of policies on OISs have at least three key attributes that OIDV policies are currently lacking: (1) specific on-scene response protocols involving experienced investigators,[140] (2) immediate notification to the corresponding District At-

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134. Drew J. Tracy, *Handling Officer-Involved Shootings*, 77 POLICE CHIEF 38, 38 (2010).

135. DENVER DISTRICT ATTORNEY'S OFFICE, OFFICER-INVOLVED SHOOTING PROTOCOL 2011 1 (2010), *available at* https://la.utexas.edu/users/jmciver/357L/P5/Denver%20DA%20--%20Officer%20Involved%20Shooting%20Protocol%202011.pdf.

136. Tracy, *supra* note 134, at 38.

137. *See* INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54, at 1 (noting that proper investigation of OIDV incidents is "imperative to the integrity of the profession of policing and the sense of trust communities have in their local law enforcement agencies [and] leaders").

138. *E.g.*, SAN FRANCISCO POLICE DEP'T, INVESTIGATION OF OFFICER INVOLVED SHOOTINGS AND DISCHARGES 2 (2005), *available at* http://sf-police.org/Modules/ShowDocument.aspx?documentid=14739; SAN JOSE POLICE DEP'T, DUTY MANUAL 354–56 (2010), *available at* https://www.sjpd.org/Records/DutyManual.asp.

139. SAN FRANCISCO POLICE DEP'T, *supra* note 138, at 1–2; SAN JOSE POLICE DEP'T, *supra* note 138, at 354–56; *see also* ANAHEIM POLICE DEP'T, POLICY MANUAL 73 (2015), *available at* http://www.anaheim.net/DocumentCenter/Home/View/6929 (noting criminal and administrative investigations may be conducted).

140. *See, e.g.*, SAN JOSE POLICE DEP'T, *supra* note 138, at 354 ("[T]he officer(s) weapon, holster, gun belt and spare ammunition is obtained and processed only by Homicide, Crime Scene Unit members at a Department approved facility away from the initial scene. The involved weapon will not be opened, unloaded or tampered with in any manner except to render the weapon safe for transportation by lowering the hammer and/or engaging safety mechanisms."); SAN FRANCISCO POLICE DEP'T, *supra* note 138, at 5 ("When a supervisor arrives on the scene, the supervisor shall have the involved member(s) escorted from the scene. If more than one member is involved in the discharging of a firearm, absent exigent circumstances, the members shall be separated and will be kept separate from one another, and shall not discuss the incident with each other prior to being interviewed by the Homicide Detail Inspectors. If possible, the supervisor shall contact the investigator from the Homicide Detail and ascertain if the involved member is to be taken to the Homicide Detail, the Investigations Bureau, or the involved member's Station or Detail. In all circumstances the member shall be taken to a department facility.").

torney's (DA) Office,[141] and (3) mandatory administrative leave in the context of administrative proceedings.[142] Additionally, OIS protocols typically mandate immediate notification of OIS incidents to several units within the police department (e.g., the Emergency Communications Division, the Crisis Incident Response Team, the Office of Citizen Complaints, the Legal Division, etc.); in contrast, the OIDV model policy only mandates that a supervisor be notified of the incident.[143] By spreading communication responses to a larger number of units and officers within the department, OIS protocols increase the level of accountability and, therefore, the potential for compliance and impartial enforcement. As discussed *infra*, departments should replicate a variation of this approach when responding to all OIDV allegations.[144] At a minimum, incidents of OIDV involving fatalities or an officer's state-issued weapon should be treated the same as OIS cases.

