

WHY CRIMINALIZE CHILDREN? LOOKING BEYOND THE EXPRESS POLICIES DRIVING JUVENILE CURFEW LEGISLATION

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INTRODUCTION

Juvenile curfew laws are popular throughout the United States.¹ Their popularity exploded in the 1990s when legislatures enacted more than one thousand new juvenile curfew laws and governments revived existing curfew laws that had long been dormant.² The express public policy rationales offered by legislatures in support of curfews sustain the enormous popularity of these laws. The most common rationales are: reducing juvenile crime rates; reducing the victimization of juveniles; and reinforcing parental authority.³ While curfew proponents tout all of these policy rationales, none of these rationales has been proven to result from the imposition of curfews.⁴ In fact, both the efficacy and the constitutionality of curfew laws have been challenged.⁵ Since curfews are backed by popular support, these

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1. Brian Privor, *Dusk 'til Dawn: Children's Rights and the Effectiveness of Juvenile Curfew Ordinances*, 79 B.U. L. REV. 415, 421 (1999). For example, both recent presidential contenders, Vice President Al Gore and Governor George W. Bush, publicly supported the use of juvenile curfews. See Clay Robinson, *Bush Signs "Tough Love" Juvenile Crime Bill; Punishment Boosted for Young Offenders*, HOUSTON CHRON., June 1, 1995, at A29 (supporting juvenile crime bill which would authorize counties to enact curfew ordinances); Katharine Q. Seelye, *Gore's Plan for Success in 2000: Wide Array of Specific Positions*, N.Y. TIMES, July 29, 1999, at A1 (supporting Federal anti-gang law that would set curfews on specific gang members).

2. Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267, 272 (1998/99); Tona Trolinger, *The Juvenile Curfew: Unconstitutional Imprisonment*, 4 WM. & MARY BILL RTS. J. 949, 961 (1996).

3. See, e.g., CHARLOTTESVILLE, VA., CODE § 17-7 (1998); D.C. CODE ANN. § 6-2181(e) (2000); see also Hemmens & Bennett, *supra* note 2, at 270.

4. See discussion *infra* Part III.A.

5. See *infra* Part I.B.

issues are only addressed after the curfews have gone into effect, if at all.

Although the express policy rationales may be responsible both for the groundswell of public support and for providing sufficient grounds for the adoption of many curfew laws, additional conscious or unconscious motivations may lurk beneath their surface. It is possible, for example, that some curfews are a reaction to the public's fear of juveniles and are considered the most effective method of getting children off the streets and out of sight. Lawmakers may also mistakenly believe that curfews assist certain segments of society in properly disciplining their children.

By observing the totality of the circumstances surrounding juvenile curfews, we may discover that other implicit policies actually drive the popularity of juvenile curfew legislation. We may also discover discriminatory effects. These implicit policies and discriminatory effects should be expressly considered when drafting curfew legislation. For example, some juvenile curfew legislation is enacted with the express purpose of reducing gang activity.⁶ However, while reducing this is a valid and desirable policy motivation, the implicit policies and discriminatory effects of legislation must also be considered, and curfew laws carefully tailored and enforced so that every child who may fit the supposed profile of a gang member does not get swept up in the criminal justice system.⁷

This note suggests that there are at least two ways in which we may uncover whether implicit policies drive the modern resurgence of juvenile curfew laws. First, an examination of the history of curfew laws in the United States indicates that these laws often arose out of oppressive and discriminatory motivations. It is therefore necessary to critically review different types of past curfew laws to assess whether similar insidious goals may actually motivate modern juvenile curfews. Second, a consideration of the enforcement and effects of modern juvenile curfew laws—to the extent that these results are predictable—provides insight into the policies guiding their enactment. But before delving into the history and effects of curfew laws

6. See *Privor, supra* note 1, at 420 (noting that Washington, D.C.'s curfew was passed in response to increase in juvenile violence and gang activity); see also U.S. DEP'T OF JUSTICE, *YOUTH GANG PROGRAMS AND STRATEGIES* 24 (2000) (on file with the *New York University Journal of Legislation and Public Policy*) (noting that aggressive curfew enforcement was one of three express strategies used in Antigang Initiative in Dallas, Texas).

7. See *infra* Part III.C.1. Note that the need to tailor curfew laws derives from the experience with curfews held invalid, on constitutional challenges, for overbreadth. See *infra* notes 17, 52-57, and accompanying text.

in order to reveal the implicit policies on which they may be based, this note will summarize the modern legal state of affairs in the area of juvenile curfew law.

I

MODERN JUVENILE CURFEW LAWS IN THE UNITED STATES

A. *The Average Juvenile Curfew Law*

There is no national juvenile curfew law. Rather, juvenile curfew laws exist in major cities and small municipalities scattered throughout the United States. According to a 1995 study of the seventy-seven most populous cities in the United States,⁸ 77% of them impose juvenile curfews. Only 56% of these curfew laws were long-standing, and the other 44% were enacted in the early nineties.⁹ Since the 1995 study, more of the cities surveyed have enacted juvenile curfews.¹⁰ Furthermore, many small towns across the nation are either enforcing long-dormant curfew laws or scrambling to enact new ones.¹¹

Juvenile curfew legislation creates status offenses by criminalizing activities of minors that would be legal if undertaken by adults. The typical juvenile curfew law sets a time during which it is a misdemeanor for any person under a particular age to be outside his or her home.¹² Some curfew laws apply to an entire city, whereas others are enacted in “hot spots”—areas of a city where there is more crime—because regulation of these areas is considered particularly necessary.¹³

Curfew laws nearly always contain exceptions specifying those situations in which it is appropriate for a minor to be out past curfew.¹⁴ The exceptions may include emergencies, running errands for

8. William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQ. 347, 353 (1995) (including in study all U.S. cities with 1992 population of more than 200,000).

9. “Long-standing” defined as enacted prior to 1990. *Id.* at 354.

10. Of the eighteen cities Ruefle & Reynolds listed as not having juvenile curfews, nine have since enacted curfews (Los Angeles, Washington, D.C., Charlotte, Tulsa, Pittsburgh, Anaheim, Louisville, Lexington-Fayette, and Jersey City). D.C. CODE ANN. § 6-2181 (2000); Ruefle & Reynolds, *supra* note 8, at 353; *see also* U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON YOUTH CURFEWS IN AMERICA’S CITIES: A 347-CITY SURVEY 1 (1997) (on file with the *New York University Journal of Legislation and Public Policy*), available at <http://www.usmayors.org/uscm/news/publications/curfew.htm> [hereinafter U.S. CONFERENCE OF MAYORS].

11. Hemmens & Bennett, *supra* note 2, at 272.

12. *See, e.g.*, D.C. CODE ANN. § 6-2182 (2000).

13. *See infra* Part III.C.2.

14. Privor, *supra* note 1, at 454.

a parent, or coming to or from work, school, or religious events.¹⁵ In order to survive a First Amendment challenge to the statute, some legislators have drafted curfew laws to include additional exceptions, such as permitting attendance at any civic or responsibly-sponsored event.¹⁶ Legislators must use caution when adding exceptions, however, because a broadening of the statute may lead to a challenge for vagueness.¹⁷

After defining the offense and exceptions thereto, the statute then names the penalty for a curfew violation.¹⁸ The penalties vary, and include the imposition of fines or community service not only for the juvenile offender, but also often for the parent or any other adult who enables the curfew violation.¹⁹ Additional penalties may even include mandatory parenting classes for the offender's parents.²⁰ Given the variety of possible penalties for curfew violations, it becomes apparent that the ordinances are far-reaching and have the potential to do extensive damage to some families. For example, with some fines reaching \$500,²¹ curfew penalties could create a financial burden for middle and lower-income families.

B. Constitutional Challenges

Though many of the challenges to juvenile curfews have been made in state courts due to the local nature of curfew laws,²² there have also been a number of constitutional challenges to juvenile curfew laws in federal courts, beginning with the 1975 case of *Bykofsky v. Borough of Middletown*,²³ brought in the Middle District of Pennsylvania.²⁴ The federal circuit courts are currently split on the issue of juvenile curfews, with some upholding the statutes as constitutional and others striking them down for violating the constitutional rights of

15. See, e.g., D.C. CODE ANN. § 6-2183(b) (2000).

16. See *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 547 (D.C. Cir. 1999).

17. See *id.* at 546-57.

18. See, e.g., D.C. CODE ANN. § 6-2183(c) (2000).

19. See, e.g., *id.* § 6-2183(d) (2000); 720 ILL. COMP. STAT. ANN. 551/1(c) (West 2000); MONT. CODE ANN. § 7-32-2302(3) (1999).

