Juvenile Curfews: Constitutional Concerns and Recommended Remedies

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Combating juvenile crime is one of the biggest challenges facing local governments across the country. Cities and counties employ many strategies to ensure that minors become neither perpetrators nor victims of crime. Juvenile curfews have proven to be popular crime-fighting tools, especially among cities.[1] However, curfews raise substantial concerns about the constitutional rights of minors and about parents' rights to raise their children in the manner they see fit.

North Carolina state appellate courts have not addressed whether curfews for minors are constitutionally valid. Consequently, local governments must look to other state courts and to federal courts for direction. Some of these courts have recognized the authority of local governments to enact curfew ordinances to combat juvenile crime, but other courts have struck down curfew ordinances that unnecessarily burden constitutional rights.[2]

A 1995 *Popular Government* article examined the body of law on juvenile curfews, discussed some practical concerns for local governments considering curfews, and offered recommendations to local governments seeking to enact curfew ordinances that would comply with the U.S. Constitution.[3] At that time, only two federal courts of appeals (also known as "circuit courts") had considered the constitutionality of juvenile curfews. Most curfew law originated in state courts. In the decade since, however, the body of federal case law has greatly expanded, rendering many state decisions obsolete.[4] Six

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federal circuit courts now have decided juvenile curfew cases. Rather than bringing uniformity to this area of law, however, the six courts have been unable to reach a consensus on nearly every legal issue in curfew cases.

This article updates the 1995 survey of curfew jurisprudence in the federal circuit courts. The article also offers recommendations for North Carolina cities and counties drafting juvenile curfew ordinances.

The article gives special attention to a 1998 decision of the Fourth Circuit Court of Appeals in the case of *Schleifer v. Charlottesville*.[5] In *Schleifer*, a group of minor children and their parents challenged the constitutionality of a curfew ordinance enacted by the city of Charlottesville, Virginia. They argued that the curfew infringed on the parents' rights to raise their children, overly burdened the minors' rights to freedom of movement and First Amendment expression, and was unconstitutionally vague. The Fourth Circuit Court rejected each of these challenges. In the absence of a decision by the U.S. Supreme Court, a decision by the Fourth Circuit Court is binding on Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

Authority

The General Assembly authorizes cities and counties in North Carolina to create curfew ordinances that apply to persons "of any age less than [eighteen]."[6] In practice, cities, not counties, typically create juvenile curfews.

Constitutional Challenges to Curfew Ordinances

Minors' Rights and Judicial Review

Plaintiffs most often challenge juvenile curfew ordinances as violations of minors' rights under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution.[7] When plaintiffs challenge a law on such grounds, courts subject the law to varying levels of scrutiny, depending on the nature of the legal right affected by the law.[8] If the law does not implicate an important or fundamental right, courts apply "rational-basis scrutiny," which requires merely that the law serve a legitimate governmental interest and be rationally related to achieving that interest. If the law does implicate a fundamental right, courts subject the law to "strict scrutiny," requiring that it serve a compelling governmental interest and be narrowly tailored to achieve that interest. If the law implicates a right that is is important but not fundamental, courts may select an intermediate level of scrutiny.

The U.S. Supreme Court has recognized that adults have a fundamental right under the Due Process Clause to engage in interstate travel.[9] Some federal circuit courts and state courts have recognized that adults also have a fundamental right under the Due Process Clause to intrastate travel, or a general right to free movement.[10] A curfew aimed at adults would burden such rights and therefore be subject to strict scrutiny.

A curfew that exempts a broad range of legitimate late-night conduct is much more likely to be legally permissible than one that does not.

A curfew aimed solely at minors, however, may be subject to more lenient review. In *Bellotti v. Baird*, the U.S. Supreme Court held that minors may be treated differently than adults under the U.S. Constitution because of "the particular vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[11] However, the Court did not explain exactly how minors' constitutional rights might be weighed differently if these factors were present in a given case. Subsequent decisions by lower courts have varied in their analysis of minors' constitutional rights based on the language in *Bellotti*. Some courts, including the Fourth Circuit Court in *Schleifer*, have interpreted *Bellotti* as meaning that, even though minors may have constitutional rights to free movement, curfews that burden such rights are subject only to some intermediate level of judicial review (less than strict scrutiny) if the *Bellotti* factors are present.[12] Other courts have held that curfews burdening minors' fundamental rights are subject to strict scrutiny but the presence of the *Bellotti* factors strengthens the government's compelling justification for them.[13] One federal circuit court has held that minors lack any constitutionally protected right to free movement. Thus it would subject curfews to the most lenient standard of judicial review.[14]

Minors' Due Process Right to Free Movement

To survive intermediate scrutiny in the Fourth Circuit Court, a juvenile curfew must serve an important governmental interest and be sufficiently tailored to achieve that interest.