Many OIS policies also require immediate notification of the incident to the DA, and often encourage independent criminal investigations by the DA.[145] In this regard, OIS criminal investigation protocols are significantly different than OIDV protocols under the IACP policy. As previously discussed, the IACP policy merely mandates that an official in the Domestic Violence Unit or alternative unit conduct the criminal investigation as he or she would in situations involving "any other criminal violation," and merely suggests that the investigation be referred to an outside law enforcement agency at the chief's discretion.[146] The policy only indicates that the DA should be notified when the incident involves the chief of police or commissioner.[147] In contrast, most OIS policies encourage cooperation between the DA and either the Homicide Unit or an equivalent, and prioritize utilizing the DA to conduct independent investigations.[148] Regardless of the

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141. *E.g.*, ANAHEIM POLICE DEP'T, *supra* note 139, at 75; SAN FRANCISCO POLICE DEP'T, *supra* note 138, at 2.

142. *E.g.*, SAN FRANCISCO POLICE DEP'T, *supra* note 138, at 5; SAN JOSE POLICE DEP'T, *supra* note 138, at 355.

143. *Compare* SAN JOSE POLICE DEP'T, *supra* note 138, at 354–56 (requiring the Chief of Police, Bureau Chief, District Attorney investigator, Internal Affairs Unit, and Press Information Officer to be notified of officer-involved shooting), *with* INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54, at 4 (requiring police officer to immediately notify supervisor regarding domestic violence incident).

144. *See* discussion *infra* Part V.

145. *Compare* ANAHEIM POLICE DEP'T, *supra* note 139, at 73 ("The criminal investigation of the officer-involved shooting will be conducted by the District Attorney's Office."), *and* DENVER DISTRICT ATTORNEY'S OFFICE, *supra* note 135, at 1 ("The criminal investigation is conducted under a specific investigative protocol with direct participation of Denver Police Department and Denver District Attorney personnel."), *with* SAN JOSE POLICE DEP'T, *supra* note 138, at 355 (discussing the District Attorney's involvement, which includes receiving case reports, allow its own District Attorney investigator to monitor the investigation, and not limiting its own ability to conduct its own investigation).

146. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54, at 7.

147. *Id.* at 5.

148. *Compare* ANAHEIM POLICE DEP'T, *supra* note 139, at 65 ("It shall be the policy of this department to utilize the District Attorney's Office to conduct an independent criminal investigation into the circumstances of any officer-involved shooting involving injury or death. If available, detective personnel from this department may be assigned to partner within investigators from the District Attorney's Office so as to not duplicate efforts in related criminal investigations."), *with* SAN FRANCISCO POLICE DEP'T, *supra* note 138, at 1 ("Investigations to determine if there was criminal conduct on the part of the

variation in structure, almost all OIS protocols involve an outside entity in the immediate post-incident criminal investigation in some way, addressing the need to provide line-of-duty crime investigations with a certain level of objectivity and impartiality. Further, OIS protocols recognize the harms implicated in citizen-police encounters involving deadly weapons by mandating administrative leave, thereby isolating the officer from access to institutional resources while a resolution of the case is pending.[149]

While it may be impracticable, unfeasible, and perhaps unwarranted to adopt these measures in all types of OIDV encounters, police forces should attempt to implement these OIS protocols in as many OIDV cases as possible. Undoubtedly, departments should institute similar guidelines when OIDV allegations involve death or serious physical injury and the officer's service weapon.

V. Regulating OIDV Investigations: The Need for Clear Directives and Independent Oversight

The systemic bias and corruption in OIDV investigations, resulting largely from a serious lack of policy development and available judicial remedies, calls law enforcement agencies to rethink their approaches to OIDV for the benefit of victims, cops, and entire communities across the country. National and local legislators need to enact laws that push individual departments to adopt policies that treat OIDV as line-of-duty crime and give officers clear instructions on how to respond to and investigate these cases. Similarly, courts must recognize the potential misuse of power in OIDV and consider expanding access to judicial relief in order to encourage widespread policy development and increase accountability. More importantly, departments must recognize the distinct harms and cyclical and corrosive nature of OIDV, including power and control dynamics, the abuser's potential for misuse of institutional resources, negative effects on policing, and most importantly, victim fatality rates.[150] This recognition should force departments to adopt zero-tolerance policies that treat OIDV as a line-of-duty crime.