20. See, e.g., D.C. CODE ANN. § 6-2183(d)(2) (2000).

21. See, e.g., *id.* § 6-2183(d)(1) (2000).

22. See, e.g., *A.C.L.U. v. City of Albuquerque*, 992 P.2d 866, 875 (N.M. 1999) (holding state constitution preempted city from enacting juvenile curfew ordinance that established criminal sanctions against children when such behavior was lawful if committed by adults); *Sale ex rel. Sale v. Goldman*, No. 27315, 2000 WL 989874, at *1 (W. Va. July 19, 2000).

23. 401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd mem.*, 535 F.2d 1245 (3d Cir. 1976), *cert. denied*, 429 U.S. 964 (1976).

24. See *Hemmens & Bennett*, *supra* note 2, at 297.

minors and parents.²⁵ Business owners affected by the curfews have also joined some of the challenges.²⁶

Most constitutional challenges look to the First and Fourteenth Amendments for support. The common First Amendment arguments are that curfew laws violate minors' rights to free assembly, speech, and religion by limiting the hours after which minors may not leave their homes.²⁷ The Fourteenth Amendment challenges often rely on due process and equal protection principles.²⁸ Under the Due Process Clause, parents argue that curfew laws violate their substantive due process right to raise their children free from government interference.²⁹ Minors also assert a substantive due process challenge based on their personal liberty interest in freedom to travel.³⁰ Finally, the equal protection arguments challenge the fact that curfew laws treat minors differently than adults.³¹

While children are afforded rights under the Constitution, the Supreme Court has declared that these rights need not be co-extensive with the constitutional rights of adults.³² In several instances, the Supreme Court has upheld the constitutionality of laws aimed at children that would have been unconstitutional if applied to adults.³³ For example, in *Bellotti v. Baird*, the Supreme Court outlined three reasons why laws aimed at children should receive different consideration: (1) children are particularly vulnerable; (2) children possess a limited ability to make critical decisions in an informed and mature manner;

25. See *infra* notes 46-52 and accompanying text.

26. See *Hutchins*, 188 F.3d at 534. Business owners are often affected by curfews because statutes may provide penalties against them for doing business with minors in violation of the curfew. See, e.g., CHARLOTTESVILLE, VA., CODE § 17-7(e) (1998); D.C. CODE ANN. § 6-2183(a)(3) (2000) ("The owner, operator, or any employee of an establishment commits an offense if he or she knowingly allows a minor to remain upon the premises of the establishment during curfew hours."). See also *City of Albuquerque*, 992 F.2d at 868-70 (holding business owner had standing to challenge juvenile curfew even though not charged with violation).

27. See, e.g., *Hodgkins v. Goldsmith*, No. IP99-1528-C-T/G, 2000 WL 892964, at *7 (S.D. Ind. July 3, 2000).

28. See *infra* Part III.C.3.

29. See, e.g., *Schleifer v. City of Charlottesville*, 159 F.3d 843, 852 (4th Cir. 1998).

30. See, e.g., *McColester v. City of Keene*, 586 F. Supp. 1381, 1384-85 (D.N.H. 1984).

31. See *City of Albuquerque*, 992 F.2d at 875.

32. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514-15 (1969) (Stewart, J., concurring) (declaring that First Amendment rights of minors are not co-extensive with those of adults); *Ginsberg v. New York*, 390 U.S. 629 (1968) (holding children do not have same First Amendment rights as adults).

33. See, e.g., *Ginsberg*, 390 U.S. at 639-40 (prohibiting sale of obscene material to minors); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (prohibiting minors from selling merchandise in public places).

and (3) the parental role is very important in child rearing.³⁴ There have, however, been a number of cases where, in the interest of parental autonomy or the constitutional rights of the children, the Court has stricken laws targeting the behavior of minors.³⁵ As a result, the constitutional limits of the rights of minors are not clear, and this area of the law remains somewhat unpredictable.

Whether a law can withstand a constitutional challenge depends, in part, on the level of scrutiny with which the court reviews the law. The standard of review for constitutional challenges to curfews depends on whether the court finds that the rights asserted by minors and their parents are, in fact, fundamental.³⁶

As citizens of the United States, minors are accorded fundamental rights of which they cannot be stripped merely because they are minors.³⁷ Although the rights of minors are not necessarily co-extensive with those of adults, it is clear that the protections of the Bill of Rights and the Fourteenth Amendment extend to minors.³⁸ Furthermore, in the context of juvenile curfews, several courts have recognized the fundamental right of minors to freedom of movement.³⁹ The important right of a citizen to move about freely has been recognized by the Supreme Court as one of the “amenities of life” that society holds dear.⁴⁰ Justice Marshall recognized this fundamental right to

34. *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

35. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that state cannot compel school attendance law for all minors); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (striking law requiring children to attend public school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking law prohibiting children from receiving education in any language other than English).

36. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982) (holding when fundamental rights of citizens are abridged by law, usual judicial deference is misplaced and strict scrutiny must apply).

37. *See Tinker*, 393 U.S. at 511 (holding that minors are “persons” under United States Constitution and possess fundamental rights which state must respect).

38. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (extending Fourteenth Amendment privacy interest to minors); *In re Gault*, 387 U.S. 1, 13 (1967) (extending due process in criminal cases to minors).

39. *See Nunez v. City of San Diego*, 114 F.3d 935, 944-45 (9th Cir. 1997); *Qutb v. Strauss*, 11 F.3d 488, 492 (5th Cir. 1993); *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072 (5th Cir. 1981); *McCollester v. City of Keene*, 586 F. Supp. 1381, 1384-85 (D.N.H. 1984).

40. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972); *see also* *Aptheker v. Secretary of State*, 378 U.S. 500, 520 (1964) (Douglas, J., concurring) (“[F]reedom 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. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.”); *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (citations omitted) (“In all the States from the beginning down to the

freedom of movement in his dissent over the Court's denial of certiorari in *Bykofsky*.⁴¹ There he argued that this freedom is protected by the Due Process Clause of the Fourteenth Amendment and that any statute attempting to abridge this freedom must survive strict scrutiny.⁴²

Those who oppose the notion that curfew laws implicate the fundamental rights of minors question whether minors have the right to control the time during which they are free to be outside their homes.⁴³ By casting the issue as a matter of the rights of minors, curfew proponents hope courts will be persuaded that it is acceptable to abridge these rights to meet legitimate state goals. However, the issue does not concern only the rights of minors, but also the rights of parents to make decisions for their children. Family autonomy is basic to the nature of freedom and is considered a basic concept of ordered liberty.⁴⁴ Thus, parents also often invoke the strict scrutiny standard based on the view that curfews interfere with the substantive due process right to parental autonomy.⁴⁵ However, although there appear to be grounds for giving curfews the highest level of review, the Supreme Court has not ruled on the issue and the circuit courts remain divided.

The results of suits in the circuit courts challenging the constitutionality of juvenile curfew laws reflect the unpredictability in this area of law. The Fourth,⁴⁶ the Fifth,⁴⁷ and, most recently, the D.C.⁴⁸ Circuits have upheld juvenile curfew laws challenged on constitu-

adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom . . .").

41. See *Bykofsky v. Borough of Middletown*, 429 U.S. 964 (1976) (Marshall, J., dissenting).

42. *Id.* at 964-65.

43. See, e.g., *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 536-39 (D.C. Cir. 1999).

44. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (holding that rights at essence of ordered liberty are protected by Fourteenth Amendment from state interference); see also *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (declaring that right to parental autonomy in decisionmaking is based on principle that family sphere is something that should be free from state interference).

45. See, e.g., *Hutchins*, 188 F.3d at 540 (declining to apply strict scrutiny due, in part, to holding that fundamental right of parents to make decisions for children is not implicated by curfew law); *Hodgkins v. Goldsmith*, No. IP99-1528-C-T/G, 2000 WL 892964 (S.D. Ind. July 3, 2000) (recognizing but not deciding whether curfew impinged on fundamental right of parents).

