Pace Law Review

Volume 14
Issue 1 *Spring 1994*

Article 5

April 1994

The Constitutionality of Large Scale Police Tactics: Implications for the Right of Intrastate Travel

Jonathan Hangartner

Comment

The Constitutionality of Large Scale Police Tactics: Implications for the Right of Intrastate Travel

I. Introduction

Feeling thirsty on a hot summer night, you head out to the corner store for a soda.[1] On your way home you see an old friend on the street. You stop and shake hands. The police move in. The officers lay you out on the pavement and search you as the neighbors watch. A helicopter clatters overhead shining a spotlight on the ground below. Hundreds of police officers cruise the neighborhood in cars and on foot. Finding nothing on you, the cops send you on your way with a warning against hanging out in an area where gangs frequently sell drugs. The problem is, gangs frequently sell drugs on just about every corner in your neighborhood.

Throughout the late 1980s and into the early 1990s, federal, state, and local law enforcement agencies have focused their energies on a triumvirate of evils that have coalesced in the inner cities of America - drugs, guns, and gangs.[2] The volatile combination has sparked huge jumps in crime rates, partic-

1. This is a fictional account based on numerous newspaper reports and editorial articles in the Los Angeles Times. *See* Paul Feldman, *Police Use a Wide Broom; LAPD's War on Gangs and Drugs Has Shifted Emphasis*, L.A. TIMES, May 8, 1988, § 2, at 1; John Johnson, *Night of the Hammer: Retaking the Streets of South L.A.*, L.A. TIMES, July 3, 1989, § 2, at 1; Samuel H. Pillsbury, *Gang Sweeps Only Look Good; Low-Profile, Constant Street Policing is the Better Idea*, L.A. TIMES, Apr. 7, 1988, § 5, at 5; Gary Williams, *What of the Innocent Snagged in 'Sweeps'?; The Price of Freedom from Gangs Shouldn't Be All Freedoms*, L.A. TIMES, Apr. 24, 1988, § 5, at 5.

2. *See, e.g.*, Santiago O'Donnell & Linda Wheeler, *D.C. Schools Add Police; Chief Shifts Officers From Special Units*, WASH. POST, Mar. 12, 1994, § 1, at A1.

ularly violent crimes such as homicide and robbery.[3] From the President down to local police chiefs, many authorities have taken the hard line, quickly proclaiming a "war" on drugs.[4] Traditional police patrol, however, is ill-suited to fighting a war, so the police have been forced to adopt new, more aggressive tactics.

The sweep[5] is a police tactic developed to a form of art by the Los Angeles Police Department (hereinafter "LAPD") under its former chief Daryl Gates.[6] The LAPD began to use sweeps in the mid-1980s to control gang activity and associated violence.[7] Paramilitary in nature, by 1988 the LAPD's gang sweeps often involved hundreds of police officers, helicopters, and mobile detention centers mobilizing on a target community.[8] Sweeps generally occur on weekend nights, when both general social activity and gang activity are at their peak.[9]

The sweeps are "not an effort to take a lot of drugs off the street," but rather to "take people off the street."[10] Police operations of a certain magnitude undoubtedly achieve that goal. Thus, sweeps act as a *de facto* curfew, preventing many residents from leaving their homes during the hours of the operation. Because they operate as a curfew, sweeps implicate the

---

3. Overall, the nation's murder rate jumped eight percent between 1989 and 1990, and the 1990 murder rate was up nine percent from 1986 levels while the robbery rate jumped fourteen percent during the same period. U.S. DEP'T OF JUSTICE, 1990 UNIFORM CRIME REPORT 9, 20 (1991).

4. *But see* Gabriel G. Marquez, *The Useless War*, N.Y. TIMES, Feb. 27, 1994, § 4, at 15.

5. As used in this Comment, a "sweep" refers to a highly focused, large-scale police mobilization intended to control street crime by arresting large numbers of people in a short period of time.

6. George Stein, *LAPD Nails 352 in Operation Hammer*, L.A. TIMES, Aug. 21, 1989, § 2, at 1. Gates served as Chief for approximately thirteen years. He resigned in the aftermath of the Rodney King verdict and related riots in 1992. *See* Robert Reinhold, *Head of Police in Philadelphia Chosen for Chief in Los Angeles*, N.Y. TIMES, Apr. 16, 1992, at 1.

7. *See* Dennis Anderson, *Police Mount War on Street Drug Traffic*, UPI, Nov. 4, 1984, *available in* LEXIS, News Library, UPI File.

8. Feldman, *supra* note 1, at 1; Johnson, *supra* note 1, at 1; Bob Pool, *Police Call Gang Sweep a Success; 1,453 Are Arrested*, L.A. TIMES, Apr. 12, 1988, § 2, at 1; *see also* MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 267-322 (1990).

9. *See* Stein, *supra* note 6, at 1.

10. Anderson, *supra* note 7.

constitutional rights of assembly and association,[11] and the right of locomotion or intrastate travel.[12]

This Comment will examine the constitutional threats posed by police sweeps, and possible protections against such threats. Part II of this Comment will describe basic police strategies and the development of the sweep in Los Angeles. Part III will consider the impact of the sweep on rights protected by the First, Fifth, and Fourteenth Amendments. Part IV will evaluate possible remedies for those whose rights have been degraded. Part V will conclude that the use of very large sweeps potentially infringes on the First, Fifth, and Fourteenth Amendment rights of local residents, and should be subject to a legal showing of necessity.

II. The Rise of the Sweep Tactic

The police tactic known as a "sweep" is an extension of traditional police strategies and tactics. Police departments in the United States have progressed through several strategical phases in this century, and many are currently struggling with proposals for basic changes in strategy. This section will discuss the history of police strategy in the United States and in Los Angeles, including the development of the sweep tactic.

A. *Development of Police Strategy in the United States*

The modern notion of an organized police force was first implemented in London, England in 1829.[13] Sir Robert Peel devised a policing strategy based on foot patrols by officers walking a specific beat.[14] The beats were devised so that the constable covered his entire beat every ten to fifteen minutes, and thus could easily be located by a citizen who needed assistance.[15] Walking a beat also allowed the officer to become acquainted with local residents and to keep informed about

11. *See infra* notes 78-111 and accompanying text.

12. *See infra* notes 149-91 and accompanying text. Recently the court in Qutb v. Strauss, 8 F.3d 260 (5th Cir. 1993) considered how a juvenile curfew implicated these rights under strict scrutiny review.

13. George L. Kelling & David Fogel, *Police Patrol - Some Future Directions*, *in* THE FUTURE OF POLICING 153 (Alvin W. Cohn ed., 1978).

14. *Id.* at 153-54.

15. *Id.* at 153.

activities in the community.[16] The first organized police force in the United States was established in Boston in 1838.[17] Early American police forces were adapted from the British model, and generally followed the beat cop strategy.[18]

Modern police strategy has its roots in the work of the influential law enforcement analyst O.W. Wilson.[19] Wilson's theory of "preventive patrol"[20] was grounded on the belief that effective policing requires police departments to create a sense of omnipresence in the community through high visibility patrols and rapid response to emergency calls.[21] Wilson also recognized the need to maintain day-to-day interaction between officers and the community.[22] Yet as police departments shifted from foot patrol to automobile patrol in an effort to economically create the impression of omnipresence, the ability of individual officers to maintain that essential communication with the community declined.[23]

In an effort to increase efficiency, law enforcement theorists increasingly promoted the use of complex, mathematically derived automobile patrol routes designed to maximize the sense of omnipresence in the community and minimize response time.[24] The result was a reactive police strategy, in which police officers patrolled large areas and only left their vehicle to respond to calls.[25] Some theorists even considered community interaction a corrupting influence that interfered with their conception of a detached, professional police force.[26]

---

16. *Id.* at 154.