Providing officers with clear directives, however, is not enough; OIDV policies must also outline protocols that incorporate an independent oversight mechanism and remove discretion from the department to increase probability of compliance.[151] As illustrated by the unfortunate result

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involved officer(s) are conducted separately by Homicide Detail and the Office of the District Attorney.").

149. *Cf.* SAN FRANCISCO POLICE DEP'T, *supra* note 138, at 2 (requiring administrative leave for officer-involved shootings); SAN JOSE POLICE DEP'T, *supra* note 138, at 355 ("The officer or officers directly involved in the shooting will be placed on Administrative Leave after the completion of their reports.").

150. *See* discussion *supra* Parts II.A–B.

151. *See* Annette Gordon-Reed, *Watching the Protectors: Independent Oversight of Municipal Law Enforcement Agencies*, 40 N.Y.L. SCH. L. REV. 87, 91 (1995) (discussing independent oversight as a way to tackle widespread corruption and misconduct); Kristen Chambers, Note & Comment, *Citizen-*

in the Michelle O'Connell case,[152] OIDV policies that largely rely on a self-policing model with no external oversight do not adequately address the potential for systemic abuse permeating OIDV investigations.[153]

The IACP model policy serves as a good guidepost for OIDV policy development. However, it could be improved to resemble OIS protocols, since its current form allows departments to conduct criminal investigations of OIDV with the same level of discretion afforded to investigations of regular crime and lacks independent oversight mechanisms.[154] In other words, the IACP policy heavily relies on the department's ability to self-regulate, a model that has proven to be an ineffective way of addressing high levels of systemic corruption. In the Michelle O'Connell case, for example, following the IACP policy would have meant that upon receiving Jeremy Banks's call, the St. Johns County Sheriff's Officer needed to notify the supervisor on duty and the dispatch supervisor.[155] Upon notification, the primary patrol unit would have arrived and secured the scene, and a supervisor of higher rank would have taken command and conducted a series of on-scene protocols.[156] This supervisor then needed to ensure that all evidence be collected; however, what exactly he needed to do to secure the area or preserve evidence is not outlined in the policy,[157] presumably because the policy defers to the official's training and ability to exercise his own judgment and discretion. Because Banks was a deputy sheriff, the supervisor of higher rank only needed to notify the sheriff and Banks's immediate supervisor, another superior officer.[158] There was no requirement that the DA be notified.[159]

Directed Police Reform: How Independent Investigations and Compelled Officer Testimony Can Increase Accountability, 16 LEWIS & CLARK L. REV. 783, 798 (2012) (arguing that objective oversight requires independent investigations).

152. Bogdanich & Silber, *supra* note 1.

153. *See* discussion *supra* Part II.C.

154. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54, at 4–5.

155. *See id.* at 4 (requiring the police officer who responds to OIDV incident to immediately notify the officer's supervisor).

156. *Id.*

157. *Compare id.* at 4 ("The on-scene supervisor shall assume command and ensure that the crime scene is secured and that all evidence is collected. Photographic and/or video documentation of the parties involved and scene shall be recorded where such resources are available."), *with* SAN JOSE POLICE DEP'T, *supra* note 138, at 354 ("[T]he officer(s) weapon, holster, gun belt and spare ammunition is obtained and processed only by Homicide, Crime Scene Unit members at a Department approved facility away from the initial scene. The involved weapon will not be opened, unloaded or tampered with in any manner except to render the weapon safe for transportation by lowering the hammer and/or engaging safety mechanisms . . . ."), *and* SAN FRANCISCO POLICE DEP'T, *supra* note 138, at 5 ("When a supervisor arrives on the scene, the supervisor shall have the involved member(s) escorted from the scene. If more than one member is involved in the discharging of a firearm, absent exigent circumstances, the members shall be separated and will be kept separate from one another, and shall not discuss the incident with each other prior to being interviewed by the Homicide Detail Inspectors. If possible, the supervisor shall contact the investigator from the Homicide Detail and ascertain if the involved member is to be taken to the Homicide Detail, the Investigations Bureau, or the involved member's Station or Detail. In all circumstances the member shall be taken to a department facility.").

