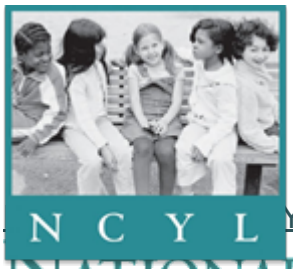

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PROLIFERATING CURFEW LAWS KEEP KIDS AT HOME, BUT FAIL TO CURB JUVENILE CRIME

By Angie Schwartz and Lucy Wang

Laws that require adolescents to be off the streets during certain hours are an old idea that is making a strong comeback. Dating back to the 1800s, youth curfew laws have seen a strong resurgence that began in the early 1980s and has steadily increased. A 2000 study found that the number of newly enacted curfew laws is rising at about 3 percent a year, and police officers report that enforcement of many long-standing curfew laws has intensified, due to growing concern about gangs and youth crime.[1]

As curfew laws gain popularity, youth advocates are working more actively to oppose them. They have increased court challenges to the laws' constitutionality, citing violations of youths' First Amendment rights to free expression and assembly, as well as to freedom of movement and due process. They also are actively working to educate communities about how these laws fail to reduce juvenile crime, and negatively impact youth.

Rationale for Curfew Laws

The growing popularity of curfew laws follows a simple line of reasoning: Keeping kids off the street is a straightforward and inexpensive way to reduce juvenile crime. The general public seems to support this belief. In a 1997 nationwide survey, 81 percent of respondents believed curfews to be "somewhat" effective, and 51 percent said they were "very" effective.[2] Many law enforcement and public officials support curfew laws as an effective tool in halting juvenile crime, and in protecting youth themselves from being victims of crime.[3] In another 1997 survey, 88 percent of mayors in cities with curfew laws believed restrictions on youth made the streets safer.[4]

For politicians, curfew laws are effective tools for conveying an image of being tough on law-and-order issues.[5]

Well-publicized gang violence and school shootings, like the Columbine High School shooting in Littleton, CO, play a role in the growing popularity of curfew laws. A national 2000 study that documented the increase in curfew laws noted, “This suggests frustration and fear by the public, wanting the police to ‘do something,’ even though there is the thinnest of rationales which might correlate curfew enforcement to prevention of mass school violence.”[6]

Juvenile rights advocates who seek to convince the public, law enforcement, and the courts that curfews are not the solution to delinquency, are impeded by broad public support for the laws. For instance, before Alaska’s curfew law was challenged in the courts, youth activists fought to get a special referendum vote on repealing the law, only to be defeated at the polls.[7] Later, the courts upheld the law as constitutional.[8]

Testimony from a recent court case, *Ramos v. Town of Vernon*, which challenged a curfew ordinance, illuminates how curfew laws draw public support. In this case, a Connecticut town imposed a curfew law largely in response to the murder of a 16-year-old boy. A town council member testified, “It seemed like this thing was starting to escalate and get to [the] point where it was non-controllable.”[9]

In actuality, the murder had nothing to do with nighttime juvenile crime and victimization, or even gang violence. The boy, a former gang member, was murdered in his own home during an afternoon robbery. But the fear of “this thing” motivated public support for a curfew law, despite the fact that it would have done nothing to prevent the crime that inspired it.

Disconnect Between Curfew Laws and Youth Crime

Youth advocates have long pointed to a disconnect between curfew laws and juvenile crime. *Youth Law News* first reported on the re-emergence of curfew laws as a purported solution to juvenile crime in 1983, and has continued to report on the issue with some frequency. The major studies that have been done show that curfews have a negligible effect in reducing juvenile crime.[10] Indeed, any undocumented, limited success of the laws is more than outweighed by the negative effects the laws have in labeling all kids delinquents.

Studies have shown that although most youth curfew laws are imposed during nighttime hours, juvenile crime peaks during unsupervised time in the late afternoon.[11] Policy

experts and youth advocates warn that juvenile crime rises when funding for summer employment programs for youth are reduced, leaving them without supervision during the afternoon.

