

Teen Curfew Laws Are Unconstitutional

Are Teen Curfews Effective?, 2009

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Teen curfews impinge on youths' constitutional rights and are commonly viewed as an overreaction by authorities to real or perceived increases in juvenile crime or endangerment. The First Amendment to the U.S. Constitution does not clearly express the relationship between free speech and the validity of curfews. For example, exceptions to the First Amendment, which designate the types of speech that are not protected, do not include speech by minors or speech exercised at night or any designated hours. Also, restricting minors' freedom because of children's particular vulnerability may be unconstitutional, because it is in the interest of cities to protect all citizens equally from crime. For a teen curfew to be justified, it must pass strict scrutiny—the ordinance must be narrowly tailored to meet a compelling interest of the government. In numerous cities, however, teen curfews do not exempt the constitutionally protected activities of minors and instead trample on their rights. Teen curfews, therefore, do not make sense.

Curfew—n. In places under martial law, a fixed time after which (or period during which) no citizen may remain outside. *Juvenile Curfew Ordinance*—Assigns responsibility to the juvenile for violation of the curfew. *Parental Responsibility Ordinance*—Assigns the responsibility of a violation to the parent of the juvenile. (Some ordinances assign responsibility to both the parent and the juvenile).

Curfews have been used for over a century for a variety of purposes. There are two main types of curfews. One is in response to an emergency and the other is a non-emergency or blanket curfew. Emergency curfews are generally in response to some catastrophic event and often are accompanied by martial law. Blanket curfews are often viewed as an overreaction by authorities to real or perceived concerns and a response that unnecessarily impinges on fundamental constitutional rights. All curfews are presumed unconstitutional by the courts if enacted outside a condition of martial law. In regards to emergency curfews, this presumption of unconstitutionality has been negated when the curfew has been held a narrowly tailored means of achieving a compelling state interest. This is commonly referred to as "strict scrutiny." A blanket curfew is presumed unconstitutional. However, blanket curfews that are applied only to juveniles have received differing treatment. Some blanket juvenile curfews have been found unconstitutional and others have not....

With the threat of constitutional challenges looming and the questionability of the effectiveness of juvenile curfews it just does not make sense to have a curfew. In addition, the cost associated with enforcing a curfew could be spent on supportive juvenile programs, rather than restricting juveniles. "We had to add \$1 million in new police payroll to enforce our curfew" [*A Status Report on Youth Curfews in America's Cities*, United States Conference of Mayors, 1997, response by the city of San Jose, California, at <http://www.usmayors.org/publications/curfew.htm>]. Finally, a juvenile curfew that might be constitutional would be ineffective because there are constitutionally required exceptions that the curfew would be inapplicable to most minors....

The First Amendment

The text of the First Amendment states:

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.

First Amendment challenges in regards to juvenile curfews are based upon free speech, freedom of religion, and peaceful assembly (including the right of free movement and free association). The First Amendment is not an absolute protection for all speech. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" [*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)]. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. There are five general categories of content-based unprotected speech; (1) Incitement, (2) Fighting Words, (3) Hostile Audiences, (4) Libel, and (5) Obscenity. If a minor or an adult were to engage in any of the prohibited speech types, this speech is accorded less or zero protection. Accordingly, a short description of each follows:

1. Incitement

The incitement exception attempts to "draw the line between 'opinion' and 'instigation'" [Sullivan & Gunther, *First Amendment Law* 14 (Foundation Press 1999)]. The current two-part test for incitement is (1) "where such advocacy is directed to inciting or producing imminent lawless action and (2) is likely to incite or produce such action." [*Brandenburg v. Ohio*, 395 U.S. 444 (1969)]. "The mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action" [*Brandenburg v. Ohio*].

2. Fighting Words

Fighting words are words that are said by the speaker and produce such a violent response in the listener that the listener is compelled to react. Thus, the violence is directed at the speaker herself, not a third party. The current definition used for fighting words is, "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" [*Chaplinsky v. New Hampshire*]. Fighting words are by definition used to produce a reaction in the listener, and are not an "essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" [*Chaplinsky v. New Hampshire*].

3. Hostile Audiences

Hostile audiences are a sub-category of fighting words. The difference between fighting words and hostile audiences is that fighting words are words that themselves cause the harm. Often times fighting words are profanity and insults. Hostile audience situations arise when "an audience is provoked by either the form of the message or by the message itself" [Sullivan & Gunther].