158. *See* INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54, at 5 (requiring notification of the accused officer's chief and immediate supervisor).

159. *Id.* at 5.

The Sheriff's Office should have then conducted an administrative investigation and a criminal investigation as would be the case for any other domestic violence incident not involving members of the police.[160] The sheriff would have been able to refer either investigation, or both, to an outside law enforcement agency at his own discretion.[161]

It can be argued that the St. Johns County Sheriff's Office in the O'Connell case in fact followed the basics of this outlined structure in the IACP policy: it purportedly responded to the call in a timely manner, sent a patrol unit, secured the area, collected evidence, and conducted a criminal investigation without calling in the FLDE to investigate independently.[162] However, guided by no specific protocols and procedures and lacking any type of outside review, the department mishandled the investigation and prematurely embraced a conclusion in favor of Banks.[163] If the agency had adopted the IACP model policy, would the department have competently and impartially investigated the case and held Banks accountable?

Unfortunately for the O'Connell family, the IACP model in its current form would have probably made little difference. First, there is very little guidance in the IACP policy delineating exactly how departments are to conduct their on-scene responses and post-hoc investigations, particularly criminal investigations and decisions. For example, the policy merely notes that the investigating official must, inter alia, conduct the investigation "as would be the case for any other criminal violation," conduct "sufficient" interviews, and "completely investigate the charges and where warranted seek prosecution."[164] It is true that "[g]iven the limitations of law enforcement resources, the need to prioritize policing goals, and the impossibility of [codifying] every move that a police officer might make, society has little choice but to entrust the police with a certain amount of discretionary authority."[165] These directives, however, are overly broad guidelines that provide little direction to officers attempting to respond in good faith to the special needs of OIDV situations. While investigative protocols arguably need to be broad enough to account for the various scenarios that officers face, this lack of specification in the context of OIDV has proven to be an ineffective approach.

Second, the policy has no independent oversight mechanism in place to address potential favoritism and procedural deficiencies. Officers can conduct their investigations—albeit pursuant to vague guidelines—to the best of their ability, yet produce biased results favoring their own ranks without any form of external oversight. Thus, the IACP protocols do not

160. *Id.* at 7.

161. *Id.* at 6–7.

162. Bogdanich & Silber, *supra* note 1.

163. *Id.*

164. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54, at 7.

165. Reenah L. Kim, *Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils*, 36 HARV. C.R.-C.L. L. REV. 461, 463 (2001) (citations omitted).

address the need to tackle systemic abuse and corruption by failing to provide an adequate rubric that ensures impartiality and objectivity. While it can be argued that the nature of administrative investigations provide OIDV cases under the IACP policy with at least *some* level of integrity, these internal proceedings fail to adequately protect against systemic abuse because they are still inherently biased and self-serving. When an officer is accused of violating department policy, some police departments address the misconduct through an internal review process, namely, through a special unit within the police department, often called an Internal Affairs Division (IAD).[166] An administrative investigation of this kind is typically triggered when a citizen files a complaint with the corresponding IAD,[167] but it can also be part of established protocol requiring departments to determine whether the officer's conduct violated department policy, as is the case for the IACP model policy on OIDV.[168] IADs thus play a role in OIDV policing in at least two different ways: (1) when an officer is accused of committing line-of-duty crime and is therefore investigated administratively and (2) when an officer mishandles an OIDV investigation in violation of department policy and procedure.