Even during the late 1990s, when juvenile crime was at an all-time low, teens were believed to be a major cause of violent crime and the use of curfews increased and gained popularity.[12] In addition to the fact curfews were enacted during times that juvenile crime was low, other studies conducted during the 1990s showed that the use of curfews was not responsible for decreasing crime rates. For example, in the early 1990s, San Jose adopted a curfew law at the same time that San Francisco ceased enforcement of its curfew law. However, San Jose's law was shown to have no effect on youth crime, and the juvenile crime rate declined in San Francisco despite the fact that the curfew was no longer enforced.[13]

In addition to their failure to reduce juvenile crime, curfew laws invite unfair enforcement by allowing police officers to target young people based on their looks, race, or non-conforming views. Several studies have shown that children without both parents at home, and minority youth, are overrepresented among curfew violators.[14] Although the minority youth arrest rate may be explained by factors other than race, little research has been done to determine what role race plays in curfew enforcement.[15] Even if there are other explanations for these rates, the perceived inequalities in enforcement are damaging and divisive in communities, and undermine curfews' effectiveness.

Legal Challenges

Advocates have relied on several long-standing principles in arguing that curfew laws directed at youth are unconstitutional. Most frequently, challenges claim the laws infringe on the fundamental rights of youth and parents, violate the right to travel and the First Amendment right to free speech, and are overbroad or vague. Despite the numerous challenges and lower court decisions, the U.S. Supreme Court has never taken up the issue of juvenile curfew laws, leaving the states to sort the issues out for themselves, with increasingly mixed results. The federal circuit courts are divided on most of the issues presented by advocates, coming to different conclusions as to whether juveniles have a fundamental right to travel, whether curfew laws impact the rights of parents in raising their children, and how and when First Amendment rights are implicated under the ordinances. The courts consistently agree that minors have constitutional rights, although their conduct can be regulated to a greater degree than adults and states have a compelling interest in monitoring the activities of minors.[16] Therefore, whether or not an ordinance withstands

constitutional challenge depends on the particular language and exceptions of the ordinance.

Freedom of Speech

A common and recently successful challenge to curfew laws is their infringement on the First Amendment rights of minors, violating their freedom of expression, religion, and assembly—all of which have long been held to be fundamental rights. Until recently, these challenges rarely succeeded because the ordinances have consistently allowed an affirmative defense for First Amendment activities.

Recently, however, the 7th U.S. Circuit Court of Appeals found that such an affirmative defense in a curfew statute is unconstitutionally restrictive. In *Hodgkins v. Peterson*, the court distinguished between affirmative defenses and broad exceptions for First Amendment activities in its review of an Indiana curfew law; it held that a statute providing an affirmative defense was on its face unconstitutional because it was not narrowly tailored to serve a significant government purpose.[17] Otherwise, allowing an affirmative defense would require a minor to suffer arrest and the attendant consequences. Just the *threat* of arrest, the court reasoned, "unduly chills the exercise of a minor's First Amendment rights," and is therefore unconstitutional.[18]

After the *Hodgkins* case, many cities, including Chicago, moved toward a Dallas ordinance, which requires police officers to investigate before making a citation or arrest.[19] But the Dallas-style ordinances are also subject to First Amendment challenges.

These laws give rise to another kind of First Amendment claim made by advocates, that the exception is inadequate because it is vague and/or overbroad. This claim asserts that First Amendment exceptions and required police investigations only protect the rights of juveniles to the extent the police and juveniles share an understanding of what activities are exempt. Advocates argue that because the exception provides no guidance in this regard, the First Amendment exceptions are meaningless.

Under the "void for vagueness" theory, a statute is unconstitutional if the wording is so vague that a reasonable person cannot determine what activity is permissible and what is not.[20] Under the overbroad doctrine, statutes are unconstitutional if they criminalize too much innocent conduct, resulting in individuals refraining from constitutionally protected activities.[21] If an ordinance is too vague or broad, it conflicts with the due process clause of the Fourteenth Amendment, which requires adequate notice of conduct that is prohibited by the government, and for which a violator may be punished.[22]

Advocates claim exceptions for “First Amendment activities,” such as those in the Dallas ordinance, are unconstitutional because ordinary citizens do not know what makes up a First Amendment right. However, the courts have generally rejected this reasoning.[23] The Alaska Supreme Court summed up the position most courts have taken, finding that First Amendment rights simply are “what ordinary citizens know and comprehend.” [24] The court cited political protests and religious worship as examples that would clearly fall under this exception.