4. Libel

Libel is the harm created by the false light shed upon a person or group by the speech or writing of another. This description is much oversimplified, and extensive analysis of libel is beyond the scope of this paper. However, libel is unprotected speech, but the test applied to libel varies with the context of the

speech/press, the people involved, and the subject matter.

5. Obscenity

Obscenity is a clear content-based restriction. The First Amendment generally bars content-based censorship. The Supreme Court has placed obscenity outside the purview of the First Amendment because it is not an "essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" [*Chaplinsky v. New Hampshire*].

Interestingly, none of the exceptions to free speech mention speech by minors or speech conducted during specific hours. Speech during specific hours is more likely a time and manner restriction, whereas the above-mentioned speech types are content based. If a minor were to engage in any of the above mentioned types of prohibited speech she would be subject to the same standards as an adult. However, in the case of juvenile curfews the conduct prohibited falls outside of these recognised areas of speech that are currently regulated. It is interesting that some cities believe it is ok to add an additional category of prohibited speech: speech that occurs during nighttime hours. There is no constitutional basis for such a distinction. Surely a distinction such as this would fail if applied to adults, [so] the same should be true when applied to minors. There is no distinctions in the constitutional rights of adults and minors, adults and minors have the same fundamental rights. However, the Supreme Court has allowed different treatment of minors than adults in certain circumstances. Thus, the question becomes, are minors entitled to the same First Amendment protections as adults? If not, why?

Do Minors Possess Fundamental Rights?

First Amendment rights are in the category described a "fundamental" right. It is important to first determine whether minors have the same fundamental rights as adults. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." [*Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976)]. "Minors as well as adults, are protected by the Constitution and possess constitutional rights." [*Nunez v. San Diego*, 114 F.3d 935 (1997)]. "Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone" [*In re Gault*, 387 U.S. 1, 13 (1967)]. A child, merely because of his minority, is not beyond the protection of the Constitution. State and Federal courts have consistently recognized that juvenile curfews implicate the rights of minors.

Although minors have the same fundamental rights, some of these rights may be limited in certain specific circumstances because of their minority. Fundamental though it may be for adults, states may sometimes curtail minors' freedoms to provide them additional protection, even at the expense of their full constitutional rights. When a state has a strong interest in protecting minors, it may restrict their rights in ways in which it could not restrict adults. Nevertheless, a state's right to restrict minors' fundamental rights is not unlimited. The Supreme Court in *Bellotti v. Baird*, the leading case regarding the rights of minors, has articulated three specific factors that, when applicable, warrant differential analysis of the constitutional rights of minors and adults: (1) the peculiar vulnerability of children; (2) their inability to make critical decisions in an informed, mature manner, and (3) the importance of the parental role in child rearing.

The *Bellotti* test must be used when deciding if minors should be protected more than adults when fundamental rights are implicated. The *Bellotti* test is triggered when a fundamental right is involved. Therefore, the court must first decide whether a minor's fundamental right is involved. Once the right is determined to be fundamental, the court then examines the state conduct through a *Bellotti* lens to determine whether minors should be protected more than adults. The *Bellotti* test is used to determine if the state has an adequate interest to justify the different treatment of minors from adults in a specific set of circumstances. When cities implement a juvenile curfew, most cities point to the peculiar vulnerability of children regarding crime victimization and perpetration. The Ninth Circuit, in *Nunez* [*Nunez v. San Diego*, 114 F.3d 935 (1997)], found that the interest of the city in protecting children from crime is the same as that of protecting all citizens. Additionally the court found it unexceptional that the city chose to treat a juvenile different[ly] regarding an adult during the curfew hours. However, the cities lack adequate reasons to limit a minor's freedom to be out past certain hours, the city also cannot use the curfew as justification to limit the minor's access to public forums during those hours....

If a curfew did allow for broad First Amendment exceptions, it "would effectively reduce a curfew ordinance to a useless device."

Freedom of Speech Rights

The rights of freedom of speech/expression and movement implicated in a juvenile curfew are fundamental rights. The implication of these fundamental rights triggers a strict scrutiny analysis. Every court that has analyzed the right to free movement has applied a strict scrutiny analysis when applied to interstate travel. Courts are split on whether the rights to free movement are implicated in intrastate travel....