Local governments often assert three main justifications for their juvenile curfews: (1) to protect the general public through a reduction in juvenile crime; (2) to promote minors' safety and well-being; and (3) to encourage and facilitate parental responsibility.[15] Generally, federal courts find the first two justifications, or interests, to be sufficiently important to support a juvenile curfew. Most courts, including the Fourth Circuit Court in *Schleifer*, have found the third interest to be important as well. They reason that parents and the government share a responsibility to protect minors. As long as state authority complements (rather than supplants) parental authority, its aims are legitimate. Other courts disagree, holding that a city cannot strengthen parental responsibility by divesting parents of decision-making authority and reserving that power for itself.[16]

If a court finds the city's proffered interests to be sufficiently important, it must determine whether the terms of the curfew are sufficiently tailored to achieve those interests. Courts generally look at two factors to answer this question.

First, a city must present evidence that a juvenile crime problem exists and that its curfew will alleviate the problem in a direct and material way. For example, if a city can document a problem with juvenile crime only after 11:00 P.M., a curfew that begins at 9:00 P.M. may be too broad and thus not sufficiently tailored to achieve the city's important interests. Although courts tend to defer

to local fact-finding in this area, they still require cities to present statistical or other evidence in support of their curfews.[17]

Second, the curfew must be no more restrictive than necessary to achieve the government's interests. A curfew's exceptions are the most important elements in addressing this factor. If a curfew exempts from its reach a broad range of legitimate late-night conduct, it is much more likely to be legally permissible than if it does not exempt such conduct. Such exceptions may include constitutionally protected activities like freedom of speech or religious exercise, civic activities, activities undertaken with adult supervision or permission, employment activities, and emergency situations.

Parents' Due Process Right to Raise Their Children

The U.S. Supreme Court has consistently recognized that parents have a fundamental right under the Due Process Clause to raise their children in the manner they see fit, without undue influence from the government.[18] Any governmental action that burdens this right is subject to strict scrutiny, and a curfew may be unconstitutionally broad if it does not allow an exception for minors who are out during curfew hours with permission from their parents. Thus, curfew ordinances raise two inquiries in this area: First, does a curfew implicate parents' fundamental rights to raise their children? Second, if so, does the curfew survive strict scrutiny?

The Fourth Circuit Court held in *Schleifer* that the Charlotteville curfew did not implicate parents' fundamental rights. Rather than recognizing a broad right of parents to control their children's movement, the court defined the right at issue narrowly, as the right to allow "young children [to] remain[] unaccompanied on the streets late at night . . ."[19] The court then explained that this right was not the type of "intimate family decision" that was entitled to due process protection.[20] Rather, the curfew was a permissible child welfare regulation that did not implicate parents' rights.

Other federal circuit courts have disagreed, holding that curfews do implicate parents' due process rights.[21] Even so, curfews may be valid in those circuits if they survive strict scrutiny. As noted earlier, courts universally recognize that cities have compelling interests in protecting the public, including ensuring the safety and well-being of minors. Thus the first prong of the strict scrutiny test is satisfied, and the question becomes whether the curfew is narrowly tailored to achieve those interests. On this test, courts are adamant that curfews are narrowly tailored only if they complement or enhance parental authority, rather than challenge or usurp it.[22] A local government can achieve the desired balance by including numerous exceptions for specified parent-approved activities such as employment and family errands, or perhaps by including a general exception for any activity undertaken with parental permission. These exceptions guarantee that a curfew makes minimal—and permissible—intrusions into the protected realm of family decision-making.[23]

Challenges of Vagueness

In addition to protecting fundamental rights, due process requires that criminal laws be consistent with notions of fairness. Such laws must clearly define

the conduct they prohibit so that the public has sufficient notice regarding their reach.[24] If a curfew ordinance does not provide sufficient notice of the conduct it prohibits, courts may consider it unconstitutionally vague.

Curfew ordinances have been challenged as vague on a number of grounds. A challenge of vagueness is likely to be successful if the ordinance does not provide adequate notice of the times during which it is enforced. For example, if the curfew lasts from "dusk until dawn," or if it begins at a certain time in the evening but has no ending time the following morning, a court is likely to find the ordinance invalid.[25] Plaintiffs also have challenged curfew provisions involving the definition of the prohibited conduct. For example, an ordinance that prohibits "remaining in a public place" during curfew hours must define "remain" and "public place" with sufficient specificity that minors will be on notice regarding what conduct is prohibited and where.[26] Similarly, an ordinance that exempts minors engaged in a "civic activity" or involved in an "emergency" must sufficiently define these terms.[27]