Some argue that internal administrative review can potentially provide investigations with at least some level of external oversight.[169] For example, many municipalities have moved toward supplementing internal investigation of misconduct with review by citizen boards, which provide investigations with a higher level of independence and impartiality since they tend to include (to varying degrees) "procedures outside the physical and organizational confines of the police force; accountability to an autonomous official or body; and the involvement of non-police personnel."[170] Additionally, to the extent these internal processes do not protect against corruption, the federal government serves as a "backstop" when states fail to properly address instances of police misconduct, occasionally providing

166. *E.g.*, *Commend an Employee or Report Employee Misconduct*, L.A. POLICE DEP'T, http://www.lapdonline.org/our_communities/content_basic_view/9217 (last visited Nov. 11, 2015); HARRIS COUNTY SHERRIFF'S OFF. INTERNAL AFF. DIVISION, http://www.harriscountyso.org/file_a_complaint.aspx (last visited Nov. 11, 2015); N.Y. ST. POLICE INTERNAL AFF. BUREAU, http://www.troopers.ny.gov/Contact Us/Compliments or Complaints/ConIA BRegionals.cfm (last visited Nov. 11, 2015); ORLANDO POLICE DEP'T INTERNAL AFF., http://www.cityoforlando.net/police/internal-affairs/ (last visited Nov. 11, 2015); TRAVIS COUNTY SHERRIFF'S OFF. INTERNAL AFF. DIVISION, https://www.tcsheriff.org/departments/internal-affairs (last visited Nov. 11, 2015).

167. *Commend an Employee or Report Employee Misconduct*, *supra* note 166; HARRIS COUNTY SHERRIFF'S OFF. INTERNAL AFF. DIVISION, *supra* note 166; N.Y. ST. POLICE INTERNAL AFF. BUREAU, *supra* note 166; ORLANDO POLICE DEP'T INTERNAL AFF., *supra* note 166; ORLANDO POLICE DEP'T INTERNAL AFF., *supra* note 166.

168. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54, at 6–7.

169. Kim, *supra* note 165, at 476–78.

170. *Id.* at 476; *see also, e.g.*, CITY OF AUSTIN POLICE MONITOR CITIZEN REV. PANEL, http://www.austintexas.gov/department/police-monitor-citizen-review-panel (last visited Nov. 11, 2015) (detailing membership, duties, and qualifications of citizen review panel that reviews disputed Internal Affairs cases).

further independent review of systemic deficiencies.[171] Thus, it can be argued that these processes are capable of safeguarding against the risk of systemic abuse.

Nonetheless, internal mechanisms are often criticized for failing to deliver impartial and reliable results.[172] Some critics argue, for example, that internal approaches to officer misconduct need development, that "independent investigations are essential to objective oversight," and that internal investigations of any kind are perceived to be biased, even when they are not.[173] Similarly, others argue that establishing an IAD results in "profound public distrust and the potential for biased, self-serving and superficial investigations."[174] This resulting distrust is largely a result of the unit's location within the department, which "helps to ensure communication between the investigatory unit and those making personnel decisions."[175] Further, it remains a problem that (i) very few departments have actually adopted OIDV investigation protocols,[176] (ii) not all departments subject their internal affairs proceedings to citizen review, (iii) citizen review systems can be ineffective, and (iv) the federal government only litigates a handful of cases. Even assuming these limitations were not lacking, when the police not only fail to adequately follow department protocol, but also fail to investigate a crime committed by one of their own, the potential for abuse becomes more critical. The special nature of OIDV simply renders the impartiality gloss offered by this post-hoc internal review process, standing alone, inadequate and insufficient.

On the other hand, adopting protocols resembling the OISs framework are a more promising and effective way of addressing the systemic corruption, under-enforcement, and bias associated with OIDV investigations. For example, policies should ensure that various response units are notified when an OIDV victim calls for help or someone reports an incident implicating an officer in domestic violence. Reporting to additional units could include the Domestic Violence Unit, Internal Affairs, the Homicide Unit, or a combination of these units, all specifically trained to respond to OIDV calls. While it is true that this model approach may not fit all departments, as there is a wide range of resources and diversity of divisions, it is important that departments look to spread accountability to some extent by mandating reporting of OIDV to more than one outlet, not just the supervisor on duty.