46. See *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998).

47. See *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993).

48. See *Hutchins*, 188 F.3d. at 531.

tional grounds. The Fourth Circuit case, *Schleifer v. City of Charlottesville*, sought an appeal to the Supreme Court, but the Court denied certiorari in early 1999.⁴⁹ The Supreme Court also denied certiorari to a Third Circuit case, *Bykofsky v. Borough of Middletown*, over a strong dissent from Justice Marshall, who argued that the Supreme Court should speak on the issue of juvenile curfew laws and the impact they have on thousands of towns.⁵⁰

The Sixth Circuit has not heard a juvenile curfew case since *Cox v. Turley* in 1974.⁵¹ *Cox* was not a challenge to the curfew law itself, but rather alleged that a minor's Fourth, Eighth, and Fourteenth Amendment rights were violated when he was arrested for a curfew violation and locked up for five days with the adult prisoners without being allowed to call his parents to notify them of his arrest. However, while the Sixth Circuit ruled in favor of the minor in this case, the curfew law itself remained intact.⁵²

In fact, the Ninth Circuit is the only circuit court in recent years to strike down a juvenile curfew law. In *Nunez v. City of San Diego*, the Ninth Circuit reversed the district court's ruling and held a San Diego curfew ordinance unconstitutional.⁵³ Although its curfew was originally enacted in 1947, San Diego adopted a city resolution in 1994 to begin aggressive enforcement of the ordinance.⁵⁴ Using the *Bellotti* standards, the Ninth Circuit performed a strict scrutiny analysis, holding intermediate scrutiny improper when assessing the fundamental rights of minors.⁵⁵ The Court found the ordinance (1) unconstitutionally vague in violation of the First Amendment;⁵⁶ (2) not narrowly tailored enough to satisfy equal protection rights;⁵⁷ and (3) violative of parents' fundamental right to rear their children absent undue government interference.⁵⁸

Although a strict scrutiny analysis has been applied in some curfew cases, many courts continue to apply a rational basis or intermedi-

49. *Schleifer v. City of Charlottesville*, 526 U.S. 1018 (1999).

50. *Bykofsky*, 429 U.S. at 965 (Marshall, J., dissenting) ("The question squarely presented in this case, then, is whether the due process rights of juveniles are entitled to lesser protection than those of adults. The prior decisions of this Court provide no clear answer.") (citation omitted).

51. *Cox v. Turley*, 506 F.2d 1347 (6th Cir. 1974).

52. *See id.* at 1355.

53. *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997).

54. *Id.* at 938-39.

55. *Id.* at 945-46.

56. *Id.* at 940.

57. *Id.* at 949.

58. *Id.* at 951-52.

ate scrutiny test to constitutional challenges to juvenile curfew laws.⁵⁹ A reason for rational basis scrutiny is the fact that age has not yet been held to be a suspect class meriting strict scrutiny,⁶⁰ and many courts are unwilling to accept the argument that minors have a fundamental right to travel.⁶¹ The split among the circuits regarding the appropriate level of scrutiny will continue until the Supreme Court addresses the issue.

The applied standard of review does not, however, constitute the bottom line in constitutional curfew law analysis. Although the application of strict scrutiny makes it less likely that a curfew law will survive,⁶² it does not render survival impossible. For example, in *Qutb v. Strauss*, the Fifth Circuit applied a strict scrutiny analysis to the juvenile curfew law in question, yet the law was upheld.⁶³ The court held that the curfew was narrowly tailored to serve the government's compelling interest in reducing juvenile crime and protecting minors.⁶⁴

C. Discrimination Challenges

Whether the test is rational basis, intermediate, or strict scrutiny, the government's stated policy interests in curfew laws are always considered valid. Implicit policy rationales that may spur some of the curfew legislation are seldom discussed in federal court opinions. Challenges to the laws on a basis other than age have not yet reached the circuit courts.⁶⁵ Studies have shown, however, that minority youth disproportionately bear the brunt of juvenile curfew enforcement.⁶⁶ However, the racial issues that may play an underlying role in the enactment and enforcement of curfew legislation rarely are addressed in judicial opinions, particularly when a sound opinion can be drafted on other grounds.

For example, in *Kolender v. Lawson*, the Supreme Court upheld the striking of a California loitering law for unconstitutional vague-

59. See Hemmens & Bennett, *supra* note 2, at 294-95.

60. See *Nunez*, 114 F.3d at 944 ("Because age is not a suspect classification, distinctions based on age are subject to rational basis review.").

61. See Hemmens & Bennett, *supra* note 2, at 294-95; see also *supra* notes 40-42 and accompanying text.

62. See, e.g., *Johnson v. City of Opelousas*, 658 F.2d 1065, 1072-74 (5th Cir. 1981).

63. *Qutb v. Strauss*, 11 F.3d 488, 494 (5th Cir. 1993).

64. *Id.*

65. If there has been a discrimination-based challenge on any basis other than age, this is not apparent in the federal circuit court opinions on curfew laws.

66. See *infra* Part III.C.

ness.⁶⁷ The law stated that suspicious persons could be stopped by the police and forced to identify themselves.⁶⁸ The plaintiff in the case had been stopped and forced to identify himself fifteen times over the course of two years.⁶⁹ The Court found this law unconstitutionally vague because it failed to inform citizens in a clear manner of how to comply, and it led to arbitrary enforcement.⁷⁰ The Court, however, failed to mention that the plaintiff was a black man with dreadlocks and that he had been stopped fifteen times while strolling through white neighborhoods.⁷¹ Thus, while race was a factor in the case, the Court's opinion does not mention this fact.

The role race plays in motivating juvenile curfew laws is similarly unclear because the courts are legitimately able to decide cases challenging these laws on other grounds. Furthermore, because a plaintiff may need to establish discriminatory intent and not merely discriminatory effect in order to successfully challenge a law on discrimination grounds, plaintiffs may see the attempt at proving legislative intent to discriminate as futile unless the proverbial smoking gun can be found in the legislative record. Additionally, because curfews are primarily passed as municipal ordinances, legislative history may be difficult to find. Thus, whether because parties fail to raise the issue or because courts fail to recognize it, judicial opinions rarely acknowledge the discriminatory effects of curfew laws. Although there is a tendency to look to the courts to address the potential ramifications of legislative motivations, these issues should be discussed at the policy level, when the justifications for the laws are being expressed.

Even when the popular media addresses curfew laws, the discriminatory aspects of those laws receive little attention.⁷² Political endorsements often tout the express policy rationales but do not venture beyond them.⁷³ Even most legal studies of curfews focus on constitutional aspects of curfews and address little in the way of their discriminatory effects.

67. *Kolender v. Lawson*, 461 U.S. 352, 353 (1983).

68. *Id.*

69. *Id.* at 354.

70. *Id.* at 361.

71. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 *YALE L.J.* 214, 230 (1983).

72. See, e.g., Eloise Salholz et al., *Blacks and Cops: Up Against a Wall*, *NEWSWEEK*, May 11, 1992, at 52 (illustrating discussion of black distrust of law enforcement with picture of curfew violators); *Washington Police Begin to Enforce 1995 Curfew*, *N.Y. TIMES*, Sept. 12, 1999, at 30 (noting that A.C.L.U. legal director anticipated that curfew's enforcement may be "discriminatory").

73. See, e.g., Hemmens & Bennett, *supra* note 2, at 272 & n.2.

Though important, constitutional arguments are not the critical issues to the thousands of children and parents affected by juvenile curfew laws each year. Every curfew law enacted in this country should certainly not be condemned for having a discriminatory intent and producing discriminatory effects. Nor is popular support for curfews found only among whites or members of the upper class.⁷⁴ However, legislatures must address the likely eventuality that small segments of the population will bear the brunt of the enforcement efforts made to ease the minds of those who favor curfew laws.

When arguing in favor of curfew laws, proponents proclaim intent to reduce juvenile crime and victimization. Rarely, however, do they discuss the history of curfew laws in order to critically assess their potential utility. Society should remember that curfews have traditionally been created by the upper class as a method to control the movements of the lower classes.⁷⁵ Curfews may therefore constitute a preemptive strike against an entire segment of the population presumed to have a propensity to commit crimes.