Finally, plaintiffs have challenged curfew ordinances as vague with regard to their First Amendment exceptions.[28] Many ordinances exempt minors who are engaged in protected First Amendment activity. Plaintiffs have argued that this type of exception is vague because the actual boundaries of First Amendment protections are unclear. In the D.C. Circuit Court, for example, plaintiffs have unsuccessfully claimed that "juveniles would need to be 'constitutional scholars' to know what activities were forbidden[,] and . . . police officers untrained in the intricacies of the First Amendment will, in their unguided discretion, enforce the curfew unconstitutionally."[29] The Fourth Circuit Court rejected a similar challenge in *Schleifer*, finding that Charlottesville's efforts to respect the First Amendment were laudable and that any marginal cases could be resolved on a case-by-case basis.[30] At least one judge on the Fourth Circuit Court disagreed with this holding, however, claiming that because of the uncertainty of the reach of First Amendment protection, a basic exception for "First Amendment activity" unduly chills the exercise of potentially protected conduct.[31]

To be narrowly tailored, curfews must complement or enhance parental authority, not challenge or usurp it.

Other First Amendment Concerns

Governmental actions that burden protected First Amendment speech may nonetheless be valid if they merely place reasonable restrictions on the time, place, and manner of such speech. The U.S. Supreme Court has held that, to be reasonable, such restrictions must "(1) [be] content neutral, (2) [be] narrowly tailored to serve a significant governmental interest, and (3) allow for ample alternative channels for . . . expression."[32]

If a curfew ordinance does not contain a First Amendment exception, it is almost certain to fail this test. The Ninth Circuit Court, for example, has held that if an ordinance lacks "a robust, or even minimal, First Amendment exception to permit minors to express themselves during curfew hours," it does not meet requirement 2.[33]

Even if a curfew ordinance does contain a First Amendment exception, it still may fail to meet requirement 2. According to the Seventh Circuit Court, a curfew ordinance is more restrictive than necessary if it does not impose a duty on police officers to investigate whether a minor is engaged in protected First Amendment activity.[34] Consider, for example, a minor who, during curfew hours, attends a political protest. The activity is clearly protected by the First Amendment. A police officer sees the minor walking home from the protest. If the officer has no duty to investigate the reasons for the minor's violation of the curfew, the officer may arrest the minor and force her to assert her First Amendment defense in court.[35] Although the minor may ultimately avoid liability, the Seventh Circuit Court recognized that the mere threat of arrest would impermissibly chill protected expression. The Fourth Circuit Court has not considered a similar challenge.

Supreme Court Involvement

In 1976 the U.S. Supreme Court declined to review a Third Circuit Court ruling that upheld a juvenile curfew ordinance.[36] Justice Thurgood Marshall disagreed with the Court's decision to pass on the case. He believed that Supreme Court precedent was unclear concerning the extent to which the Constitution protects minors' rights, and he would have taken the case in order to resolve this issue.

Curfew jurisprudence since 1976 has not resolved the issue. In fact, the preceding discussion demonstrates that there are many conflicts in the federal courts regarding issues in juvenile curfew law, including whether juvenile curfews implicate the fundamental due process rights of minors or their parents; how those rights should be defined; what the appropriate level of judicial scrutiny is; and how adequate curfew exceptions are, especially those exempting protected First Amendment activity.

These types of disagreements in decisions of the various federal circuit courts is generally a good indicator that the U.S. Supreme Court will agree to hear a case in order to resolve the disagreements. The Court, however, has let them stand. It declined to review a juvenile curfew case in 1993.[37] It then declined to review the Fourth Circuit Court's 1998 holding in *Schleifer*.[38]

Recommended Remedies

Although the Fourth Circuit Court upheld a juvenile curfew ordinance in *Schleifer*, the court would not necessarily uphold an identical curfew ordinance in a differently situated city or a more burdensome curfew ordinance in the same city. The court viewed the challenged Charlottesville ordinance as "among the most modest and lenient of the myriad curfew laws implemented nationwide."[39] However, at least one judge on the Fourth Circuit Court and majority panels on other federal circuit courts have strongly asserted that certain types of curfew ordinances are unconstitutional. Thus a city or a county considering a curfew for juvenile crime control should be aware that any ordinance it creates could be vulnerable to legal challenge. It should look to the

opinions of courts nationwide to help craft a regulation that satisfies constitutional due process, equal protection, and First Amendment requirements.[40]

Following are recommendations to local governments seeking to enact a juvenile curfew ordinance that is constitutionally defensible. Any such ordinance should include the following components: an explanation of the need for a curfew, definitions of terms, a statement of the target population and the prohibited conduct, and a list of exceptions to the curfew.

The Need for a Curfew

This introductory section should include two important features: a statement of the purposes of the curfew, and the reasons for its necessity; and a statement of the facts that led the city to conclude that the curfew and its specific terms are needed.