17. Edward Eldefonso et al., PRINCIPLES OF LAW ENFORCEMENT 219 (2d ed. 1974).

18. EDWARD A. THIBAULT ET AL., PROACTIVE POLICE MANAGEMENT 14 (3d ed. 1990).

19. O.W. WILSON, POLICE ADMINISTRATION (1963).

20. According to Wilson, the basic purpose of the police patrol is to prevent crime by eliminating the opportunity or the belief in the opportunity for successful criminal activity. *Id.* at 228.

21. *Id.* at 228, 244-45.

22. *Id.* at 228.

23. *See* PAUL B. WESTON, POLICE ORGANIZATION & MANAGEMENT 140 (1976).

24. *See, e.g.*, J.F. ELLIOT, INTERCEPTION PATROL (1973); ROY C. LARSON, URBAN POLICE PATROL ANALYSIS (1972).

25. Kelling & Fogel, *supra* note 13, at 158.

26. *See, e.g.*, James D. Bannon, *Foot Patrol: The Litany of Law Enforcement*, THE POLICE CHIEF, Apr. 1972, at 44-45.

In the 1970s, scholars began to question the effectiveness of the preventive patrol strategy and promoted a variety of reforms.[27] Specific factors identified as contributing to the failure of preventive patrol included increasing community alienation, failure to understand the nature of violent crime, and misunderstandings about victim response to crime.[28] Some critics of traditional police strategy believed that the reestablishment of extensive ties to the community by altering patrol tactics and emphasizing interaction with local citizens was critical to creating a more effective police force.[29]

Despite these criticisms, most municipalities faced with rising crime and shrinking budgets continued to rely on preventive patrol strategies.[30] Although police departments around the country tinkered with various reforms,[31] it was not until the late 1980s that a few major cities, faced with mounting drug problems and skyrocketing murder rates, undertook major strategic reforms, generally referred to as "community policing."[32] The concept of community policing takes many forms, but the emphasis is on addressing the problems identified by critics of preventive patrol, particularly the problem of community alienation.[33] This is generally done by reestablishing ties to the com-

27. *See, e.g.*, LARSON, supra note 24; GEORGE L. KELLING ET AL., THE KANSAS CITY PREVENTIVE PATROL EXPERIMENT (1974); J.F. Schnelle et al., *Social Evaluation Research: The Evaluation of Two Police Patrolling Strategies*, 4 J. APPLIED BEHAV. ANALYSIS 353 (1975).

28. Kelling & Fogel, *supra* note 13, at 167-70.

29. *See id.*; Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 CRIME & DELINQUENCY 236 (1979); James Q. Wilson & George L. Kelling, *Police and Neighborhood Safety: Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

30. Even today, most municipalities operate under the basic preventive patrol strategy and organization popularized by O.W. Wilson. THIBAULT, *supra* note 18, at 3.

31. *See id.* at 206-23.

32. Houston was one of the first major cities to implement community policing in the late 1980s under Police Commissioner Lee Brown. Some smaller cities such as Flint, Michigan and Aurora, Colorado moved to a community policing strategy in the early 1980s. Robert C. Trojanowicz, *An Evaluation of a Neighborhood Foot Patrol Program*, 11 J. POLICE SCI. & ADMIN. 410, 410 (1983); Gary Enos, *Cities Take Diverse Paths to Community Policing; Ultimate Goal is to Reduce Crime*, CITY & ST., July 27, 1992, at 16.

33. *See* Enos, *supra* note 32.

munity, often by returning to the old-fashioned beat cop patrolling a familiar neighborhood on foot.[34]

B. *The Los Angeles Police Department*

> This is the continuing saga of us versus them and we've got a bigger gang than they do.
>
> Lt. Dan Cooke, LAPD (1984).[35]

The LAPD can be considered the prototype of a traditional, automobile-based, aggressive, preventive patrol police force.[36] Charged with patrolling a vast area that is home to millions of people, the LAPD faces problems typical of major American cities: widespread drug trafficking, poverty, and a high rate of violent crime.[37] Faced with spiraling crime rates, and a surge in street gangs and gang-related crime in the late 1980s, the people of Los Angeles demanded action. The LAPD responded with aggressive traditional tactics rather than progressive community policing tactics.[38]

Despite several attempts to incorporate more modern police strategies, the LAPD's policing strategy is relatively unchanged from the days of the old television show "Dragnet."[39] The basic patrol function is performed by uniformed officers cruising the streets in marked patrol cars.[40] Patrolling large areas, officers leave their units only to respond to calls or investigate activity on the street.[41] As with all automobile-based preventive patrol strategies, a premium is placed on keeping all units "in-ser-

---

34. *See* Ken Peak et al., *Improving Citizen Perceptions of the Police: "Back to the Basics" with a Community Policing Strategy*, 20 J. CRIM. JUST. 25, 26-28 (1992).

35. Anderson, *supra* note 7.

36. "The LAPD has a reputation as a hard working, car-based mobile strike force that is tough on criminals." INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, REPORT OF THE INDEPENDENT COMMISSION 23 (1991) [hereinafter CHRISTOPHER COMMISSION REPORT].

37. *Id.* at 22; LOS ANGELES POLICE DEP'T, 1990 STATISTICAL DIGEST 1.2 (1991) [hereinafter STATISTICAL DIGEST]. The LAPD patrols an area of approximately 470 square miles, with a total population of 3.3 million people. *Id.*

38. Between 1988 and 1990, the number of homicides surged twenty-five percent and the number of robberies jumped twenty-eight percent in the area served by the LAPD. STATISTICAL DIGEST, *supra* note 37, at 2.3, 2.7.

39. *See* CHRISTOPHER COMMISSION REPORT, *supra* note 36, at 101-04.

40. Kelling & Fogel, *supra* note 13, at 157.

41. *Id.*

vice."[42] A unit is considered in-service when the officers are in the car, cruising the patrol route.[43] Thus, the emphasis on keeping units in-service has the practical effect of minimizing the officers' contact with community residents.[44]

The LAPD has historically been known for aggressively implementing this basic strategy.[45] Intimidation and omnipresence have been the trademark of the LAPD under successive police chiefs, particularly Chief Daryl Gates, who held the post for thirteen years until he resigned under pressure following major riots in 1991.[46] Gates set the tone for the police force, and his controversial, outspoken style further eroded the LAPD's relationship with many communities.[47] Gates' views on the use of force were made clear to every officer in the LAPD when he told a United States Senate committee that casual drug users should be taken out and shot.[48] In addition, he has repeatedly antagonized minority communities with racist remarks.[49]

Between 1960 and 1990, the overall crime rate in Los Angeles increased more than three hundred percent.[50] The LAPD periodically responded with new programs designed to promote community involvement.[51] Following the Watts riots in 1965,[52] the LAPD assigned Community Relations Officers to each neighborhood to promote communication with residents.[53] In the 1970s, the LAPD adopted a "team-policing" strategy, again

---

42. *Id.* at 158.

43. *Id.*

44. *Id.*

45. *See* CHRISTOPHER COMMISSION REPORT, *supra* note 36, at 99.