II

TYPES OF CURFEW LAWS

Although nighttime juvenile curfews are the most popular type of curfew in the United States,⁷⁶ other types of curfews exist. Emergency curfews, for example, are implemented for brief periods of time in the interest of public safety, often during natural disasters or social protests.⁷⁷ Furthermore, past curfews have not only targeted juveniles but a variety of other populations. These curfews have a long and unpleasant history and have often been motivated by emotions—distrust, disrespect, discrimination, and hate—that have no place in lawmaking.

A. Gender-Based Curfews

In the recent past, fear for women's safety led to laws restricting their behavior. For example, Eastern Kentucky University imposed a curfew on all female freshmen as late as the 1970s.⁷⁸ After their

74. *Id.* at 275.

75. See CURFEW.ORG, A BRIEF HISTORY OF CURFEWS, at <http://www.curfew.org/history/> (last modified Sept. 20, 2000); see also Hemmens & Bennett, *supra* note 2, at 279.

76. U.S. CONFERENCE OF MAYORS, *supra* note 10, at 1 (noting that four out of five of surveyed cities had nighttime curfew); see also Hemmens & Bennett, *supra* note 2, at 273.

77. See Trollinger, *supra* note 2, at 951.

78. 475 F.2d 707, 708 (6th Cir. 1973).

freshman year, however, female students could avoid the curfew and regulate their own hours if they: (1) maintained a “C” average and remained free of academic or social probation; (2) paid a fifteen dollar fee each semester; and (3) if they were under twenty-one, obtained written parental consent.⁷⁹ There were no curfew restrictions applicable to male students.⁸⁰

In *Robinson v. Board of Regents of Eastern Kentucky University*, a female student challenged the curfew, arguing that it was unconstitutional because it violated the Equal Protection Clause of the Fourteenth Amendment.⁸¹ The Sixth Circuit upheld the district court’s decision that a curfew that imposes restrictions on women does not constitute an equal protection violation.⁸² The court reasoned that sex-based classifications are often upheld and explained that equal protection does not require identical treatment.⁸³ The curfew regulation survived the Sixth Circuit’s rational relation test because the state interest in the discriminatory statute was safety: Women are more likely to be attacked and less likely to defend themselves.⁸⁴ The Sixth Circuit’s safety justification which permitted curfews targeting women effectively kept some young women under lock and key as a precaution against the improper behavior of men.

Gender-based curfews, however, only reinforce improper behavior rather than create incentives for lawfulness. Selective curfew laws criminalize otherwise lawful behavior and punish individuals for their status as potential crime victims. Like gender-based curfew laws, juvenile curfew laws similarly aim to protect those who would be crime victims. However, as in the previous example, these laws punish potential victims rather than aggressors. Furthermore, rather than seeking to create a safer environment for all citizens, curfew laws aimed at potential victims demonstrate that lawmakers have succumbed to fear. Fearing for the safety of some, legislators attempt to shield potential victims at the victim’s expense. However, if these potential victims choose to leave their homes in violation of a curfew law, not only must they fear their aggressors, but also criminal prosecution.

79. *Id.* at 708-09.

80. *Id.* at 709.

81. *Id.*

82. *Id.*

83. *Id.* at 710.

84. *Id.* at 711.

B. Race-Based Curfews

The United States has also imposed race-based curfews. In order to demonstrate that discrimination and fear motivated the enactment of the laws, it is important to note that these types of curfews often applied to free blacks as well as to slaves. This fear led to laws allowing blacks to travel freely only during the daytime, when whites could observe them.⁸⁵

In *Jennings v. Washington*, Mary Jennings challenged the ten dollar fine assessed against her for violating the city of Washington's curfew law.⁸⁶ Jennings argued that the city's power to restrain and prohibit the meetings of free persons of color did not include the power to prohibit their being outside after ten o'clock at night.⁸⁷ The court disagreed and held that the curfew was a valid exercise of the power to "restrain and prohibit the nightly and other disorderly meetings of slaves, free negroes, and mulattoes."⁸⁸

The curfew at issue in *Jennings* did carve out some exceptions which allowed those who were subject to the law to be out past curfew. For example, in *Brown v. Robertson*, an 1843 case, Charles Brown, a free black man, challenged his arrest and detention for a curfew violation because he claimed to be exempt from the statute.⁸⁹ The curfew statute read, in pertinent part:

[N]o free black or mulatto person shall be allowed to go at large through the city of Washington, at a later hour than ten o'clock at night, excepting such free black or mulatto persons have a pass from some justice of the peace or respectable citizen, or be engaged in driving a cart, wagon, or other carriage.⁹⁰

Brown challenged his prosecution under the law because, at the time of his arrest, he was in the employ of Sen. Daniel Webster.⁹¹ The court rejected Brown's argument, holding that he had to prove to the police officer at the time of arrest that he was out with the permission of Senator Webster: establishing that fact in court was too late.⁹²

Curfews on free blacks and slaves were clear acts of discrimination. This could be expected, however, considering the state of affairs between blacks and whites in mid-nineteenth century America. The

85. Hemmens & Bennett, *supra* note 2, at 279.

86. 13 F. Cas. 547 (C.C.D.C. 1838) (No. 7,284).

87. *Id.*

88. *Id.*

89. 4 F. Cas. 426 (C.C.D.C. 1843) (No. 2,027). Brown also challenged the authority of the city to impose the curfew. *Id.*

90. *Id.* at 426 n.2.

91. *Id.* at 427.

92. *Id.*

use of curfews as a way to exercise control over a minority feared by a majority is instructive, however, in the modern American resurgence of juvenile curfews because the focus of curfew laws may not have shifted entirely from race to age. Today's curfew laws may disparately affect minority youth.⁹³ If today's juvenile curfews are enacted with knowledge of this discriminatory effect, such curfews could in fact be considered to reflect a discriminatory policy.

C. *Ethnicity-Based Curfews*

Perhaps the most famous (or infamous) ethnicity-based curfew in America was the curfew imposed on all Japanese, and alien Germans and Italians during World War II.⁹⁴ Although the curfew was imposed on persons from all three countries, the law focused on those of Japanese ancestry in the Pacific military region.⁹⁵ The curfew affected approximately 100,000 people of Japanese descent.⁹⁶ Several Americans of Japanese ancestry challenged the law in federal court, but the Supreme Court upheld the curfew law as a valid exercise of military power.⁹⁷

This curfew exemplifies how an acceptable explicit policy (military exigency) may in fact mask an implicit, discriminatory policy. Under the War Powers Clause, President Roosevelt in his capacity as Commander in Chief signed an executive order granting powers to the Secretary of War and certain military commanders, including General DeWitt who oversaw Military Area Number One encompassing California, Oregon, Washington, and Arizona.⁹⁸ General DeWitt instituted a number of laws through public proclamations, including the curfew at issue.⁹⁹

DeWitt's Public Proclamation No. 3 imposed a curfew on alien Germans and Italians and all Japanese from 8:00 P.M. to 6:00 A.M. every day.¹⁰⁰ In *Hirabayashi v. United States* (*Hirabayashi I*), Gordon Kiyoshi Hirabayashi, an American citizen of Japanese descent, challenged his arrest and prison sentence for violating the curfew.¹⁰¹ Hirabayashi argued that the curfew constituted

93. See *infra* Part III.

94. See generally *Hirabayashi v. United States*, 320 U.S. 81, 88 (1943).

95. *Id.*

96. See *Hirabayashi v. United States*, 828 F.2d 591, 596 (9th Cir. 1987).

97. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 217 (1944); *Hirabayashi*, 320 U.S. at 102.

98. *Hirabayashi*, 320 U.S. at 85-88.

99. *Id.* at 86-88.

100. *Id.* at 88.