While there is a vast area between such core First Amendment activities and other kinds of protected speech, this ambiguity has generally not been sufficient to render the ordinances void for vagueness. Rather, the Alaska court and others presented with similar questions determined that the exceptions are sufficient, and that activities in the gray areas can be taken on a case-by-case basis.[25]

Equal Protection and Due Process

Another common challenge to curfew laws is that they violate the equal protection and due process rights of youth and their parents. These challenges draw on the presumption that all citizens have certain “fundamental rights,” among them the freedom of movement, speech, and the rights of parents to raise their children as they see fit.

Courts recognize that youth possess fundamental rights, just as adults do.[26] But, the courts also agree that the rights of youth are not absolute and are not equal to the rights of adults, and that preventing juvenile crime and protecting juveniles from becoming victims of crimes are important and compelling governmental interests.[27] Thus, the courts are split on how to balance the interest of the state with the rights of parents and youth.

Freedom of Movement

Advocates argue that youth possess a fundamental right to movement, which is infringed upon by curfew ordinances. While it has long been settled that individuals have a fundamental right to interstate travel, the federal courts are evenly split as to whether this also encompasses a right to intrastate travel or a right to free movement.[28] Further, even courts that have held that youth possess a constitutional right to free movement, are further divided as to what level of scrutiny— strict or intermediate—to apply to the ordinances.

Normally, a law that impinges on a fundamental right would be subject to strict scrutiny, meaning the law would have to achieve a compelling governmental interest and be narrowly tailored in meeting that purpose. Federal appeals courts in the 9th and 5th

circuits have used strict scrutiny in reviewing claims that the laws violated the fundamental rights of minors.[29]

Several other circuits have recognized that youth have a fundamental right to movement, but have applied intermediate scrutiny to curfew laws, reasoning that youth have different vulnerabilities and characteristics than adults and that a lesser level of review is required.[30] Under this lower standard, a state or locality must show that the law serves important governmental purposes, and that the means employed are substantially related to meeting those objectives.

The level of scrutiny applied, however, has not clearly determined the outcome of the cases. In *Ramos*, the 2nd Circuit recognized that youth possess a fundamental right to free movement and proceeded to strike down the ordinance using intermediate scrutiny.[31] Conversely, in *Qutb v. Strauss*, the 5th Circuit applied strict scrutiny to Dallas' curfew law, but upheld the law.[32]

In *Ramos*, the court concluded that the evidence presented by the town of Vernon failed to demonstrate the need for the curfew law.[33] The town failed to show the law was substantially related to its goals, because the curfew was aimed at reducing youth crime and victimization at night but the town did not present evidence that such crimes were in fact occurring during curfew hours.[34] The town's failure to produce this evidence is consistent with the fact that less than one-fifth of violent juvenile crime takes place during typical evening curfew hours.[35]

In *Qutb*, the court applied strict scrutiny to the fundamental rights claims asserted by the plaintiffs, but upheld the curfew. While the *Ramos* court focused on the evidence relied on by the town in constructing its law, the *Qutb* court determined that the affirmative defenses provided in the ordinance were the most important factor in determining if it was narrowly tailored. It reviewed the statistics presented by Dallas in support of the curfew, but did not require that the data establish a nocturnal juvenile crime problem. In *Qutb*, data needed only to show that juvenile crime was rising overall, and that the most violent crimes, regardless of the age of the perpetrator, were likely to occur late at night.[36] The court ignored the fact that no data were brought to suggest that juveniles were committing those violent crimes late at night.

The different judicial outcomes on the question of the fundamental rights of children raise important issues for advocates: (1) whether there is a fundamental right to freedom of

movement; (2) whether such a right extends to juveniles;[37] (3) what level of scrutiny should be applied; and (4) how much data is sufficient to satisfy the judicial test.

Until the U.S. Supreme Court weighs in, the answer to the first three questions will not be resolved. In the meantime, additional research on the differences between adult crime and juvenile crime, and the effectiveness of curfews in curbing crime, may bolster future challenges to curfews.

Right of Parents to Rear Their Children

Advocates frequently argue that curfew laws infringe on the fundamental rights of parents to rear their children as they see fit. Unlike minors' right to freedom of movement, the courts universally recognize the fundamental right of parents to raise their children.[38] However, the courts disagree as to whether curfew laws unduly burden parents, focusing on the degree to which the exceptions and defenses contained within the ordinances succeed in tailoring the laws to meet the state's interest.