46. Joseph D. McNamara, *Police Story; Report Just Underlined the Obvious: Gates has Long Acted Questionably*, L.A. TIMES, July 14, 1991, at M1; Reinhold, *supra* note 6, at 1.

47. McNamara, *supra* note 46.

48. Harold Meyerson, *Gatesgate: L.A. Liberals Meet the Police Chief*, NEW REPUBLIC, June 10, 1991, at 20.

49. *Id.* "During his thirteen years as Chief, he has called Blacks physiologically different from 'normal people,' Latinos 'lazy,' and Salvadorans 'drunks.'" *Id.*

50. CHRISTOPHER COMMISSION REPORT, *supra* note 36, at 23.

51. *Id.* at 101.

52. In August, 1965, the community of Watts in South-Central Los Angeles broke out into riots after a white police officer arrested a young African-American male. THE POLITICS OF RIOT COMMISSIONS 1917-1970, at 261 (Anthony Platt ed., 1971). The riots lasted for six days and resulted in 34 deaths and extensive property damage. *Id.* at 261-64.

53. CHRISTOPHER COMMISSION REPORT, *supra* note 36, at 101.

designed to promote greater contact with local residents.[54] All of these programs, however, were created to supplement the basic preventive patrol strategy of the LAPD rather than to fundamentally alter the Department's overall strategy, and in 1979 the LAPD began to eliminate them due to budget constraints.[55]

The 1980s posed a major challenge to the LAPD's traditional strategy. Faced with a growing drug problem, Chief Gates initially responded with a program known as DARE - Drug Abuse Resistance Education - in 1983.[56] Although DARE is a community-oriented program, like earlier efforts it has merely been a supplement to the traditional style of law enforcement that is the backbone of the LAPD's operations.[57] Starting in the mid-1980s, gang activity and gang-related crime in Los Angeles skyrocketed.[58] Given Gates's belief in hard-nosed aggressive policing, it is not surprising that his principal response to increasing crime rates was traditional - enhance the sense of police omnipresence and try to intimidate potential criminals until they learn that criminal behavior is more of a hassle than it is worth.

To achieve this goal, the LAPD began to use sweeps.[59] Starting in 1984, the gang sweeps targeted communities plagued by gang-related violence.[60] According to Chief Gates, the sweeps were "not an effort to take a lot of drugs off the street," but rather to "take people off the street."[61] Gates predicted that the strategy would have a calming effect on gang rivalries that were the source of much violence.[62]

Gates' prediction failed to come true, and in the late 1980s Los Angeles saw double digit increases in the rates of many violent crimes including homicide and robbery.[63] The LAPD again

54. *Id.*

55. *Id.* at 102.

56. Gates consistently focused on the problem of narcotics, characterizing it as the "greatest common danger threatening the safety of the people of Los Angeles" as early as 1983. LOS ANGELES POLICE DEP'T, 1983 ANNUAL REPORT 2 (1984).

57. CHRISTOPHER COMMISSION REPORT, *supra* note 36, at 103-04.

58. *See* LOS ANGELES POLICE DEP'T, 1988 ANNUAL REPORT (1989).

59. Anderson, *supra* note 7.

60. *See id.*; LOS ANGELES POLICE DEP'T., *supra* note 58, at 8.

61. *See* Anderson, *supra* note 7.

62. *Id.*

63. Davan Maharaj, *Crime Rise Triggers a New Sweep on Gangs*, L.A. TIMES, July 9, 1989, § 2, at 1.

responded with a show-of-force strategy intended to intimidate criminals by virtually constant harassment. "Operation Hammer" was unveiled in early 1988, and it institutionalized the massive sweeps begun in 1984.[64] Under Operation Hammer, task forces of hundreds of police officers conducted highly publicized forays into communities affected by gang violence.[65] During a sweep, officers detained or arrested suspected gang members on any charges they could, including everything from felonies to traffic citations.[66] The massive sweeps were supplemented by a 160-officer anti-gang unit that targeted particular communities for nightly sweeps.[67]

In addition to sweeps, another major tactic in support of the LAPD's strategy of aggressive policing is the use of extensive field investigations.[68] Field investigations involve the stop and search of large numbers of people who fit a "gang profile," often based on race, age, and style of dress.[69] During a single week in 1988, the anti-gang unit formally stopped and questioned over 2,400 people, filling out index cards with name, address, and gang affiliation if any.[70] All of these tactics are meant to intimidate potential criminals off the street and reassure the public that the LAPD is out on the street protecting the community.[71]

III. Rights Implicated by the Sweep

> I think people believe that the only strategy we have is to put a lot of police officers on the street and harass people and make arrests for inconsequential kinds of things. That's part of the strategy, no question about it.
>
> Daryl F. Gates
> Former Chief of the LAPD[72]

The sweep raises constitutional concerns because it prevents people from leaving their homes for any reason, creating

64. LOS ANGELES POLICE DEP'T., *supra* note 58, at 8.
65. *Id.* at 8-11.
66. *Id.* at 8; Pool, *supra* note 8.
67. Feldman, *supra* note 1.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

an effective curfew on the target neighborhood.[73] Keeping people off the streets is the stated objective of the sweep. This goal is accomplished by the magnitude of the police presence and the use of all available tools to exhibit police power.[74] The ability of the residents of a target community to leave their homes is seriously chilled by the risk, or the perceived risk, of harassment, detention, and even arrest for traffic or other minor violations. This is particularly true for minority and juvenile residents because the use of race- and age-based profiles to support the establishment of reasonable suspicion puts them at heightened risk of police detention.[75]

The rights implicated by such a *de facto* curfew are the rights of assembly and free association, and the right of locomotion or intrastate travel.[76] The constitutional sources and the scope of these rights will be discussed in this section. In addition, cases involving challenges to curfews and other travel restrictions will by considered by analogy.[77] The cases patch together a hodgepodge of constitutional theories and tests, but generally fail to articulate a clear standard for review of local travel restrictions.

A. *First Amendment Rights of Assembly and Association*

The Supreme Court has noted that freedom of travel is "closely related to rights of free speech and association."[78] Restrictions on movement implicate the rights of assembly and association by preventing attendance at meetings and activities that are protected by the Constitution. The right to peaceably assemble to petition the government is explicitly recognized in the First Amendment.[79] Although the right of association lacks

73. This Comment is not directly concerned with the potential for individual Fourth Amendment violations created by the atmosphere of the sweep, where officers may be more inclined to stop and search under the agitated circumstances created by the large police presence.

74. *See Anderson*, *supra* note 7; *see supra* note 7 and accompanying text.

75. *Supra* notes 68-71 and accompanying text.

76. *See infra* notes 78-113 and accompanying text.

77. *See infra* notes 149-91 and accompanying text.

78. Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964).

79. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

explicit textual support in the Constitution, the Supreme Court has repeatedly recognized it as a necessary corollary of the First Amendment.[80]

The rights of assembly and free association are fundamental rights.[81] Together, they protect many types of associational activities, including political[82] and economic activities.[83] These rights, however, are not absolute and may be subject to regulation under some circumstances.[84] In addition, the variety of associational rights are not all equally protected.[85] Religious or political exercise of the rights of assembly and association are accorded greater protection than commercial or economic exercise of these rights.[86] Unlike some curfew ordinances that except local travel to attend political or religious functions, the effective curfew established by the sweep does not distinguish among the types of activities that may be prevented.[87] Thus, the effect of the sweep must be considered against the greater protections afforded religious or political activities.