101. *Id.* at 83-85.

unconstitutional discrimination under the Fifth Amendment.¹⁰² The Court held, however, that the curfew was a lawful delegation of legislative power to a military commander.¹⁰³ Furthermore, the Court refused to substitute its judgment regarding military necessity for that of DeWitt, in effect deferring to military commanders in times of national emergency.¹⁰⁴

In *Hirabayashi I*, the Court paid lip service to legal precedent against discrimination, stating, “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.”¹⁰⁵ The government also conceded in its oral argument before the Court in *Korematsu* that if the orders had been based on racist precepts, they would be invalid.¹⁰⁶ However, the Court explained that although racial classifications are usually irrelevant, they will not preclude a military commander’s determination that such classifications are necessary for national defense purposes.¹⁰⁷

The *Hirabayashi I* decision can be seen as a lengthy attempt by the Court to charge that the curfew did not concern race, but national defense. The Court itself gave several reasons for the need to target all persons of Japanese ancestry. For example, the Court stated that experience has taught that in times of war, those with an ethnic affiliation to the enemy are a greater source of danger than others.¹⁰⁸ Furthermore, the Court explained that the poor treatment of Japanese by white Americans in the past may have “been [a] source[] of irritation and may well have tended to increase [Japanese-Americans’] isolation, and in many instances their attachments to Japan and its institutions.”¹⁰⁹ Instead of using the examples of poor treatment of Japanese-Americans as a red flag for the possible discriminatory intent behind the curfew law, the Court used these examples to argue that those of Japanese ancestry posed a national threat.

The Court revealed much of its anti-Japanese prejudice in its opinion, implying that all people of Japanese descent, although Ameri-

102. *Id.* at 83.

103. *Id.* at 104-05.

104. *Id.*

105. *Id.* at 100.

106. *See Hirabayashi*, 828 F.2d 591, 600 (9th Cir. 1987) (discussing *Korematsu*, 323 U.S. at 214).

107. *See Hirabayashi*, 320 U.S. at 100.

108. *See id.* at 101.

109. *Id.* at 98.

cans, remained foreign because “social, economic and political conditions . . . have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population.”¹¹⁰ In explaining the threat posed by Japanese Americans, the federal district court trial judge also stated, “They are shrewd masters of tricky concealment among any who resemble them.”¹¹¹ Perhaps these negative stereotypes did not attach to Americans of Italian and German descent because they could more easily physically assimilate with whites, thereby causing white Americans to be more forgiving of their particular ethnic affiliations.

More than forty years after his conviction and sentence under the emergency curfew, Hirabayashi was back in federal court challenging his conviction (*Hirabayashi II*).¹¹² Hirabayashi presented new evidence supporting his claim that the curfew law was based on racial discrimination, not military exigency: the sole copy of General DeWitt’s report drafted to explain the basis of the curfew and exclusion orders.¹¹³ The orders were, in fact, based on racial stereotypes, and the War Department had not only rewritten the report to change the materially offensive aspects but had also attempted to destroy all copies of DeWitt’s original report.¹¹⁴

This new evidence supported the arguments from Hirabayashi’s 1943 briefs to the Supreme Court that the law was based on discriminatory motives, not military emergency. Despite the concealed report, a federal court held that although Hirabayashi’s exclusion was a violation of due process, the curfew was not a significant infringement on freedom. Therefore, it reasoned that the Supreme Court would have upheld the curfew conviction despite the racial basis of the order.¹¹⁵ However, the Ninth Circuit reversed and held that the curfew order should be vacated.¹¹⁶ The Ninth Circuit also noted that a plethora of reports and articles had condemned these laws as unjust because they were in fact based on race.¹¹⁷

The importance of *Hirabayashi I* and the writ of *coram nobis* granted in *Hirabayashi II* is critical. First, these cases demonstrate how a law can be supported by express policy justifications and embraced by the public, while concealing insidious policy justifications

110. *Id.* at 96.

111. *United States v. Hirabayashi*, 46 F. Supp. 657, 661 (W.D. Wash. 1942).

112. *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986).

113. *Hirabayashi*, 828 F.2d at 593.

114. *Id.* at 598.

115. *Hirabayashi*, 627 F. Supp. at 1457.

116. *Hirabayashi*, 828 F.2d at 608.

117. *Id.* at 593.

that, if expressed, might invalidate the law. Second, the length of time it took to vacate Hirabayashi's convictions demonstrates that even when it seems obvious that an insidious implicit policy drives legislation, proving that fact in court may be extremely difficult. In fact, had an archival researcher not discovered the smoking gun in DeWitt's original report, all of the historical condemnations of the wartime curfew still would not have led the courts to vacate Hirabayashi's convictions. Thus, without more than speculation and statistics regarding the implicit policy rationales driving juvenile curfew laws, there may be no immediate relief for those affected by them.

Italian-Americans also included in the executive order at issue in the *Hirabayashi* cases likewise received no legal relief since no federal challenges to the curfew were brought by any of the 50,000 Italians affected by the curfew.¹¹⁸ While the Italian-American community's injuries cannot be quantified, the Wartime Violation of Italian American Civil Liberties Act was recently signed into law by President Clinton. This Act formally acknowledges the injustices, including curfews, that were perpetuated against Italian-Americans during World War II.¹¹⁹

The fact that Italian-Americans still clamor for recognition of the wrongs perpetuated against them because of their ethnicity indicates that discriminating curfew laws leave deep scars that persist throughout lifetimes. For Italian-Americans, the ill-effects felt by parents during World War II were passed on to their children who now seek symbolic reparations.¹²⁰ Likewise, the ill-effects of discriminatory juvenile curfew laws may also be passed on to an alarming number of children of those arrested for curfew violations.

III

EFFECTS OF MODERN JUVENILE CURFEW LAWS

A. *Juvenile Curfews May Not Attain Express Public Policy Goals*

Even where legislatures intend juvenile curfew laws to be applied neutrally, the enforcement of the curfews may result in minority youths being disproportionately targeted and criminally charged. Consider how curfew laws function. If a juvenile is stopped because

118. Wartime Violation of Italian American Civil Liberties Act, H.R. 2442, 106th Cong. § 2(2) (1999) (enacted Nov. 7, 2000).

119. *Id.*

120. See generally *Wartime Violation of Italian American Civil Liberties Act: Hearing on H.R. 2442 Before the Subcomm. on the House Constitution of the Comm. on the Judiciary*, 106th Cong. (1999) (statements of Reps. Charles T. Canady, Eliot Engel, and Rick Lazio).

he or she is out past curfew, that juvenile will either be punished for violating the curfew or, if he or she has a legitimate excuse for violating the curfew which falls under the curfew's express exceptions, that juvenile will be sent home. Therefore, in deciding whether to punish or to free the juvenile, enforcers have considerable latitude in deciding whether to enforce the curfew. We may query, then, whether the laws function satisfactorily such that they can be equally applied to all juveniles regardless of race, ethnicity, or social status.¹²¹ If the laws are not implemented in an evenhanded manner, the express public policy goals may not be achieved.

The express public policy goals of curfews are, as previously mentioned, reducing juvenile crime, reducing juvenile victimization, and enhancing parental authority.¹²² Whether the curfew laws successfully meet stated policy goals is a point of contention between proponents and opponents of curfew legislation.¹²³ For example, one may argue that if curfew laws achieve these goals when applied primarily to minority youths, then by extension minority youths may in fact be a group in need of regulation: If enforcing curfews against minority youths prevents crime, then minority youths must have been committing the targeted crimes; if enforcing curfews against minority youths reduces juvenile victimization, then minority youths may be most in need of protection; if enforcing curfew laws against minority youths enhances parental authority, then the parents of minority children may most need government assistance in exercising authority at home. This view, however, contrasts with the facially neutral laws, as those laws imply that all children, regardless of race, gender, ethnicity, or class, need protection.

If curfew laws are in fact enforced disproportionately against minorities, that does not mean that white children are above the law, nor does it mean that they escape its enforcement altogether. Instead, it signifies that white juveniles as a group feel the effects of the law less than they would if the laws were enforced in an evenhanded manner. If the law is consistently and predictably implemented in a discriminatory manner without achieving any of the express public policy rationales, it demonstrates a likelihood that discriminatory enforcement is an implicit policy behind the law.

Some argue that a discriminatory effect does not evidence a discriminatory intent. To mount a successful challenge to discriminatory curfew enforcement, the Supreme Court requires that a plaintiff estab-

121. *See infra* Part III.C.

122. *See supra* note 3 and accompanying text.