OIDV policies also should outline specific on-site response proto-

171. Kami Chavis Simmons, *Cooperative Federalism and Police Reform: Using Congressional Spending Power to Promote Police Accountability*, 62 ALA. L. REV. 351, 368 (2011) (discussing federal authority to address police misconduct).

172. Hazel Glenn Beh, *Municipal Liability for Failure to Investigate Citizen Complaints Against Police*, 25 FORDHAM URB. L.J. 209, 219 (1998); Chambers, *supra* note 151, at 798.

173. Chambers, *supra* note 151, at 798.

174. Beh, *supra* note 172, at 219.

175. *Id.*

176. *See* discussion *supra* Part III.C.

cols to be followed by OIDV-trained investigators, and these protocols should ensure OIDV incidents are investigated with the level of priority afforded to other line-of-duty crimes, including, for example, OISs. On-site response should never be left in the hands of a single supervisor. As outlined by the IACP model policy, the officer should be immediately arrested when probable cause exists and relieved of all service weapons.[177] Additionally, victims should be immediately notified of protection alternatives and available counseling services to help break cycles of abuse, which can potentially reduce fatality rates and encourage early reporting of abuse by victims.

Further, OIDV policies should trigger parallel criminal and administrative investigations regardless of the nature of the incident, as the IACP policy dictates.[178] However, as in the case of OISs, criminal investigations should be afforded a higher level of objectivity by requiring intervention of either an independent investigating unit or state law enforcement agency, or by facilitating independent investigations by the DA's Office, or a combination of these approaches. The DA's involvement, for example, can significantly change the incentive structure for supervisors and investigating officers, since under a notification requirement, the department would no longer be independently controlling investigations and the flow of decision-making. While perhaps not all instances of abuse could be subjected to this notification requirement in a large number of departments, police forces should at least adopt policies that require fatal incidents of OIDV or OIDV cases involving serious physical injury or service weapons be reported automatically to an independent entity. In this regard, the IACP policy could be improved, for example, by mandating, rather than recommending, that these cases be referred to an outside law enforcement agency for it to conduct administrative and criminal investigations.[179]

Lastly, administrative investigations should mandate that the officer be put on administrative leave in order to isolate the officer from internal processes and decision-making. Again, while the large variation of resources across departments and of incidents of abuse make it impractical to require automatic administrative leave in all OIDV situations, this requirement should be compulsory in all OIDV cases involving serious physical injury or a state-issued weapon. Denying access to institutional resources while the investigation is ongoing not only protects victims and communities from further abuse of authority, but also communicates salient consequences to abusive officers, potentially deterring future violations.

While not guaranteed to reduce systemic abuse in its entirety, incorporating these internal and external oversight mechanisms can help increase accountability and stop the corruption permeating OIDV cases across state lines.

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177. INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 54, at 5.

178. *Id.* at 6.

179. *Cf. id.* at 6–7 (permitting, but not requiring, outside review of OIDV cases).

VI. Conclusion

Officer-involved domestic violence, while personal and intimate in nature, is a cyclical and corrosive crime intrinsically associated with misuse of institutional power by the abusive officer. Nonetheless, departments have failed to regulate it effectively, often operating under no clear set of directives. This lack of clarity has prompted a trend of systemic corruption and under-enforcement negatively affecting victims, communities, and the police across the country. Lack of OIDV-focused legislation and reluctance by the courts to hold the police accountable through civil liability has further disincentivized departments from promulgating clear procedures for handling OIDV cases as line-of-duty crime. However, it is imperative that departments independently recognize the significant harms associated with OIDV and begin prioritizing the integrity of these investigations. Guided by the mechanisms regulating OISs, police forces should adopt specific protocols that treat OIDV as line-of-duty crime and incorporate objective mechanisms of oversight and control in order to address these critical issues in policing.