The test applied in direct challenges to regulations infringing on the rights of assembly and association involving highly protected First Amendment activities is strict scrutiny.[88] The Supreme Court has found that government infringement on the right of association "may be justified by regulations adopted to

80. *See* Coates v. City of Cincinnati, 402 U.S. 611 (1971) (striking down a city ordinance prohibiting assembly of three or more persons on a sidewalk acting in an annoying manner); NAACP v. Button, 371 U.S. 415 (1963) (holding that state of Virginia could not prohibit the activities of the NAACP); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (holding that the state could not compel the NAACP to reveal the names and addresses of its members).

81. Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 580 (1980); NAACP v. Button, 371 U.S. 415, 430 (1963); De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

82. Buckley v. Valeo, 424 U.S. 1, 22-23 (1976).

83. United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 221-25 (1967).

84. *See, e.g.*, Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984) (finding that the right of association is not absolute).

85. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 950 (3d ed. 1986).

86. *Id.* at 951. *Compare* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (involving politically motivated boycott) *with* NLRB v. Retail Store Employees Local 1001, 447 U.S. 607 (1980) (involving economically motivated boycott).

87. For example, a curfew enacted in the Borough of Middletown, Pennsylvania provided an exception from the juvenile travel prohibition if advance notice of intent to exercise First Amendment rights was provided to the municipality. Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1258 (M.D. Pa. 1975).

88. *See Roberts*, 468 U.S. at 623.

serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[89] Thus, the regulation must both serve a compelling state interest, and do so in the least restrictive way.

A regulation infringing on First Amendment rights may also be challenged as overbroad.[90] The overbreadth doctrine allows a party to challenge a regulation even though it may not infringe on a constitutionally protected right as applied to that particular party.[91] The basic test is that a regulation is overbroad if, in addition to proscribing activities that may be constitutionally proscribed, it also operates to proscribe speech or conduct that is protected under the First Amendment.[92] However, a state regulation will only be struck down as overbroad if it is not subject to a narrowing construction[93] and its deterrent effect on constitutionally protected activity is real and substantial.[94]

Unfortunately, the cases involving challenges to curfews or other travel restrictions on First Amendment grounds do not agree on the proper test to apply. In *Johnson v. City of Opelousas*,[95] the former Fifth Circuit considered a class action challenge to a juvenile curfew ordinance enacted by the city.[96] The plaintiffs challenged the ordinance as overbroad because, in addition to the intended proscription of unlawful juvenile behavior, the ordinance proscribed constitutionally protected associational activities.[97] The court found that

89. *Id.*

90. Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (holding that a law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that . . . constitute an exercise" of First Amendment rights).

91. *See id.*

92. *Id.*

93. Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

94. Broadrick v. Oklahoma, 413 U.S. 601, 612-15 (1973).

95. 658 F.2d 1065 (5th Cir. Unit A Oct. 1981).

96. *Id.* at 1067. The ordinance prohibited anyone under the age of seventeen to "travel, loiter, wander, stroll, or play in or upon or traverse any public streets, highways, roads, alleys, parks, places of amusements and entertainment, places and buildings, vacant lots or other unsupervised places" in the city from 11:00 p.m. until 4:00 a.m. on weekday nights and from 1:00 a.m. to 4:00 a.m. on weekend nights. *Id.* at 1067 n.1.

97. *Id.* at 1072.

under the ordinance minors were prohibited from attending religious or school meetings, organized dances,[98] and other activities.[99] The court struck down the ordinance, holding that it swept within its ambit "innocent activities which are constitutionally protected," and had a real and substantial effect on the exercise of First Amendment rights.[100]

Although the United States District Court for the Middle District of Georgia also applied overbreadth analysis in striking down a curfew imposed by the City of Eatonton, Georgia,[101] the United States District Court for the District of Columbia rejected application of the overbreadth doctrine in a similar curfew challenge.[102] The District of Columbia court found it inappropriate to employ traditional overbreadth analysis when the plaintiffs themselves were engaged in protected activity.[103] Instead, the court treated the plaintiffs' claim as a direct facial attack on the curfew ordinance.[104] The court's reasoning, however, was not altogether clear as it seemingly mixed First Amendment concerns with Fifth Amendment substantive due process concerns, arriving at a test requiring the ordinance to be "narrowly focused on the harm at hand, as well as sensitive to needless intrusions upon the constitutional interests of the innocent."[105]

In *Bykofsky v. Borough of Middletown*,[106] the United States District Court for the Middle District of Pennsylvania applied still a different test in considering a curfew ordinance adopted by the Borough of Middletown, Pennsylvania. The Middletown

98. Note that the Supreme Court recently held that social events, such as organized dances, do not implicate associational rights under the First Amendment due to the slight expressive component of such events. City of Dallas v. Stanglin, 490 U.S. 19, 24-25 (1989). However, this does not upset the court's analysis in *Johnson* because the court also considered the impact of the curfew on attendance of religious meetings that are highly protected associational meetings. *Johnson*, 658 F.2d at 1072.

99. *Johnson*, 658 F.2d at 1072.

100. *Id.* at 1074.

101. Ruff v. Marshall, 438 F. Supp. 303, 304 (M.D. Ga. 1977).

102. Waters v. Barry, 711 F. Supp. 1125, 1127 (D.D.C. 1989).

103. *Id.* at 1133. The court described overbreadth as "essentially a *jus tertii* device" to be used by those properly charged under a statute to raise the rights of others whose rights might be chilled. *Id.*

104. *Id.* at 1134.

105. *Id.* at 1135.

106. 401 F. Supp. 1242 (M.D. Pa. 1975).

curfew ordinance contained an exception for minors exercising their First Amendment rights, as long as they provided advance notice to the proper government office.[107] Relying on cases involving regulation of public demonstrations such as parades[108] and picketing,[109] the court held that the curfew was an exercise of the Borough's "legitimate interest in the reasonable control of its streets" that outweighed the "slight" restriction imposed on the exercise of First Amendment rights.[110] The court did not address the impact of the curfew on the residents' ability to attend protected private associational activities such as religious services or political meetings.

These cases provide inconsistent guidance for analyzing the constitutionality of curfews or other local travel restrictions under the First Amendment. Although every court recognized the link between such restrictions and the exercise of the First Amendment rights of assembly and association, the methods of analysis and the outcomes varied dramatically. However, the district court's analysis in *Bykofsky* is flawed in its application of a low-level, rational basis type of test to a curfew ordinance. Unlike the regulation of expressive conduct on public property,[111] a curfew or other travel restriction directly infringes on the right to participate in protected activities. Thus, some heightened level of scrutiny is necessary whether the First Amendment claim is brought as an overbreadth challenge or as a direct facial attack.

B. *The Right of Intrastate Travel*

The individual right to walk to the store to buy food or to the park to meet friends is so basic to our existence that it is rarely articulated as a right. The courts have awkwardly described this right to come and go as the right of locomotion[112] or

107. *Id.* at 1258.

108. *Id.* (citing Cox v. New Hampshire, 312 U.S. 569 (1941)).

109. *Id.* at 1259 (citing Cox v. Louisiana, 379 U.S. 559 (1965)).

110. *Id.* at 1258-59. The court went on to note that any restriction on speech was incidental to the nonspeech purposes furthered by the ordinance, thus justifying such restrictions under the test announced in United States v. O'Brien, 391 U.S. 367 (1968). *Id.* at 1260.

111. *See supra* notes 108-09 and accompanying text.

112. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

the right to travel intrastate.[113] The difficulty describing such a fundamental concept may arise from its very simplicity. Unfortunately, attempts to assign a constitutional basis for the right have been rare, and generally even more awkward than its description.

An exploration of the doctrinal foundations of the right of intrastate travel must begin with the recognition that there is no express provision of such a right in the Constitution. To evaluate the basis of the right, it is helpful to consider the constitutional underpinnings of a related right, the right of interstate travel. With an understanding of the variety of constitutional sources relied on to support the universally accepted right of interstate travel, the right of intrastate travel will be considered.

1. *The Right of Interstate Travel*

The right of interstate travel has a rich constitutional history. Unlike the Articles of Confederation, the United States Constitution does not expressly provide for a right of interstate travel.[114] This right, however, has consistently been found in the Constitution, although under a wide variety of constitutional doctrines.[115] Five principal constitutional theories have

---

113. *See* Lutz v. City of York, 899 F.2d 255, 259 (3d Cir. 1990).

114. The Articles of Confederation provided that:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each to these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and *the people of each state shall have free ingress and egress to and from another state*, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof . . . .

ARTICLES OF CONFEDERATION art. IV (emphasis added).

115. In *Lutz*, the court identified seven different sources cited by the Supreme Court for the right of interstate travel: the Privileges and Immunities Clause of Article IV, the Privileges and Immunities Clause of the Fourteenth Amendment, a conception of national citizenship implicit in the Constitution, the Commerce Clause, the Equal Protection Clause, and the two Due Process Clauses. *Lutz*, 899 F.2d at 260-61. This Comment will consider all of these except the Equal Protection Clause. Although most of the right of interstate travel cases have been decided under the Equal Protection Clause, they do not ascribe the right to that clause. Instead, the Equal Protection Clause provides the framework for evaluating whether there is a discriminatory infringement of the right of interstate travel. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 406 (1975) (upholding a state durational

been advanced in support of the right of interstate travel,[116] and different Justices have sometimes advanced different theories in support of the same result in an individual case.[117] Each of the theories will be discussed below.

a. *The Privileges and Immunities Clause of Article IV*

The Privileges and Immunities Clause[118] provided an early source of constitutional support for the right of interstate travel. In *Corfield v. Coryell*,[119] the court observed that

> [t]he right of a citizen of one state to pass through or to reside in any other, for purpose of trade, agriculture, professional pursuits, or otherwise . . . may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental.[120]

This clause is still invoked by Justice O'Connor as the legitimate source of the "elusive" right of interstate travel.[121] Article IV, Section 2, however, only protects against state discrimination in favor of its own citizens.[122] Thus, if this is the true source of the right of interstate travel, the right is limited to cases involving the basic fact pattern of discrimination in favor of state residents.[123]

---

residency requirement under equal protection analysis); Shapiro v. Thompson, 394 U.S. 618, 627-38 (1969) (holding that state statutes denying welfare benefits based on length of residency violate equal protection clause).

116. Thomas Steel, *The Right to Travel and Exclusionary Zoning*, 26 HASTINGS L.J. 849, 858-68 (1975); *see supra* notes 110-15; *see infra* notes 117-39 and accompanying text for a discussion of these theories.

117. *See, e.g.*, Edwards v. California, 314 U.S. 160 (1941).

118. U.S. Const. art. IV, § 2, cl. 1. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.*

119. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

120. *Id.* at 552.

121. Zobel v. Williams, 457 U.S. 55, 80-81 (1982) (O'Connor, J., concurring).

122. Toomer v. Witsell, 334 U.S. 385, 395 (1948).

123. *Lutz*, 899 F.2d at 263-64.

b. *The Fourteenth Amendment Privileges and Immunities Clause*

Despite its expansive language, the Privileges and Immunities Clause of the Fourteenth Amendment[124] was quickly construed as a very narrow guarantee against state infringement on the rights of national citizenship.[125] The rights of national citizenship are limited to those "which owe their existence to the Federal government, its National character, its Constitution, or its laws."[126] Although the Court has been extraordinarily reluctant to recognize rights of national citizenship, in *Edwards v. California*[127] Justices Douglas and Jackson separately argued that the right of interstate travel is a right of national citizenship that is protected against state interference by the Privileges and Immunities Clause of the Fourteenth Amendment.[128] This position has not been subsequently embraced by any other Justice of the Supreme Court.

c. *The Commerce Clause*

The Commerce Clause[129] has been invoked as a source of the right of interstate travel by some Justices since the mid-1800s.[130] In *Edwards v. California*,[131] the Court noted that interstate travel has consistently been considered "commerce" within the meaning of the Commerce Clause.[132] Under Commerce Clause theory, state regulation that restrains the transportation of persons and property across state borders is prohibited.[133] The right of interstate travel, as protected by the Commerce Clause, is grounded in the principle that "the peo-

---

124. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. CONST. amend. XIV, § 1.

125. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

126. *Id.* at 79.

127. 314 U.S. 160 (1941).

128. *Id.* at 177 (Douglas, J., concurring); *Id.* at 181 (Jackson, J., concurring).

129. U.S. Const. art. 1, § 8, cl. 3. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ." *Id.*

130. Edwards v. California, 314 U.S. 160 (1941); Colgate v. Harvey, 296 U.S. 404, 445 (1935) (Stone, Brandeis, Cardozo, JJ., dissenting); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1868) (concurring opinion); The Passenger Cases, 48 U.S. (7 How.) 283 (1849).

131. 314 U.S. 160 (1941).

132. *Id.* at 172.

133. *Id.* at 173.

ples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[134]

d. *Inherent in the Federal Union*

An early argument that underlay Justice Douglas's concept of the right of interstate travel as a right of national citizenship was the notion that the right of interstate travel is so basic to the existence of a federal union that it is implied in the nation's very structure. In *Crandall v. Nevada*,[135] the Court explained that without such a right citizens would be unable to travel to the seat of government or its offices throughout the country.[136] Thus, the right of interstate travel flows directly from the establishment of the nation as a federal union.[137]

In *Shapiro v. Thompson*,[138] the Court stated that

> [t]his court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.[139]

Although specifically invoking the concepts of liberty and federalism, the Court found "no occasion to ascribe the source of this right of interstate travel to a particular constitutional provision."[140] Instead, the Court adopted Justice Stewart's notion that "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the constitution created."[141]

e. *Due Process Clauses*

Some Justices have considered the right of interstate travel an individual liberty interest protected by the Due Process

134. *Id.* at 174 (quoting Baldwin v. G.A.F. Seelig, 294 U.S. 511, 523 (1935)).
135. 73 U.S. (6 Wall.) 35 (1868).
136. *Id.* at 48.
137. *Id.* at 49. The Court in *Crandall* stated that since we are all U.S. citizens, we must be able to "pass and repass through every part of it without interruption. . . ." *Id.*
138. 394 U.S. 618 (1969).
139. *Id.* at 629.
140. *Id.* at 630.
141. *Id.* at 631 (quoting United States v. Guest, 383 U.S. 745, 757-58 (1966)).

Clauses.[142] In *Aptheker v. Secretary of State*,[143] the Court stated that the right of interstate travel is an aspect of the individual's liberty protected by the Due Process Clause of the Fifth Amendment.[144] Similarly, in *Kent v. Dulles*,[145] the Court grounded the right of interstate travel in the Fifth Amendment liberty interest.[146] However, both cases also involved significant First Amendment concerns and closely linked the right of interstate travel to rights of assembly and free association under the First Amendment.[147] Thus, the Court's invocation of substantive due process protections in these cases was rejected by the Third Circuit as precedent establishing such a basis for the right of interstate travel in *Lutz v. City of York*.[148]

To date, the only unifying aspect of the Supreme Court's discourse on the right of interstate travel is the recognition that such a right exists. Although the Supreme Court has consistently found a constitutionally protected right of interstate travel, the individual Justices have never reached consensus on the source of that right. It is important to recognize that the nature and source of the right of interstate travel have significant implications for the degree of protection from government interference that the right will be afforded.