123. *See infra* notes 126-32 and accompanying text.

lish discriminatory intent, not just discriminatory effect.¹²⁴ However, legislatures may offer relief from discriminatory effects without evidence of intent.¹²⁵ Once a law's effects have been studied and disseminated, this knowledge should be incorporated to indicate lawmakers' intent. If known effects were not part of the intent, then the curfew law would be amended or abandoned in an attempt to avoid discrimination. When legislatures, made aware of curfews' discriminatory effects, gloss over or ignore them, these effects must be considered part of the policy driving the laws' enactment.

There is a paucity of studies showing the actual enforcement and effects of curfew laws on a national scale.¹²⁶ Data is available at the local level, however,¹²⁷ and legislators considering the implementation of a curfew law should review this information. A critical look at some of the available data reveals the disparate effect these laws have on different segments of society. For example, police enforcing the much publicized New Orleans juvenile curfew law arrest black youths at a rate nineteen times higher than white youths.¹²⁸ Vincent Schiraldi, director of the Center of Juvenile Justice argues that, "If middle-class white kids were arrested at 19 times the rate of African-American youths, there would be no debate over the effectiveness of the New Orleans curfew, because there wouldn't be a New Orleans curfew—period."¹²⁹

The Justice Policy Institute's study examining the effects of the impact of juvenile curfews in California showed a slightly more hopeful picture. Evidence indicated that authorities in most counties evenhandedly enforced curfew laws.¹³⁰ In four of the largest California counties, however, relatively minor discrepancies existed: police arrested black and Latino youths for curfew violations 2 to 8.4 times

124. See *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (finding presumption that law enforcement acts in unbiased manner, absent clear and convincing evidence of discriminatory effect and discriminatory purpose).

125. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 n.4 (1993).

126. See, e.g., Hemmens & Bennett, *supra* note 2, at 276; Ruefle & Reynolds, *supra* note 8, at 361.

127. See *infra* notes 128-38.

128. Vincent Schiraldi, *No Panacea: While Violating the Rights of Youths, The D.C. Curfew Won't Bring Down Juvenile Crime*, *LEGAL TIMES*, Sept. 27, 1999, available at WL 9/27/1999 Legal Times 23; see also Privor, *supra* note 1, at 417 (stating that New Orleans' curfew is most restrictive in America).

129. Schiraldi, *supra* note 128.

130. MIKE MALES & DAN MACALLAIR, *THE IMPACT OF JUVENILE CURFEW LAWS IN CALIFORNIA 14* (Report by Justice Policy Institute of the Center on Juvenile and Criminal Justice, 1998) (on file with the *New York University Journal of Legislation and Public Policy*), available at <http://www.cjcj.org/jpi/curfew.html>.

more often than white youths.¹³¹ Interestingly, while the study revealed relatively evenhanded enforcement, it also concluded that “curfew enforcement does not reduce youth crime over time for any racial/ethnic group on a statewide basis.”¹³²

The inefficacy of curfew laws calls into question whether, considering their discriminatory effects, juvenile curfew laws are worth legislatures’ efforts.¹³³ No study has proven conclusively that enactment or enforcement of juvenile curfew laws achieves any of the laws’ express policy goals.¹³⁴ For example, New Orleans officials claimed that their curfew led to a thirty-eight percent reduction in juvenile crime.¹³⁵ The empirical data, however, failed to support the city’s claimed success.¹³⁶ Furthermore, when an overall drop in crime coincides with the implementation of a juvenile curfew law, it is difficult to determine whether the overall drop in crime or the curfew is responsible for reduced juvenile crime rates. Even if the juvenile crime rate for New Orleans did decrease, however, such a decrease does not necessarily constitute proof of the curfew law’s effectiveness because other factors may have contributed to this decrease. Specifically, in addition to its curfew, New Orleans implemented many other programs, such as recreational centers, jobs, camps, and an increased police force.¹³⁷ Proclamations of curfew success may fail to take into account these and other factors that help to reduce juvenile victimization and crime rates. Furthermore, the implementation of a curfew to reduce juvenile crime rates seems misplaced because some studies show that the majority of juvenile crime occurs between three and eight P.M.,¹³⁸ hours unaffected by most juvenile curfews. Therefore, the implementation of a juvenile nighttime curfew does not target the time of day when most juvenile crime occurs.

There is also little evidence that juvenile curfew laws reduce the victimization of juveniles. Many children are abused and victimized in their own homes. Juvenile curfew laws may in fact increase victimization of some children, faced with the choice of being home during a parent’s abusive rage or alcoholic haze, or being on the street and

131. *Id.*

132. *Id.* at 8.

133. *See infra* Part III.C.

134. *See* Hemmens & Bennett, *supra* note 2, at 269 (“While it is unclear whether juvenile curfews are effective in reducing crime, it is clear that they are being readily embraced by communities across the country.”) (citations omitted).

135. Privor, *supra* note 1, at 467.

136. *Id.* at 467-68.

137. *Id.*

138. Schiraldi, *supra* note 128.

subject to a possible curfew violation and the resulting legal and personal consequences. Finally, the policy goal of increasing parental authority is not one a statistical study can quantify. The debate continues as to whether juvenile curfews in fact increase or decrease parental authority in the eyes of children since children may perceive that parents are no longer able to make basic child-rearing decisions. In effect, curfew laws conclusively achieve none of the express policy goals put forth in support of their enactment. Therefore, one may query whether a more insidious implicit discriminatory policy drives the enactment of these laws.

B. *Discrimination in Drafting*

Although appearing neutral on its face, a curfew law may, in fact, be drafted to have a discriminatory effect on a particular group of children. For example, a curfew law disproportionately affects minority youths whose cultural traditions leave them more susceptible to the effects of the facially neutral law. Implicit restrictions on black leisure have long existed in American law.¹³⁹ Thus, although the curfew implies that it will affect all children equally, certain cultural customs such as gathering at later hours may force some children to choose between violating the curfew or violating their own cultural norms.¹⁴⁰

The curfew laws also have a discriminatory effect on children from lower socio-economic backgrounds. Children in large cities with curfews disproportionately tend to be minorities.¹⁴¹ Furthermore, disallowing poor children to leave the home may itself be more restrictive than disallowing wealthier children from so doing, for wealthier children may have backyards, porches, or basements.¹⁴² The Washington, D.C. curfew may have attempted to alleviate this problem in some way by creating a curfew exception if the juvenile is on the

139. See, e.g., Regina Austin, "Not Just for the Fun of It!": *Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667, 676-78 (1998) (discussing facially neutral laws, including curfews, with discriminatory impacts).

140. See *id.*

141. See, e.g., Jessie McKinnon & Karen Humes, U.S. CENSUS BUR., *THE BLACK POPULATION IN THE UNITED STATES 2* (1999) (finding that majority of blacks live in central cities of metropolitan areas), available at http://www.census.gov/prod/2000/pubs/p20_530.pdf.

142. See Austin, *supra* note 139, at 678.

sidewalk in front of his or her home.¹⁴³ However, this is allowed only so long as neighbors do not complain.¹⁴⁴

Curfew laws also disproportionately affect poorer juveniles because those juveniles may be more likely to have part-time jobs. Although many curfew laws create an exception for juveniles traveling to or from work, this still disproportionately affects working children. For example, if a police officer observes a person who appears to be in violation of the curfew ordinance, the officer has the right to question that suspect and determine whether he or she is affected by the curfew law. If the curfew law affects the suspect, the officer must then determine whether that child should be punished for a violation or whether he or she falls under one of the law's exceptions. In the case of the juvenile coming home from work at night, that juvenile bears the burden of explaining to a police officer why he or she is on the street and bears the risk that the police officer may not believe him or her. It is important to note that the more exceptions a juvenile curfew contains, the more discretion police officers may exercise.¹⁴⁵

C. *Discrimination in Enforcement*

The politics behind the imposition of a curfew may enjoy popular support, but practical enforcement issues are often sorted out only after a curfew law has been enacted. Depending on the size of a city, universal enforcement of a juvenile curfew law may not be economically feasible. Therefore, large cities utilize three main techniques to enforce curfews: (1) regular enforcement (officers enforce curfew laws as any other law); (2) regular enforcement augmented by crack-downs by special curfew units; or (3) saturation.¹⁴⁶ Saturation is generally used in response to public outrage over increased violence, or used to increase police regulation for brief periods (such as the summer months).¹⁴⁷ Enforcement itself may lead to discriminatory effects, as distrust between members of different racial, ethnic, religious, and economic backgrounds often exists in the United States. This burden of distrust may fall on juveniles.