First Amendment protections are important in determining the constitutionality of a curfew. Having concluded that a facial challenge is appropriate we then apply the standard three-part test to determine whether the ordinance is a reasonable time, place and manner restriction. To be a permissible time, place, and manner restriction (1) it must be content neutral, (2) it must be narrowly tailored to a significant government interest, and (3) it must leave open ample alternative channels for legitimate expression. Since the ordinances do not prohibit specific conduct and allow others it does not differentiate between types of conduct. Thus, it is usually undisputed that the regulation is content neutral.

The second prong requires the government to have a significant interest and that [the] ordinance is narrowly tailored to that interest. For First Amendment purposes the Supreme Court has recognized that "there is a compelling interest in protecting the physical and psychological well-being of minors" [*Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989)]. Thus, the ordinance must be narrowly tailored to achieve the physical and psychological well-being of minors. In most instances, they are not narrowly tailored because they do not sufficiently exempt lawful, innocent conduct, including First Amendment activities from the curfew. If a curfew did allow for broad First Amendment exceptions, it "would effectively reduce a curfew ordinance to a useless device" [*Nunez v. San Diego*].

The third prong of the test requires that there be ample alternative channels available. The blanket

prohibition placed on minors during the curfew hours eliminates all alternative channels during those hours. The right to express oneself cannot be preserved by ... allowing expression [only] within one's own home. In the alternative, allowing minors to express themselves during non-curfew hours is also not a legitimate alternative. In most cases allowing minors to express themselves only during non-curfew hours excludes 1/3 to 1/4 of each day. Such a broad ban excluding a large portion of every day, but allowing expressive conduct during the remainder of the day, is not a legitimate alternative.

Freedom of Movement

Another argument asserted under First Amendment challenges to juvenile curfews is that the curfew is an unconstitutional limitation on a minor's right of association. The recognized right to association is limited to (1) intimacy, and (2) "expressive association" for First Amendment activity [*City of Dallas v. Stanglin*, 490 U.S. 19 (1989)]. The right to expressive association includes assemblies for non-political purposes, such as social, legal, or economic ones, but the Constitution does not provide a generalized right to societal association outside the context of expressive association. Therefore, the minors must assert a right to expressive association that is more than a general socialization.

Many youths belong to "cliques," groups or the like, and accordingly the association with the group is part of the individual's identity. When these groups gather they are expressing their view by their language, dress, and conduct. The message of many of the groups is clear. Punk rock youths give a clear message that they are angry at society. This view is expressed through their clothing and conduct. With a group of these individuals there is no doubt that their presence sends a clear message about who they are and what they believe. This conduct, whether in an organized forum (punk rock show) or informally (hanging out) expresses a clear message. The same expressive conduct can be attributed to many other groups; cheerleaders, chess club, athletes, 4H, Young Republicans, and many others. Accordingly, the gathering of youths in public places is expressive conduct and should be accorded full protection under the First Amendment.

Citizens have a fundamental right of free movement, "historically part of the amenities of life as we have known them" [*Papachriston v. City of Jacksonville*, 405 U.S. 156, 164 (1972)]. Similarly, the Constitution guarantees the fundamental right to interstate travel. "Freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking" [*Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964)]. This freedom is rooted both in the First Amendment's protection of association and expression and in the fundamental liberties of the Fifth Amendment. Thus, citizens have the right to travel to and from the various states....

The only reason juvenile curfews exist in the absence of adult curfews is that minors lack political power and representation.

Strict Scrutiny

The designation of juvenile freedom of movement rights as a fundamental right requires the application of strict scrutiny in the analysis of juvenile curfews. If the right was less than fundamental then a lower level

of scrutiny could be applied. Consequently, a lower level of scrutiny is certain to doom a juvenile curfew. Thus, it is key for the courts to recognize that minor's freedom of movement is fundamental. Some courts have upheld juvenile curfews but have not decided whether the freedom of movement rights of minors are fundamental, but still applied strict scrutiny in their analysis. Other courts have found freedom of movement to be a fundamental right of minors and struck down the curfew, also applying strict scrutiny. The Ninth Circuit is in the [latter] category.

In order to survive strict scrutiny, the classification created by the juvenile curfew ordinance must be narrowly tailored to promote a compelling governmental interest. To be narrowly tailored, there must be a sufficient nexus between the stated government interest and the classification created by the ordinance.