2. *The Right of Intrastate Travel*

When we go out to the movies, few of us realize that we are exercising a constitutionally protected right. That right is not exercised in watching the movie, it is exercised in leaving the house and walking or driving to the theater. This "right to remove from one place to another according to inclination,"[149] will be referred to as the right of intrastate travel.

To understand the scope of the right of intrastate travel its doctrinal roots, if any, must be exposed. The arguments supporting the right of interstate travel will first be examined to see if they support the right of intrastate travel. In addition,

142. U.S. CONST. amends. V, XIV, § 1.
143. 378 U.S. 500 (1964).
144. *Id.* at 505 (citing Kent v. Dulles, 357 U.S. 116, 127 (1958)).
145. 357 U.S. 116 (1958).
146. *Id.* at 125.
147. *Aptheker*, 378 U.S. at 507; *Kent*, 357 U.S. at 126.
148. 899 F.2d 255, 267 (3d Cir. 1990).
149. Williams v. Fears, 179 U.S. 270, 274 (1900).

the case law provides significant, if somewhat opaque, support for the existence of the right of intrastate travel as a fundamental constitutional right.

Five constitutional theories supporting the right of interstate travel have been discussed. The first two theories, based on the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment, can be eliminated immediately. Both relate to state actions that discriminate against non-residents.[150] Any intrastate travel restriction such as a curfew applies equally to both residents and non-residents. Any attempt to distinguish among the two groups would run afoul of the right of interstate travel.

The Commerce Clause is similarly inapplicable, because a purely intrastate travel restriction like a curfew is facially neutral with regard to interstate commerce. Unless an intrastate travel restriction somehow imposed a burden on interstate commerce clearly excessive in relation to its local benefits, the Commerce Clause can not come into play.[151] The fourth theory, that the right of interstate travel is inherent in the federal union, has a logical simplicity that is equally applicable to intrastate travel. However, the lack of a firm textual anchor weakens the theory and does nothing to guide the Court in developing an appropriate test.

The final theory supporting the right of interstate travel, substantive due process under the Fifth and Fourteenth Amendments, is the only theory that fully supports the right of intrastate travel. This notoriously vague constitutional theory provides for heightened scrutiny of regulations that limit the exercise of "fundamental" constitutional rights.[152] To rank as fundamental, a right must be "implicit in the concept of ordered liberty."[153] The Court announced an alternative formulation in *Moore v. City of East Cleveland*,[154] recognizing as fundamental those rights "deeply rooted in the Nation's history and tradi-

150. *See supra* notes 118-128 and accompanying text.

151. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

152. *See* NOWAK, *supra* note 85, at 367.

153. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

154. 431 U.S. 494 (1977).

tion."[155] The inherent difficulty in applying these illuminating tests reflects the doctrine's natural law history.[156]

Fortunately, application of the substantive due process test to the right of intrastate travel is relatively easy. Unlike many other rights considered by the Court, such as reproductive rights or sexual preference, the right of intrastate travel does not arrive laden with moral judgments. Instead, the right of intrastate travel is essentially morally neutral.

Liberty, the yardstick established in the Constitution[157] and invoked by the Court in *Palko v. Connecticut*,[158] embodies the core value of the right of intrastate travel - the simple freedom to go where one wishes whenever one wishes to go. This includes the right to walk or drive to the store, relax in the park, or just talk with neighbors on the sidewalk. If these things are not an exercise of liberty, it is difficult to conceive what is. Thus, the right of intrastate travel is a fundamental right protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.

The concept of the right of intrastate travel is not often directly addressed in case law. The substance of the right, however, is assumed in uncountable opinions. For example, every opinion considering the validity of a police stop begins from the presumption of the right to be lawfully on the streets or in public places.[159] Some courts have also explicitly recognized the right of intrastate travel, typically invoking the language of substantive due process, in decisions concerning vagrancy laws, restrictions on the right to assemble, and curfew ordinances.

In *Territory of Hawaii v. Anduha*,[160] the United States Court of Appeals for the Ninth Circuit struck down a statute providing that anyone found habitually loafing, loitering, and/or

---

155. *Id.* at 503.

156. *See* NOWAK, *supra* note 85, at 367-69.

157. The Due Process Clauses of the Fifth and Fourteenth Amendments provide that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV, § 1.

158. 302 U.S. 319 (1937).

159. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968). "It must be recognized that whenever a police officer accosts an individual and restrains his *freedom to walk away*, he has 'seized' that person." *Id.* at 16 (emphasis added); Sibron v. New York, 392 U.S. 40 (1968) (applying the test announced in *Terry*).

160. 48 F.2d 171 (9th Cir. 1931).

idling in a public place would be guilty of a misdemeanor.[161] The court viewed the statute as a restraint on the right of intrastate travel.

> Personal liberty, which is guaranteed to every citizen under our constitution and laws, consists of the right of locomotion - to go where one pleases, and when, and to do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all other citizens.[162]

Based on this restraint, the court held that the statute was overbroad because it "trenche[d] upon the inalienable rights of the citizen to do what he will and when he will."[163]

While not calling it such, the Supreme Court similarly recognized the right of intrastate travel in *Papachristou v. Jacksonville*.[164] In striking down a Florida vagrancy ordinance providing that "common night walkers" and others would be guilty of a misdemeanor, the Court discussed the virtues of " 'wandering or strolling' from place to place."[165] The Court concluded that "these activities are historically part of the amenities of life as we have known them."[166]

The right of intrastate travel is also closely linked to the right of free assembly,[167] and the Supreme Court has implicitly recognized the right of intrastate travel in decisions grounded in that right. In *Hague v. Committee for Industrial Organization*,[168] the Court considered a challenge to an ordinance requiring a permit to conduct a meeting on public property.[169] The discussion illustrates the close ties between the right of intrastate travel and the rights of assembly and association:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out

---

161. *Id.*
162. *Id.* at 172 (quoting Pinkerton v. Verberg, 44 N.W. 579, 582 (Mich. 1889)).
163. *Id.* at 173.
164. 405 U.S. 156 (1972).
165. *Id.* at 164.
166. *Id.*
167. "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." De Jonge v. Oregon, 299 U.S. 353, 364 (1937).
168. 307 U.S. 496 (1939).
169. *Id.* at 501.

> of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all . . . but it must not, in the guise of regulation, be abridged or denied.[170]

This language highlights that the right of intrastate travel is critical to the exercise of the rights of assembly and association.[171]

Challenges to curfew ordinances provide additional judicial recognition of the right of intrastate travel. In upholding the constitutionality of "emergency" curfews, the Supreme Court has referred to the "freedom to come and to go" as a liberty that may "in the face of sudden danger, be temporarily limited or suspended."[172] Yet, none of these Supreme Court cases moves from general recognition of the right of intrastate travel in some form to the rigorous analysis of its constitutional source critical to understanding the degree of protection it will be afforded.