143. D.C. CODE ANN. § 6-2183(b)(1)(F) (2000).

144. *Id.*; see also *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 547 (holding that neighbors' right terminate sidewalk privilege does not unconstitutional impair juvenile's rights).

145. Trollingier, *supra* note 2, at 1001 ("Vague language and inadequate standards vest in law enforcement officers unconfined discretion, unconstitutionally authorizing discriminatory and selective enforcement.").

146. Ruefle & Reynolds, *supra* note 8, at 352.

147. *Id.*

1. *Racial Profiling*

The realities of racial profiling were for years ignored, but recently such profiling, or the crime of “DWB” (“Driving While Black”) has gained national attention both in the popular press and in scholarly work.¹⁴⁸ It is now widely conceded that black and Latino motorists are stopped at a much higher rate than their white counterparts.¹⁴⁹ For example, New Jersey’s own internal audits showed that during a three year period, eighty-four percent of people arrested on the New Jersey Turnpike were members of minority groups.¹⁵⁰ The practice of racial profiling may similarly affect minority youths in the area of juvenile curfews.

With the prevalence of curfew laws, police officers have a legitimate pretext for stopping young drivers who appear to be black or Latino. Just as minority drivers are generally stopped disproportionately, minority juveniles may be stopped more frequently in a legitimate effort to enforce curfew laws or under that pretext. One may wonder what difference this makes, since all the juvenile must do is convince the police officer that he or she is not violating the curfew. However, all youths should bear the brunt of the curfew laws equally. Indeed, making certain children more frequent targets of the law will increase the levels of distrust of the criminal justice system and broaden the divide between white and minority children’s experiences and consciousness.¹⁵¹ Furthermore, some cities have raised the stakes. For example, with the express intent of reducing gang activity, one Illinois town passed a law allowing police officers to seize the car of any teenager out past curfew.¹⁵²

Controlling gang activity is, of course, a valid public goal. However, the act of targeting gangs itself is replete with racial connotations. If the curfew is explicitly aimed at gangs dominated by minority youths from inner cities, the law may not be enforced in neighborhoods where gang activity is not present. Additionally, the

148. See, e.g., David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 269 & n.17 (1999) (citing polls that show that majority of whites believe that blacks suffer from police racism).

149. *Id.* at 266-67 (using examples from Ohio to show that “Driving While Black” is not urban phenomenon).

150. See David Barstow & David Kocieniewski, *Records Show New Jersey Police Withheld Data on Race Profiling*, N.Y. TIMES, Oct. 12, 2000, at A1; see also Harris, *supra* note 148, at 267 (“Sophisticated analyses of stops and driving populations in [New Jersey and Maryland] showed racial disparities in traffic stops that were ‘literally off the charts.’”) (citation omitted).

151. See Harris, *supra* note 148, at 269-70 (describing pretextual traffic stops as phenomenon “common to blacks, but almost invisible to whites”).

152. *Crime Prevention: Lights Out*, ECONOMIST, Sept. 18, 1999, at 30.

police may only stop children who fit race-based profiles of gang members.¹⁵³ It may appear that the curfew applies to all youths. However, when a curfew specifically targets a segment of the population traditionally made up of minority youths, other juveniles rarely share the burden of the law.

2. *Hot Spots*

In an effort to enforce juvenile curfew legislation, municipalities may target specific enforcement areas. In such situations, the curfew law has often been enforced infrequently or not at all, and suddenly an *ad hoc* enforcement team begins to enforce the curfew in a particular neighborhood.¹⁵⁴ Such a development usually occurs in response to a sudden increase in crime or community complaints, or to control a statistically high crime neighborhood, or “hot spot.”¹⁵⁵

Often, however, other unstated motives are at play. In *Ashton v. Brown*, a race-based curfew enforcement case presented in a Maryland state court, a nineteen-year-old and a sixteen-year-old sued the city of Frederick, challenging the constitutionality of the city’s curfew and seeking damages for their detention.¹⁵⁶ The Frederick curfew applied to youths under eighteen who were out “during the nighttime hours.”¹⁵⁷ The court record revealed that the enforcement of the curfew was generally limited to occasional arrests by individual officers,¹⁵⁸ but that police instituted a curfew crackdown aimed at “the Rainbow,” a local club that attracted a predominantly black clientele.¹⁵⁹ The city contended that the crackdown was aimed at all four establishments on a particular block. However, the police concentrated their efforts on the Rainbow and detained no minors from any other establishment. In the end, all twenty-eight people detained were black.¹⁶⁰

The *Ashton* plaintiffs claimed that white teenagers had never been “rounded up in such a manner” although they also congregated

153. See, e.g., Note, *Juvenile Curfews and Gang Violence: Exiled on Main Street*, 107 HARV. L. REV. 1693, 1698 (1994) (“[Y]oung Hispanic males who match police profiles of gang members [] suffer frequent police stops and questioning.”).

154. See Ruefle & Reynolds, *supra* note 8, at 352, 359.

155. For example, Denver, Phoenix, and Orlando have curfews that are restricted to hot-spots. *Id.* at 352. These target area curfews survived court challenges. *Id.*

156. *Ashton v. Brown*, 660 A.2d 447, 452-53 (Md. 1995).

157. *Id.* at 452.

158. *Id.* at 453 n.6.

159. *Id.* at 452.

160. *Id.* at 453. *But see id.* at 453 n.4 (noting police claimed that only twenty-five of twenty-eight arrestees were African-American).

past curfew hours.¹⁶¹ The police chief admitted that the only other similar curfew crackdown had taken place in the mid-1980s and had also targeted an establishment predominantly frequented by blacks.¹⁶² The plaintiffs argued that even if the curfew ordinance might be considered valid, the actions of the police constituted “a *de facto* policy” of subjecting black people to disparate treatment.¹⁶³ While the high court of Maryland struck the ordinance for being unconstitutionally vague, it noted that a lower court can avoid addressing the plaintiffs’ claims of racial discrimination, although raised in the briefs and clearly a factor in the motivation of the police.¹⁶⁴

The failure of the courts generally to address racial discrimination claims in this context demonstrates a nationwide reluctance to speak about race.¹⁶⁵ The fact that the police can target a minority group for curfew enforcement, and then refuse to address the racial issues inherent in the case, reflects the nation’s tendency to ignore racial issues.

3. *Fourth Amendment*

The description of the detention of the plaintiffs in *Ashton* reflects the larger implications of juvenile curfew laws. The nineteen-year-old plaintiff, Vanessa Brown, should not have been affected by the curfew ordinance, which applied to individuals younger than eighteen.¹⁶⁶ However, as she was walking on a public street in the direction of the Rainbow, Brown was photographed, handcuffed, and searched, including being subjected to a “pat-down” of her entire body.¹⁶⁷ The police detained her for forty minutes on a police bus stationed outside of the Rainbow.¹⁶⁸ The lower courts held that the police had probable cause to arrest Brown, and, therefore, that any search or seizure incident to arrest was lawful.¹⁶⁹ The Maryland Court

161. *Id.* at 453.

162. *Id.* at 453 n.6.

163. *Id.* at 454.

164. *Id.* at 455.

165. *See supra* notes 67-72 and accompanying text.

166. Also illustrated by *Ashton* is the fact that not only minors, but also youthful-looking adults may be subject to police detention under the pretext of curfew laws. A person may be stopped if police have a reasonable suspicion that a person falls under the curfew law. Thus, police enforcing a juvenile curfew law have the authority to stop any adult who may be mistaken for a teenager. It is likely that the burdens of these laws will be disproportionately felt by minorities, even those whose age excludes them from the law. *See supra* Part III.C.1.

167. *Ashton*, 660 A.2d at 453.