Many ordinances have framed their purposes in terms similar to the *Bellotti* factors, listed earlier. The Charlottesville ordinance, for example, stated its purposes as follows: "to (i) promote the general welfare and protect the general public through the reduction of juvenile violence and crime within the city; (ii) promote the safety and well-being of the city's youngest citizens, persons under the age of seventeen (17), whose inexperience renders them particularly vulnerable to becoming participants in unlawful activities . . . ; and (iii) foster and strengthen parental responsibility for children."[41] The first two purposes have been almost universally recognized as important or compelling governmental interests. However, the third purpose has been attacked by a number of judges who think that curfews threaten to usurp, rather than supplement, parental authority. That would constitute a violation of parents' due process rights to raise their children in the manner they see fit.[42] Thus, any curfew ordinance should clearly state that it is meant only to supplement or enhance parental authority while respecting parents' fundamental rights to rear their children. More important, the curfew ordinance must actually strike this balance when implemented. An ordinance that offers myriad exceptions for parent-approved activities is more likely to achieve this constitutional balance than one that does not.

Regarding facts to support the curfew ordinance, a city should consider a wide range of data—for example, local police records, including the ages of offenders and victims, and the times and locations of crimes; national crime statistics; crime statistics from other localities that have implemented juvenile curfews, including pre- and post-curfew crime statistics; opinion surveys; and news reports.[43]

Although all this information is relevant and important to establishing the need for a curfew, courts will require that cities carefully consider local data and sufficiently tailor their curfew ordinances to remedy a documented local problem. Consideration of some over-inclusive statistics may be acceptable. For example, the curfew ordinance challenged in the D.C. Circuit Court case *Hutchins v. District of Columbia* affected only minors age sixteen and younger. The court held that, to support the curfew, the city could rely on arrest

statistics that included seventeen-year-olds, even though inclusion of those statistics overstated the juvenile crime problem.[44]

Reliance on underinclusive or incomplete statistics poses a more difficult problem. In *Ramos v. Vernon*, for example, the Second Circuit Court rejected the evidentiary basis for a curfew ordinance in Vernon, Connecticut. The town had received complaints about young people gathering on the streets, but no such complaints came during curfew hours. In fact, there was no suggestion that the groups of minors ever engaged in criminal activity. Even if there had been a crime problem, the town never showed that the juveniles targeted by the curfew were the perpetrators or the victims of such crime.[45]

In general, the closer the fit between the proven problem and the chosen remedy, the greater the likelihood that a curfew ordinance will be constitutionally permissible.

Definitions of Terms

Four terms commonly used in curfew ordinances have been challenged on grounds of vagueness: "remain," "civic organization," "emergency," and "First Amendment activity." Defining these terms carefully and thoroughly may help insulate a curfew ordinance from such challenges.

"*Remain*": Ordinances typically make it illegal for minors to "remain" in public places during curfew hours. The word should be defined to give minors sufficient notice of the exact type of conduct prohibited by the curfew ordinance. The Ninth Circuit Court, for example, has held that terms such as "loiter, idle, wander, stroll, or play" are impermissibly vague and do not give adequate notice of the type of conduct prohibited.[46] No other circuit court, however, has considered a similar challenge of vagueness.

"*Civic organization*": Ordinances generally make an exception for minors attending an activity sponsored by a "civic organization." Plaintiffs have claimed that "civic" is vague. Courts have universally disagreed, and the Fourth Circuit Court has assigned "civic" its common definition of "concerned with or contributory to the general welfare and the betterment of life for the citizenry of a community."[47] This definition could be incorporated into any curfew ordinance containing a civic exception.

"*Emergency*": Many ordinances allow an exception for minors experiencing an emergency. Plaintiffs have argued that "emergency" is vague. Again courts have universally disagreed, especially if the ordinance contains a detailed definition of "emergency." The Fourth Circuit Court in *Schleifer*, for example, upheld Charlottesville's curfew ordinance, which defined the term as "unforeseen circumstances, or the status or condition resulting therefrom, requiring immediate action to safeguard life, limb or property. The term includes, but is not limited to, fires, natural disasters, automobile accidents, or other similar circumstances."[48] This definition could be incorporated into any curfew ordinance offering an emergency exception.

"*First Amendment activity*": As noted earlier, at least one judge on the Fourth Circuit Court thinks that because the exact boundaries of First Amendment protection are unclear, an exception for minors exercising protected "First Amendment activity" is impermissibly vague. This perspective presents an interesting dilemma. On the one hand, attempting to define "First Amendment activity" adequately may be a hopeless exercise. On the other hand, federal case law makes clear that a curfew ordinance must contain an exception for protected First Amendment activity in order to pass constitutional muster. Because of this dilemma, a better approach than defining "First Amendment activity" may be to recognize the inherent vagueness of a First Amendment exception and take steps to ensure that the vagueness does not impermissibly infringe on minors' First Amendment rights. This approach is discussed at greater length later in this article.