The nearest any Supreme Court Justice has come to ascribing a source to the right of intrastate travel came in an opinion with no precedential value.[173] In his dissent from the denial of certiorari in *Bykofsky v. Borough of Middletown*,[174] Justice Marshall forcefully presented his view that the right of intrastate travel is a fundamental right protected by the Constitution.[175] He wrote that "[t]he freedom to leave one's house and move about at will is 'of the very essence of a scheme of ordered liberty,' and hence is protected against state intrusions by the Due

170. *Id.* at 515 (opinion of Roberts & Jackson, JJ.).

171. Justice Douglas explicitly recognized this link in Stotland v. Pennsylvania, 398 U.S. 916, 921 (1970) (Douglas, J., dissenting). Considering the constitutionality of a mayoral proclamation forbidding public gatherings in groups of 12 or more, Justice Douglas asked whether the proclamation "transgress[es] one's constitutional right to freedom of movement which of course is essential to the exercise of First Amendment rights?" *Id.*

172. Korematsu v. United States, 323 U.S. 214, 231 (1944) (Roberts, J., dissenting).

173. Bykofsky v. Borough of Middletown, 429 U.S. 964 (1976) (denying petition for certiorari). The denial of a writ of certiorari is accorded no precedential value. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 919 (1950).

174. *Bykofsky*, 429 U.S. at 964 (Marshall, J., dissenting).

175. *Id.*

Process Clause of the Fourteenth Amendment."[176] As a fundamental right, Justice Marshall would evaluate any state regulation that intrudes on this right under "strict scrutiny," striking any law not "narrowly drawn" to further a "compelling state interest."[177]

Several lower courts have struck down curfew ordinances based on a fundamental right of intrastate travel,[178] but only the Third Circuit has rigorously analyzed the underpinnings of the right.[179] In *Lutz v. City of York*,[180] the court concluded that "no constitutional text other than the Due Process Clauses could possibly create a right of localized intrastate movement."[181] The court then analyzed the right of intrastate travel under the formulation of substantive due process advanced by Justice Scalia in *Michael H. v. Gerald D.*[182] Under this test, the Due Process Clauses substantively protect unenumerated rights " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[183] However, protection only extends to such rights when they are identified and evaluated "at the most specific level of generality possible."[184] The *Lutz* court applied this test to the right of intrastate travel, which it described as "the right to travel locally through public spaces and roadways,"[185] and concluded that even under Justice Scalia's narrow formulation of the substantive due process test, the right of intrastate travel is a fundamental right protected by the Due Process Clauses.[186]

What emerges from the cases is a right of intrastate travel that has neither clear textual support in the Constitution nor a

176. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

177. *Id.* at 965 (citing Roe v. Wade, 410 U.S. 113, 155-56 (1973)).

178. *See* Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. Unit A Oct. 1981); Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989); McCollester v. City of Keene, 586 F. Supp. 1381 (D.N.H. 1984).

179. Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990).

180. *Id.*

181. *Id.* at 267.

182. 491 U.S. 110 (1989). Although explicitly declining to adopt Justice Scalia's formulation of substantive due process, the court considered it the most restrictive interpretation currently advanced by a sitting justice and thus the most difficult to meet. *Lutz*, 899 F.2d at 268.

183. *Lutz*, 899 F.2d at 268 (quoting *Michael H.*, 491 U.S. at 122).

184. *Id.* (citing *Michael H.*, 491 U.S. at 126 n.6).

185. *Id.*

186. *Id.*

basis clearly articulated by the Supreme Court. The argument advanced by the Third Circuit in *Lutz*, however, provides powerful support for the existence of the right of intrastate travel. Of the constitutional bases invoked in support of the right of interstate travel, only the Due Process Clauses are applicable to intrastate travel. This is not surprising, because although both rights involve travel, the nature and effect of potential restrictions on intrastate travel are very different from those of restrictions on interstate travel.

Although modern substantive due process protections[187] are quite limited, there is no constitutional or logical basis for restriction to the specific areas that have been recognized to date.[188] Unenumerated fundamental rights are few, but it is extremely difficult to argue that those that have been recognized are the only unenumerated rights "implicit in the concept of ordered liberty,"[189] or "deeply rooted in this Nation's history and tradition."[190]

The very concept of liberty rests on the ability to control one's movement from place to place. It defies conception to state that an individual unable to walk the streets due to government action has any meaningful liberty.[191] Thus, the right of intrastate travel should be explicitly recognized as a fundamental right grounded in the liberty interest protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.

IV. Seeking a Remedy

Day-to-day police operations and even heightened police presence to address the possibility of unrest do not necessarily raise any implications for the rights of assembly or association,

187. As distinguished from the substantive due process decisions of the *Lochner*-era. *See* Lochner v. New York, 198 U.S. 45 (1905).

188. The Supreme Court has recognized six unenumerated fundamental rights. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.7, at 434-35 (2d ed. 1992). These six fundamental rights are: 1) Freedom of association; 2) The right to vote and participate in the electoral process; 3) The right of interstate travel; 4) The right to fairness in criminal proceedings; 5) The right to fairness in proceedings involving government deprivation of life, liberty, or property; and 6) The right to privacy. *Id.* at 435-36.

189. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

190. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

191. *See supra* note 170 and accompanying text.

or the right of intrastate travel. Police activity is a part of daily life, and most citizens are comforted by the knowledge of a police presence in the community. To the extent such police presence generates a sense of security in the community, it may even promote the exercise of these rights. However, at some point the magnitude and nature of a large-scale police operation undoubtedly has the effect of keeping people off the streets.

The notion that a massive paramilitary police operation will prevent people from exercising the right of intrastate travel would not surprise the LAPD. The stated goal of their gang sweeps is to "take people off the street."[192] Translated into the language of constitutional theory, sweeps are intended to "chill" the exercise of the right of intrastate travel. Thus, the sweep is intended to operate as a curfew, and when implemented on a sufficient scale it certainly achieves that intent.

That the intent is only to chill gang members' exercise of this right has no positive constitutional significance for two reasons. First, an individual does not shed his or her constitutional rights by joining a gang any more than by joining any group. Second, the chilling effect is not confined to gang members, but extends to other members of society who fear that they may be swept up along with those targeted by police. In addition, the intentional application to gang members may raise its own questions regarding potential infringement on associational rights under the First Amendment. Regardless of the intent of the police, however, the curfew effect of the sweep implicates both the First Amendment rights of assembly and association and the substantive due process right of intrastate travel.

Although use of the sweep has the effect of a curfew, the lack of a specific ordinance implementing travel restrictions creates complications for those seeking relief. In actions alleging constitutional violations resulting from the operation of a specific statute or ordinance it is relatively easy to apply the appropriate standard to evaluate the constitutionality of the legislation.[193] Here, however, the legal challenge would be directed at a specific government activity used to enforce a variety

192. Anderson, *supra* note 7.

193. *See* NOWAK, supra note 85, at 359.

of unquestionably constitutional criminal statutes. As a result, there is no specific rule to test against the constitutional standard. This problem may be addressed by challenging the police department policy of using sweeps as a law enforcement tactic, and seeking an injunction against the use of the sweep tactic.[194]

The constitutional rights implicated are individual rights. A challenge to the use of sweeps could conceivably be brought individually, or as a class action. The doctrine of standing would require that the individual plaintiff, or the individuals represented by the class, establish a "distinct and palpable injury" that is "fairly traceable" to the challenged conduct.[195] The problem of standing, however, may be overcome if necessary by raising First Amendment claims under the overbreadth doctrine.[196]

A. *Standards of Review*

The courts that have considered challenges to local travel restrictions under the First Amendment and the Due Process Clauses have generally not established consistent standards for reviewing such regulations.[197] Some of the decisions do not even effectively distinguish the grounds of the challenge, mixing together the analysis of First Amendment and intrastate travel claims.[198] If the claims are not distinguished, it is impossible to discern the tests applied to evaluate each claim.