1. Compelling State Interest

Before a municipality can enact valid legislation which infringes on a fundamental right like freedom of movement, the government must prove a compelling need. It need not have scientific or exact proof of the need for legislation. The city has a compelling interest in protecting the entire community from crime, this includes juvenile crime. The city's interest in protecting the safety and welfare of its minors is also a compelling interest.

Furthermore, the government may have a compelling interest in protecting minors from certain things that it does not for adults. Generally, in defense of a city curfew ordinance "a city claims its interest in protecting minors from the dangers of public places at night is particularly compelling, for all the reasons set forth in *Bellotti* regarding differential treatment of minors." These cities assert that greater restrictions of minors may be justified because they have a greater vulnerability at night than do adults and because minors are not equally able as adults to make mature decisions regarding the safety of themselves and others. Some courts have reached the opposite conclusion but the Ninth Circuit "agree[s] with those courts [that find] that all citizens are vulnerable to crime at night and that ... it [is] unexceptional for the City to conclude that minors are more susceptible to the dangers of the night and are generally less equipped to deal with danger that does arise. Thus, the City may have a compelling interest in placing greater restrictions on minors than adults to insure the minors' own safety." Therefore the curfew would meet the first prong of strict scrutiny test.

2. Narrowly Tailored

"Similarly, minor curfew ordinances may be permissible where they are specific in their prohibition and necessary in curing a demonstrable social evil" [*Seattle v. Pullman*, 514 P.2d 1059 (1973)]. The question then becomes whether the ordinance is narrowly tailored to promote a compelling state interest. To be narrowly tailored, there must be an evidentiary nexus between a law's purpose and effect....

Although the Constitution does not require the government to produce "scientifically certain criteria of legislation" [*Ginsberg v. New York*, 390 U.S. 629, 642-43 (1968)], the City must "demonstrate that its classification is precisely tailored" [*Plyler v. Doe*, 457 U.S. 217 (1982)]. In general, some statistics will be more helpful than others to prove the narrow tailoring of the ordinance....

If a nexus is proven to indicate that the curfew is related to the goal of reducing juvenile crime and

victimization, the city must then prove that the ordinance is narrowly tailored. In order to be narrowly tailored, the ordinance must ensure that the broad curfew minimizes any burden on minors' fundamental rights, such as the right to free movement. Thus, we examine the ordinance's exceptions to determine whether they sufficiently exempt legitimate activities from the curfew. Most cities, when challenged, will argue that the ordinance has sufficient exceptions for legitimate activity. A review of the Washington ordinances shows that out of 46 ordinances only seven have comprehensive exemptions. The other 39 cities are likely enforcing an unconstitutional ordinance and trampling the rights of minors.

The seven cities that have included comprehensive exemptions in their ordinances may pass constitutional scrutiny in this one area but will still fail under the parental rights analysis, because they fail to include an exemption for parental permission. Furthermore, of these seven cities only one has an exception for intrastate travel. Thus, the other six would be subject to an intrastate travel challenge to their ordinance.

In sum, it is insufficient for a city to cite only national statistics, though these statistics may be useful when combined with local statistics "... but the national statistics do not conclusively show that the nocturnal juvenile curfew is a narrowly tailored solution" [*Nunez v. San Diego*]. One city cited the statistics of another city in an attempt to prove that juvenile curfews worked overall. The citing of another city's statistics has no effect on the validity of a curfew in the target city. It is also ineffective to use the "justification that the ordinance has the additional beneficial deterrent effect of permitting police officers to get juveniles off the streets before crimes are committed" [*Nunez v. San Diego*]. The Supreme Court has sharply critiqued this type of rationale as overinclusive, at least with respect to adults.

The Need Is Obsolete

Nocturnal juvenile curfews just do not make any sense. The only justification is that if we keep people in their homes that crime is less likely to occur. This is true of minors and adults. The idea of keeping all adults in at night would never be accepted, but for minors we have another standard. The only reason juvenile curfews exist in the absence of adult curfews is that minors lack political power and representation. In short, the myriad of problems that plague any juvenile curfew make implementation ineffective. This paper covered only the First Amendment challenges to juvenile curfews, but there are many other challenges as well. This accumulation of potential for litigation makes the decision to implement a curfew suspect. Furthermore, the availability of other means to combat juvenile crime and juvenile victimization make the need for a juvenile curfew obsolete.

Further Readings

Books

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