The Target Population and the Prohibited Conduct

This section should include (1) a statement of the people to whom the curfew applies, (2) a description of the prohibited conduct, (3) the locations where such conduct is prohibited, and (4) the hours during which such conduct is prohibited.

Part 1 of this section should clearly state whether the curfew applies to all minors (excluding emancipated minors) or simply to minors under a certain age. Charlottesville's curfew ordinance defined "minor" as "any person under seventeen (17) years of age who has not been emancipated by court order . . ."[49] Although legislative bodies have some discretion in defining the targeted population, a city should have sufficient evidence, or other important or compelling reasons, to support the application of the curfew to every age group in the targeted population.[50]

As to parts 2 and 3, Charlottesville's ordinance describes the prohibited conduct and related locations as follows: "It shall be unlawful for a minor, during curfew hours, to remain in or upon any public place within the city, to remain in any motor vehicle operating or parked therein or thereon, or to remain in or upon the premises of any establishment within the city."[51]

As noted earlier, any vague terms in parts 2 and 3, such as "remain," "public place," or "establishment," should be sufficiently defined in the definitions section of the ordinance. Doing so ensures that minors have sufficient notice regarding the exact nature of the conduct prohibited by a curfew ordinance. In the Charlottesville ordinance, "remain" is defined as "(1) to stay or linger at or upon a place; and/or (2) to fail to leave a place when requested to do so by an officer or by the owner, operator or other person in control of that place." "Public place" is defined as "any place to which the public or a substantial group of the public has access, including, but not limited to: streets, highways, roads, sidewalks, alleys, avenues, parks, and/or the common areas of schools, hospitals, apartment houses, office buildings, transportation facilities and shops." "Establishment" means "any privately-owned place of business within the city operated for a profit, to which the public is invited, including, but not limited to any place of amusement or entertainment."[52]

Part 4 must include both starting and ending times for the curfew. These times should be presented in HH:MM format (for example, 11:00), rather than in general terms such as "dusk" or "sun-

rise." Curfew hours are generally left to legislative discretion, as long as there is sufficient statistical evidence or other important or compelling reasons to support applying the curfew during its stated hours. Some judges, however, may express more concern with long-running curfews (such as 9:00 P.M.–6:00 A.M.) than with curfews covering only short, late-night periods (say, 12:00 A.M.–5:00 A.M.), even if juvenile crime is a documented problem at all hours.[53] In *Schleifer*, for example, the Charlottesville curfew upheld by the Fourth Circuit Court began at 12:01 A.M. on weeknights and 1:00 A.M. on weekend nights, and ended at 5:00 each morning.[54]

Juvenile curfew ordinances must satisfy constitutional due process, equal protection, and First Amendment standards.

With regard to each of these sections, one judge on the D.C. Circuit Court has offered some valuable advice: A city should not adopt another city's ordinance "wholesale." Rather, it should tailor the ordinance to its specific circumstances. Indeed, wrote the judge, "[t]he need for substantial tailoring precludes off-the-rack solutions . . ."[55]

Exceptions to the Curfew

A curfew ordinance's exceptions are the most important factor in ensuring that it is no more restrictive than necessary to achieve a city's interests in controlling juvenile crime.[56] Eight common exceptions are found in many curfew laws. Every federal circuit court that has reviewed a curfew ordinance containing these eight exceptions has upheld it.[57] Every federal circuit court that has considered a curfew ordinance lacking all eight exceptions has struck it down.[58] This is not to say that all the exceptions are constitutionally mandated, although some, such as the First Amendment exception, clearly are. Rather, this list of exceptions can serve as a guide to cities seeking to enact an ordinance that complies with the U.S. Constitution but is not impermissibly restrictive.

The eight standard exceptions are as follows. All these exceptions appear in the Charlottesville ordinance, with minor modifications.

1. *The minor is involved in an emergency*. The term "emergency" should be sufficiently defined.

2. *The minor is engaged in an employment activity, or is going to or returning home from such activity, without detour or stop*.

3. *The minor is on the sidewalk directly abutting a place where he or she resides with a parent*. This exception may be written to allow a minor also to be on a neighbor's property, with the permission of the neighbor.

4. *The minor is attending an activity sponsored by a school, religious, or civic organization, or by a public organization or agency, or by a similar organization or entity, as long as the activity is supervised by adults; and/or the minor is going to or returning home from such activity, without detour or stop*. The term "civic organization" should be sufficiently defined.

5. *The minor is accompanied by a parent.*

6. *The minor is on an errand at the direction of a parent*. This exception may be written to include other requirements—for example, that the minor have in his or her possession written permission from a parent, which should include the parent's contact information and a description of the authorized errand. Alternatively, this and the preceding exception might be broadened to exempt any minor who is in public during curfew hours, for whatever reason, as long as the minor has parental permission.