Ordinances that contain exceptions allowing parents to provide permission for their children to be out at night have generally held up.[39] For example, the Dallas law, which has become a model for other jurisdictions, includes exceptions for when the parent is accompanying the child, or has authorized another adult to do so, or has signed a written, dated permission slip for the child to be on a specific errand. The same exceptions are included in the Alaska law upheld in *Treacy v. Municipality of Anchorage*.

However, a more narrow exception may not be sufficient. The 9th Circuit held in *Nunez v. City of San Diego* that an exception requiring parents to accompany the child after curfew hours was a violation of a parent's fundamental right.[40] It defeated parents' ability to give their children the opportunity to learn how to be responsible without adult supervision. Likewise, an Indiana ordinance is being challenged for failing to provide any exceptions allowing parents to give their children permission to be out during curfew hours.[41]

Courts Seek Balance Between Rights and Community Interest

Despite youth and parent advocacy efforts of the past two decades, there have been no holdings that curfew laws are altogether unconstitutional. Rather, courts agree that the constitutionality of curfew laws depends on the exceptions they contain. Even in cases where the laws have been struck down, the courts have been careful to note that if the ordinance were reconstructed, it might withstand future challenges.

The primary reason courts have been unwilling to hold curfews unconstitutional in general is that they universally agree that minors' conduct can be regulated to a greater degree

than adults, and that states have a compelling interest in monitoring the activities of minors.[42] Therefore, the constitutionality of any given statute turns on how well the locality has balanced the rights of parents and the more limited rights of youth with the community's interest in ensuring safety and order.

Despite the willingness of courts to uphold ordinances that contain sufficient exceptions, there still is little evidence that these laws are curbing delinquency. As noted in *Youth Law News* more than 20 years ago, a more effective approach to juvenile crime would be the development of effective after-school programs, rather than the enactment of laws that lock up children in their homes at night.

Dangerous Consequences

One of the most dangerous consequences of curfew laws may be their tendency to limit young people's development and alter their perception of society. As the federal appeals court stated in *Hodgkins*, "The strength of our democracy depends on citizenry that knows and understands its freedoms, exercises them responsibly, and guards them vigilantly."[43]

Curfew laws unnecessarily target and isolate juveniles, with potentially serious consequences. While only 6 percent of young people are responsible for two-thirds of all violent crimes committed by juveniles, curfew laws affect the lives of all youth.[44] As the Americans for a Society Free from Age Restrictions reminds us, "A society that forgets to distinguish innocence from guilt in its citizens may end up with citizens who no longer care about or respect the difference in their actions."[45]

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Lucy is a senior at Yale University and will be attending Yale Law School in the fall.

Footnotes

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[5] Bannister, et al., Bannister, supra n.1 at 5.

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[17] Hodgkins v. Peterson, 355 F.3d 1048, 1062 (7th Cir. 2004).

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[20] Hill v. Colorado, 530 U.S. 730, 732 (2000).

[21] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[22] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[23] Schleifer v. Schleifer, 159 F.3d 843, 853 (4th Cir., 1998).

[24] Treacy, 91 P.3d at 264.

[25] Schleifer, 159 F.3d 843, 853; Hutchins v. D.C., 188 F.3d 531, 546-548 (D.C. Cir. 1999).

[26] Hodgson v. Minnesota, 497 U.S. 417, 435 (1990).

[27] Belloti v. Baird, 443 U.S. 622, 634-36 (1979) (stating three reasons why children's rights are not coextensive with adults); McCollester v. City of Keene, 514 F. Supp. 1046, 1049 (D.N.H. 1981); Hutchins, 188 F.3d 531, 545-546; Qutb v. Strauss, 11 F.3d 488, 492 (5th Cir. 1993).

[28] Baden, supra n. 15, at 859-860.

[29] Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997); Qutb, 11 F.3d at 493.

[30] See, e.g. Schleifer v. City of Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998); Ramos, v. Town of Vernon, 353 F.3d, at 176-181.

[31] Ramos, 353 F.3d 171.

[32] Treacy, 91 P.3d 252.