168. *Id.*

169. *Id.* at 460.

of Appeals held, however, that even if the arrest was proper under the Fourth Amendment for probable cause, the arrest violated Brown's due process rights because the arrest was based on an unconstitutional ordinance.¹⁷⁰

Ashton illustrates several additional problems that arise from the enactment of curfew laws. First, curfew laws may weaken the Fourth Amendment rights of juveniles. Maryland's supreme court refused to address this problem because the curfew was held to be unconstitutional under the Fourteenth Amendment. However, when a curfew ordinance is valid and police frisk or search a juvenile stopped for a potential curfew violation, that search may constitute a valid exercise of police power or an unconstitutional violation of the juvenile's Fourth Amendment rights. The courts are split on this issue,¹⁷¹ as the Supreme Court has provided no guidance on the Fourth Amendment in the context of juvenile curfews. However, several federal district courts have upheld curfews in the face of Fourth Amendment challenges, holding that the Fourth Amendment right to be free from unreasonable search and seizure is properly limited by the governmental power to criminalize certain forms of behavior.¹⁷²

If a curfew allows for the arrest of a juvenile as opposed to merely requiring an escort home, police will more likely be able to perform a search incident to arrest.¹⁷³ However, until the arrest or in cases in which the arrest is not authorized, the police must adhere to the same Fourth Amendment requirements that apply to adults:¹⁷⁴ no detention without reasonable suspicion of criminal activity, and no frisks unless a reasonable fear of imminent danger exists.¹⁷⁵ Curfew laws, however, allow police to eliminate the required reasonable suspicion of criminal activity by simply criminalizing the act of being outside the home. This establishes a pretext for police to detain and

170. *Id.* at 461.

171. *Compare* Schleifer v. City of Charlottesville, 963 F. Supp. 534, 551 (W.D. Va. 1997); *Waters v. Barry*, 711 F. Supp. 1125, 1138 (D.D.C. 1989); *with* L.A.F. v. State, 698 N.E.2d 355, 355-56 (Ind. Ct. App. 1998).

172. *See* Peckman v. City of Wichita, No. 00-1065-JTM, 2000 WL 1294422, at *4 (D. Kan. Aug. 15, 2000) (holding that policy of taking curfew violators into custody does not violate Fourth Amendment); *see also* *Waters v. Barry*, 711 F. Supp. 1125, 1137-38 (D. D.C. 1989).

173. *See*, for example, the arrest of Vanessa Brown in *Ashton*. *See supra* notes 167-70 and accompanying text.

174. *See, e.g., In re* People, 506 P.2d 409, 411 (Colo. App. 1973).

175. *See, e.g.,* L.A.F. v. State, 698 N.E.2d 355, 355-56 (Ind. Ct. App. 1998) (holding search of minor detained for curfew violation violated Fourth Amendment because no evidence of reasonable belief that minor was armed and dangerous was presented).

search youth.¹⁷⁶ Again, this may result in discriminatory effects because enforcement officers disproportionately stop minority youths.¹⁷⁷

The effects of curfews therefore include increased searches and seizures of minority youths and their property. An abrogation of the Fourth Amendment rights of the many juveniles affected by curfew laws may result. Courts have held that some searches incident to curfew violations' arrests are unreasonable. For example, in *In re People*, the Colorado Court of Appeals held that although the curfew violation was itself valid, the search was invalid because of its exploratory nature.¹⁷⁸ Furthermore, the search did not constitute a valid inventory search because the juvenile was not to be incarcerated; he was merely being detained until his parents picked him up.¹⁷⁹ However, other courts may find differently.

Curfew ordinances themselves generate the most juvenile arrests in the United States, more than all violent juvenile crimes combined.¹⁸⁰ With over 140,000 curfew arrests in 1996, up 116% from 1994,¹⁸¹ such ordinances obviously affect a large number of families. When considering the possibility that any number of these children will be frisked, society must question whether a status crime justifies such invasions and whether curfews really meet the express policy goals.

CONCLUSION

As this note has indicated, the express policy goals of juvenile curfew laws enacted throughout the United States have not been consistently achieved. Furthermore, the documented existence of discrimination in the criminal justice system means that curfew laws are likely to disparately affect minority juveniles, as well as juveniles of lower socio-economic classes. Therefore, while the benefits of curfew

176. While frisks are generally reserved for those situations in which a police officer believes he or she is in imminent danger, some statutes authorize frisks of curfew violators. See, e.g., N.C. GEN. STAT. § 14-288.10(b) (2000).

177. See *supra* Part III.C.; see also Benjamin Weiser, *U.S. Detects Bias in Police Searches: Prosecutors and Mayor's Office in Talks on Racial Profiling*, N.Y. TIMES, Oct. 5, 2000, at A1 (noting that analysis of New York City street searches found pattern of racial profiling).

178. See *In re People*, 506 P.2d at 412.

179. See *id.*

180. Jason Ziedenberg, *Curfew Violation—A Useless Statutory Crime*, WASH. POST, Sept. 15, 1999, at A24. Ziedenberg is a policy analyst at the Justice Policy Institute in Washington, D.C.

181. See *Youth Curfews Fizzle Under Microscope: First Comprehensive Study of Juvenile Curfews Finds No Reduction in Youth Crime*, JUSTICE POLICY INSTITUTE, at <http://www.cjcj.org/jpi/curfewpr.html> (last visited Nov. 14, 2000).

laws remain in dispute, their ill effects for particular segments of society are a virtual certainty.

Discriminatory enforcement is not unique to curfews, and legislatures have yet to find a meaningful solution to this problem in the criminal justice system. Legislative caution must be exercised in the area of juvenile curfews because a disenfranchised segment of the population is the target of these laws. The disparities in law enforcement require that legislators make critical assessments of their stated reasons for enacting curfew legislation in order to ascertain whether the stated goals are in fact the true basis for these laws. This proposition is a difficult one because legislators may be apprehensive of a potential backlash if they express doubt as to the efficacy of curfews.

In order to consider these issues fully, legislators must first critique their own motives. They must ask themselves tough questions, the answers to which they may fear. In the modern politically correct era, legislators may feel stifled and unable to have a truly free discussion about the racial, ethnic, and class differences that factor into the enactment of curfews for fear that a comment may be taken out of context, or used against the legislator in a political campaign. However, legislators must begin to discuss these issues because they inevitably bear responsibility for the negative effects of the curfew laws they enact.

The distinct possibility that the unfortunate practice of racial profiling will affect juveniles in the context of curfew laws, combined with the oppressive history of the use of curfews, creates a responsibility on the part of legislatures to be particularly critical of curfew legislation. Responsibility does not mean, however, that curfew laws should not be enacted. Rather, legislators must consider carefully the potential discriminatory, detrimental effects of a curfew law prior to its enactment. This may be accomplished in a variety of ways. Rather than looking only to statistics, legislatures could seek out feedback from those constituents most likely to bear the brunt of the proposed curfew in order to get a sense of the relationship between those citizens and the police.

Given the tremendous number of children and families swept up in the criminal justice system through juvenile curfew laws, consideration must also be given to the history of curfew laws. Curfew laws have traditionally been used to establish social control over and to oppress particular groups with limited political power. This history must be examined as a possible indicator of the policies driving the current vogue of juvenile curfew laws in the United States.

If proponents of curfew laws truly desire to meet their stated policy objectives, legislatures and communities should implement programs that have been proven to correlate with a drop in juvenile crime. The decision to criminalize behavior through curfews rather than to create proactive solutions to nocturnal juvenile activity, such as supervised recreation or employment, contributes to the perceived need for curfew laws. In passing curfew laws, legislatures create an offense which, being responsible for the most juvenile convictions in the nation, increases statistics indicating rising juvenile crime. As juvenile crime rate statistics increase, so does the public perception of the need for juvenile curfew laws.

Until researchers conduct more studies and legislators further discuss both the questionable efficacy and the possible discriminatory effects of curfew laws, popular support for curfews is likely to continue. The prevalence of curfew laws in the United States, which shows no sign of declining, manifests an unflagging desire to meet the express policy goals of decreasing juvenile crime, decreasing juvenile victimization, and increasing parental support. However, legislators owe a duty to juveniles and parents alike to ensure that the proclaimed benefits of curfew laws are supported by factual evidence. Without proof of the efficacy of curfews, legislators, academics, and the general public must look beyond the express policy goals and be cognizant and critical of the implicit policies and potential discriminatory effects of modern juvenile curfew laws.