7. *The minor is involved in interstate travel through, or beginning or ending in, the City of X (the city enacting the ordinance)*. The U.S. Supreme Court has recognized a fundamental right to interstate travel, suggesting that such an exception may be constitutionally mandated. The exception also may exempt minors involved in intrastate travel. The Supreme Court has never recognized a fundamental right to intrastate travel. However, some federal circuit courts and some state courts recognize such a right. Neither the Fourth Circuit Court nor North Carolina state courts have issued an opinion on this question.[59]

8. *The minor is exercising First Amendment rights protected by the United States Constitution*. This exception has been a contentious issue in curfew cases. The only clear holding from the federal cases is that a curfew ordinance must have a First Amendment exception. Most courts have upheld general First Amendment exceptions. However, as noted earlier, some judges think that a standard exception for "protected First Amendment activity" is unconstitutionally vague because police and minors (and courts, for that matter) simply do not know the full extent of First Amendment protection. Thus these exceptions carry too great a threat of unduly chilling expression that is constitutionally protected. Unfortunately these judges have provided little guidance on how to fashion a valid First Amendment exception.

Still, experimentation is possible. Rather than trying to craft an exception that would not be vague, it may be more realistic to acknowledge the inherent vagueness of a First Amendment exception and take steps to ensure that such vagueness does not pose a constitutional problem. The Seventh Circuit Court has suggested that this objective may be achieved by imposing an affirmative duty on a police officer to investigate the reasons for a minor's violation of the curfew.[60] For example, a city could (1) require an officer to conduct a reasonable investigation to determine whether a minor in violation of the curfew is shielded by one of the exceptions, and (2) forbid an officer from enforcing the curfew unless the officer has probable cause to believe that the minor is violating the curfew and is not shielded by one of the exceptions.

By imposing an affirmative duty on the officer to investigate and by bringing the existence of exceptions within the probable cause requirement, this proposal may significantly reduce the threat of chilled speech. Rather than merely enforcing the curfew and requiring a minor to assert his or her First Amendment defense in court, an officer would have to consider the

minor's First Amendment rights while the minor is still on the streets. Although chilling of protected speech remains a concern, this approach is more deferential to First Amendment rights and may give local police departments an incentive to provide training for officers regarding the scope of protected First Amendment activity.

Practical Considerations

A local government considering a juvenile curfew ordinance should confer with law enforcement agencies regarding how to provide for custody and penalties for minors. Minors who are at least age sixteen but not yet age eighteen may be punished as adults in North Carolina. For minors in this age group, a curfew ordinance may punish a violation with a fine or imprisonment, as otherwise permitted by law. However, the North Carolina Juvenile Code does not permit minors under age sixteen to be punished by a fine or imprisonment, though they still may be subject to delinquency proceedings.[61] For these minors, a curfew ordinance may authorize law enforcement officers to take temporary custody of them.[62]

To support a curfew ordinance, a city should consider a wide range of data—local police records, national crime statistics, crime statistics from localities that have implemented juvenile curfews, opinion surveys, news reports, and more.

A local government also may face significant practical problems in enforcing a juvenile curfew. For example, does the local law enforcement agency have adequate resources to enforce a curfew for minors effectively? Are law enforcement officers provided with sufficient training to understand the curfew ordinance and to enforce it correctly? Typically a local government will want to know that it has the support of its local law enforcement agency in creating a curfew ordinance. Additionally, does the local community support a curfew? In the absence of widespread support, a government may be more vulnerable to legal challenge from those who oppose the ordinance (though local support alone cannot save an otherwise unconstitutional curfew ordinance).

Summary

This article summarizes relevant federal case law concerning juvenile curfew ordinances. Such ordinances raise a number of constitutional concerns. First, they may burden minors' due process and equal protection rights to free movement. For this burden to be constitutionally acceptable, a city must demonstrate that its curfew serves an important or compelling interest. Further, the city must justify its curfew with statistical evidence and must exempt a sufficient amount of legitimate nighttime activity.

Second, curfews may infringe on parents' due process rights to raise their children in the manner they see fit. Curfews must enhance, rather than supplant, parental decision-making. Broad exceptions for parent-approved conduct may ensure that this requirement is met.

Third, a curfew ordinance must be carefully drafted to put minors on sufficient notice regarding the exact type of conduct it prohibits. Any vagueness about the ordinance's reach, especially in the area of First Amendment expression, may raise constitutional concerns.

Finally, curfews may impermissibly infringe on minors' First Amendment rights unless the restrictions on the time, place, and manner of First Amendment expression are reasonable. This ensures that a curfew will not impermissibly chill the exercise of protected First Amendment freedoms.