As fundamental rights, the First Amendment claims raised in a challenge to the use of sweeps should be subjected to strict scrutiny.[199] The sweep, like a curfew, directly infringes on the residents' ability to exercise their rights of assembly and association. The district court's application of what is essentially a rational basis review in *Bykofsky v. Borough of Middletown*[200]

194. *See* Spring Garden United Neighbors, Inc. v. City of Philadelphia, 614 F. Supp. 1350 (E.D. Pa. 1985) (granting an injunction against police "sweeps" involving unconstitutional detentions and arrests following the murder of a police officer).

195. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 72 (1978).

196. *See* Thornhill v. Alabama, 310 U.S. 88 (1940); *see supra* note 96.

197. *See supra* notes 78-191 and accompanying text.

198. *See, e.g.*, Waters v. Barry, 711 F. Supp. 1125 (D.D.C. 1989).

199. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

200. 401 F. Supp. 1242 (M.D. Pa. 1975).

misconstrues the nature of the claim and is not sufficiently protective of the fundamental rights of assembly and association. The issue is not the regulation of expressive conduct, which is accorded a lower level of protection,[201] but rather the direct infringement of fundamental First Amendment rights.

Strict scrutiny can be properly applied whether an action is brought individually or as a class action. Although precise formulation of the test may vary, the basic requirement is that the challenged regulation (1) serve a compelling state interest, (2) be unrelated to the suppression of ideas (content-neutral), and (3) be the least restrictive alternative available that will accomplish the state interest.[202] Lesser scrutiny would be insufficient to protect the residents' rights under the First Amendment.

Claims based on the right of intrastate travel must be separately judged from those based on the First Amendment. The traditional standard of review for regulations implicating substantive due process rights is strict scrutiny.[203] However, the only court to explicitly recognize a right of intrastate travel rooted in the theory of substantive due process rejected the application of strict scrutiny.[204] The Third Circuit instead developed an intermediate level of scrutiny based on the time, place, and manner doctrine developed under the First Amendment.[205]

The court characterized the time, place, and manner doctrine as an intermediate level of scrutiny, requiring only that a content-neutral state regulation be "narrowly tailored to serve a significant government interest . . . while leaving open ample alternative channels of communication."[206] In addition, under this test the tailoring requirement does not require the government to use the least restrictive means available, as long is the chosen means are narrowly tailored.[207] The court reasoned that

201. United States v. O'Brien, 391 U.S. 367, 376 (1968).

202. Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

203. Lutz v. City of York, 899 F.2d 255, 268-69 (3d Cir. 1990) (citing Roe v. Wade, 410 U.S. 113, 155 (1973)).

204. *Id.* at 269.

205. *Id.* Under the time, place, and manner doctrine, intermediate level scrutiny is used to evaluate content-neutral restrictions that only regulate the time, place or manner of the expression. *Id.*

206. *Id.* (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293-94 (1984)).

207. *Id.* (citing Board of Trustees v. Fox, 492 U.S. 469, 478 (1989)).

if this intermediate scrutiny is sufficient to protect the enumerated right of speech, a similar test is clearly sufficient to protect the unenumerated right of intrastate travel.[208] Thus, the Third Circuit found that a regulation infringing on the right of intrastate travel "will be upheld if it is narrowly tailored to meet significant [government] objectives."[209]

The difficulty with a broad application of the Third Circuit's intermediate scrutiny test is the court's analogy to content-neutral speech restrictions. The analysis was based on a specific finding that the ordinance in question, a city ordinance that prohibited "cruising"[210] on specific streets, was closely analogous to a content-neutral restriction on speech in a public forum.[211] This analogy, however, is stretched in other factual situations such as a juvenile curfew ordinance or the effective curfew imposed by the use of sweeps. Such ordinances may not so easily be dismissed as nondiscriminatory, particularly when applied to specific neighborhoods within a larger metropolitan area.

A solution to this problem may be drawn from the Supreme Court's two-tier First Amendment jurisprudence. While content-neutral time, place, and manner restrictions on public speech are subject to intermediate scrutiny, all content-specific restrictions are subject to strict scrutiny.[212] A similar two-tier analysis may be appropriate in travel restriction cases. Thus, travel restrictions would be subject to strict scrutiny, unless the government could make a showing that such restrictions on the time and manner of travel are nondiscriminatory. Nondiscriminatory travel restrictions would be subject to only intermediate level scrutiny.

B. *The Remedy*

An additional problem created by the lack of a specific ordinance regarding the sweeps is that of the appropriate remedy.

---

208. *Id.*

209. *Id.* at 270.

210. "Cruising" as used in the ordinance consists of driving repeatedly around a loop of certain public roads in the city, which the court noted is "an apparently popular activity among local youth." *Id.* at 256.

211. *Id.* at 270.

212. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

Challenges to travel restrictions such as curfews typically seek to strike down the ordinance in question. Because there is only a police policy of using the sweep tactic, and no ordinance or statute for the court to consider, the action should seek a permanent injunction against the use of sweeps. Such an injunction must be carefully crafted to preserve the ability of the police to carry on legitimate law enforcement activities, and should allow even large-scale police maneuvers when supported by a showing of factual necessity.

First, an injunction must clearly define the prohibited activity. There are multiple variables that must be addressed in such a definition, including the number of officers, the location and size of the target community, and even the nature of the deployment of the officers. Although it may be clear that a sweep targeting a small community and involving one thousand officers with air and ground support infringes on the right of intrastate travel, it is difficult to draw the line where lesser operations cease to infringe on that right.

Second, the injunction should provide for exceptions to the prohibition based on a showing of need. The problems of urban crime are severe, and in some locations the fear of crime may itself inhibit the exercise of the right of intrastate travel. To allow for the need to use large-scale police operations in response to unrest or heightened criminal activity, the injunction should allow the police department to obtain an order allowing such operations. This type of order should only be granted on a showing of particularized need supported by factual affidavits.

V. Conclusion

Implemented on a certain scale, the sweep tactic implicates fundamental rights guaranteed by the First, Fifth, and Fourteenth Amendments of the Constitution. Such sweeps have the effect of a curfew, preventing residents and visitors from moving about in the target community. The courts, however, have not rigorously analyzed similar travel restrictions such as curfews, often failing to clearly distinguish the various rights implicated by the restrictions.

Although many decisions recognize the First Amendment impacts of travel restrictions, few have separately considered the substantive due process concerns that such restrictions

raise. Concern for the protection of the right of intrastate travel may ultimately reflect not only a basic respect for the rights guaranteed in the Constitution, but also the broader conceptual belief that the United States will not operate as a police state. The right of intrastate travel is so basic to the concept of liberty that it must be fully protected against encroachment by law enforcement activity.

The use of very aggressive police tactics such as the sweep raises profound concerns regarding the continued vitality of fundamental constitutional rights. The problems facing American cities create tensions within our society that continually test the rights guaranteed in the Constitution and the values underlying those rights. Yet to abandon these values in the face of difficulty will destroy this republic as certainly as the difficulties of crime and violence themselves.

*Jonathan Hangartner**

* To Carol and our families, without whom this would not have been possible.