Although federal case law is inconsistent, it provides valuable guidance to cities seeking to draft juvenile curfew ordinances that comply with the U.S. Constitution. Every curfew ordinance should contain a section stating why a curfew is necessary. The section should be based on the city's specific crime problems. The ordinance should clearly and specifically define the population to whom the ordinance applies, the type of conduct it prohibits, the locations where such conduct is prohibited, and the times during which such conduct is prohibited. Also, the ordinance should include a broad range of exceptions for legitimate nighttime conduct. These exceptions ensure that the curfew is no more burdensome than necessary to achieve the government's important or compelling interests in juvenile crime control.

Notes

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1. *See* U.S. Conference of Mayors, *A Status Report on Youth Curfews in American Cities* (Washington, D.C.: U.S. Conference of Mayors, 1997). Also available online at news/publications/curfew.htm. The report discusses the experiences of 347 U.S. cities with curfews for minors.

2. For another survey of jurisprudence on this issue, *see* Craig Hemmens and Katherine Bennett, "Juvenile Curfews and the Courts: Judicial Response to a Not-So-New Crime Control Strategy," *Crime and Delinquency* 45 (1999): 99–121.

Here and elsewhere, I use the terms "implicate," "burden," and "infringe on" advisedly. A government action that in any way affects a constitutional right implicates that right. The government may then burden the constitutional right as long as its action can pass scrutiny by the courts. "Infringe on" suggests a violation of the constitutional right—a burdening that the government cannot justify.

3. *See* Thomas H. Thornburg, "Curfews for Minors and Other Special Responses to Crime," *Popular Government,* Fall 1995, pp. 2–13. This article is available as a reprint from the School of Government's publications office. Call 919.966.4119 or go to www.sogpubs.unc.edu/singlebook.php?id=121.

4. State court cases involving challenges based solely on state law, however, remain controlling in the respective states, as long as state law provides equal or greater protection than the U.S. Constitution.

5. Schleifer v. Charlottesville, 159 F.3d 843 (4th Cir. 1998).

6. N.C. Gen. Stat. §§ 153A-142 (hereinafter G.S.) (authorizing counties to enact curfew ordinances), 160A-198 (authorizing cities to enact curfew ordinances).

7. U.S. Const. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

8. In due process challenges, courts base the level of scrutiny on the nature of the legal right implicated by the law. In equal protection challenges, courts do the same but also look to whether the classification drawn by the statute disadvantages a "suspect class" of people. The U.S. Supreme Court has held that

age is not a suspect class. *See* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991). Juvenile curfews are thus not subject to a higher level of scrutiny merely because they affect minors as a class. Therefore, the appropriate level of scrutiny in both due process and equal protection challenges to juvenile curfews is determined by the same factor: the nature of the legal right implicated by the statute.

9. *See, e.g.*, United States v. Guest, 383 U.S. 745, 757 (1966) ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union").

10. *See, e.g.*, Ramos v. Vernon, 353 F.3d 171, 176 (2d. Cir. 2003) ("The right to intrastate travel, or what we sometimes will refer to as the right to free movement, has been recognized in this circuit").

11. Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion).

12. *See, e.g.*, Schleifer v. Charlottesville, 159 F.3d 843, 847 (4th Cir. 1998).

13. *See, e.g.*, Qutb v. Strauss, 11 F.3d 488, 492 & n.6 (5th Cir. 1993).

14. *See* Hutchins v. District of Columbia, 188 F.3d 531, 536–39 (D.C. Cir. 1999) (en banc). *See also Ramos*, 353 F.3d at 176–77 (discussing the three approaches to judicial review of juvenile curfews by federal circuit courts).

15. *See Schleifer*, 159 F.3d at 846. *See also, e.g.*, *Ramos*, 353 F.3d at 173.

16. *See, e.g.*, *Ramos*, 353 F.3d at 182–83; *Schleifer*, 159 F.3d at 867–68 (Michael, J., dissenting).

17. *See, e.g., Schleifer,* 159 F.3d at 849. The Fourth Circuit Court in that case wrote, "[T]he curfew must be shown to be a meaningful step towards solving a real, not fanciful problem . . ." *Id*. (alteration added). To support its point, the court cited the decision in *Turner Broadcasting System v. FCC,* in which the U.S. Supreme Court said, "[The government] must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broad. Sys. v. FCC, 512 U.S. 622, 664 (1994) (alteration added) (citation omitted).

18. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

19. *Schleifer*, 159 F.3d at 852 (alterations added).

20. *Id.* at 853.

21. *See, e.g.*, Nunez v. San Diego, 114 F.3d 935, 951–52 (9th Cir. 1997) ("The curfew is, quite simply, an exercise of sweeping state control irrespective of parents' wishes. Without proper justification, it violates upon [*sic*] the fundamental right to rear children without undue interference").

22. *See id.*; Ramos v. Vernon, 353 F.3d 171, 182–83 (2d Cir. 2003).

23. *See* Qutb v. Strauss, 11 F.3d 488, 495–96 (5th Cir. 1993).

24. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

25. *See* Naprstek v. Norwich, 545 F.2d 815 (2d Cir. 1976).

26. *See Nunez*, 114 F.3d at 940–43.

27. *See, e.g.*, Hutchins v. District of Columbia, 188 F.3d 531, 547 (D.C. Cir. 1999) (en banc).

28. U.S. CONST. amend. I ("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 peaceably to assemble, and to petition the government for a redress of grievances").

29. *Hutchins*, 188 F.3d at 546 (alteration added).

30. Schleifer v. Charlottesville, 159 F.3d 843, 853–54 (4th Cir. 1998).

31. *Id.* at 871 (Michael, J., dissenting).

32. Hodgkins v. Peterson, 355 F.3d 1048, 1059 (7th Cir. 2004) (alterations added) (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

33. Nunez v. San Diego, 114 F.3d 935, 951 (9th Cir. 1997).

34. *Hodgkins*, 355 F.3d at 1060–62.

35. *Id.* at 1061.

36. *See* Bykofsky v. Middletown, 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976).

37. *See* Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993), *cert. denied*, 511 U.S. 1127 (1994).

38. Schleifer v. Charlottesville, 159 F.3d 843 (4th Cir. 1998), *cert. denied*, 526 U.S. 1018 (1999).

39. *Id.* at 855.

40. Although the Fourth Circuit Court has provided guidance regarding U.S. constitutional requirements, there is no North Carolina state case law regarding juvenile curfews. So a North Carolina court may find that the state constitution provides more protection for minors' and parents' rights in this area than the federal Constitution does.

41. CHARLOTTESVILLE, VA., CODE § 17-7 (2007). *See also, e.g.*, Ramos v. Vernon, 353 F.3d 171, 173 (2d Cir. 2003).

42. *See, e.g.*, *Ramos*, 353 F.3d at 182 ("[W]e cannot help but observe the irony of the supposition that responsible parental decisionmaking may be promoted by the government removing decisionmaking authority from responsible parents and exercising that authority itself") (alteration added).

43. *See Schleifer*, 159 F.3d at 849. *See also* Hutchins v. District of Columbia, 188 F.3d 531, 568–69 (D.C. Cir. 1999) (en banc) (Rogers, J., dissenting).

44. *See Hutchins*, 188 F.3d at 543.

45. *See Ramos*, 353 F.3d at 186.

46. *See* Nunez v. San Diego, 114 F.3d 935, 943 (9th Cir. 1997).

47. *Schleifer*, 159 F.3d at 854 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (UNABRIDGED) 412 (1961)).

48. CHARLOTTESVILLE, VA., CODE § 17-7(a) (2007).

49. *Id.*

50. *See* note 17 and accompanying text.

51. CHARLOTTESVILLE, VA., CODE § 17-7(b) (2007).

52. *Id.* at § 17-7(a). The *Schleifer* plaintiffs did not challenge any of these provisions on the grounds of vagueness.

53. *Compare Schleifer v. Charlottesville*, 159 F.3d 843, 846 (4th Cir. 1998) (upholding curfew running from 12:01 A.M. to 5:00 A.M., Monday–Friday, and from 1:00 A.M. to 5:00 A.M., Saturday–Sunday), *with* Nunez v. San Diego, 114 F.3d 935, 938 (9th Cir. 1997) (striking down curfew running from 10:00 P.M. to daylight).

54. *Schleifer*, 159 F.3d at 846.

55. Hutchins v. District of Columbia, 118 F.3d 531, 569 (D.C. Cir. 1999) (en banc) (Rogers, J., dissenting).

56. Qutb v. Strauss, 11 F.3d 488, 493–94 (5th Cir. 1993).

57. *See id.*; *Hutchins*, 188 F.3d 531; *Schleifer*, 159 F.3d 843.

58. *See Nunez*, 114 F.3d 935; Ramos v. Vernon, 353 F.3d 171 (2d Cir. 2003).

59. The North Carolina Court of Appeals declined to answer this question in State v. Stewart, 40 N.C. App. 693 (1979). Also, the Fourth Circuit Court recently had the opportunity to answer this question but declined to do so. *See* Willis v. Marshall, 426 F.3d 251, 265 (4th Cir. 2005) ("[W]e conclude that in this case, there is no reason to decide whether the right to intrastate travel . . . [is a] fundamental right protected by the substantive component of the Due Process Clause") (alterations added).

60. *See* Hodgkins v. Peterson, 355 F.3d 1048, 1060–62 (7th Cir. 2004).

61. *See* G.S. 7B-1501(7), -1601.

62. *See* G.S. 7B-1900, -1901.