

Law Offices of Donald Kilmer

A Professional Corporation

1645 Willow Street, Suite 150
San Jose, California 95125
E-Mail: Don@DKLawOffice.com
Phone: 408/264-8489
Fax: 408/264-8487

June 10, 2009

Via: E-File

U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, California 94103-1526

Re: Nordyke, et al., v. King, et al., Case No.: 07-15763
Pending Case – Filed April 20, 2009.
En Banc Vote Pending pursuant to May 18, 2009 Order.
Original Panel: Arthur L. Alarcon, Diarmuid F. O'Scannlain
and Ronald M. Gould

Your Honors:

This letter is intended to comply with Federal Rule of Appellate Procedure 28(j). A significant case of persuasive authority on the issue of judicial scrutiny of fundamental rights was issued by the highest court in New York.

The case is: *Jiovon Anonymous, a Minor by and Through his Father and Legal Guardian, Thomas Anonymous, & Thomas Anonymous, Individually v. City of Rochester, Robert Duffy, in his official capacity as Mayor of City of Rochester, and David Moore, in his official capacity as Chief of Police of City of Rochester*, Case No.: 81. The opinion is attached.

In applying an intermediate scrutiny, fundamental rights analysis, the New York Court found that the municipality must do more than state conclusory crime statistics that have no (or minimal) relationship to the target of the law.

The reasoning of this New York case is significant here because the County of Alameda has conceded that the Nordykes' gun shows are crime free and conducted in accordance with federal and state gun show laws.

Without evidentiary support for banning gun shows¹ and because the rights asserted by the Nordyke plaintiffs (First, Second and Equal Protection) are subject to at least intermediate scrutiny, this Court should strike down the Alameda Ordinance for the same reasons the New York Court of Appeals struck down the Rochester Ordinance, lack of evidentiary support that the target of the ordinance is a source of community evil.

Respectfully Submitted,

/s/

Donald Kilmer
Attorney for Appellants

encl: Opinion from New York Court of Appeals

¹ In *Nordyke v. King (Nordyke I)*, 229 F.3d 1266, 1268, the court found that:

The Ordinance would forbid the presence of firearms at gun shows, such as Nordyke's, held at the Fairgrounds. Practically, the Ordinance makes it unlikely that a gun show could profitably be held there.

The California Supreme Court made an even stronger finding in *Nordyke v. King (Norykde II)*, 27 Cal. 4th 875, 882:

[T]he effect on the Nordykes of the Ordinance banning guns on county property is to make gun shows on such property virtually impossible.

=====
This opinion is uncorrected and subject to revision before
publication in the New York Reports.

No. 81

Jiovon Anonymous, a Minor by and
Through his Father and Legal
Guardian, Thomas Anonymous, &
Thomas Anonymous, Individually,
Respondents,

v.

City of Rochester, Robert Duffy,
in his official capacity as Mayor
of City of Rochester, and David
Moore, in his official capacity
as Chief of Police of City of
Rochester,

Appellants.

Jeffrey Eichner, for appellants.

Michael Adam Burger, for respondents.

New York Civil Liberties Union; New York State
Conference of Mayors and Municipal Officials, amici curiae.

JONES, J.:

The issue before this Court is whether the juvenile
nighttime curfew adopted by the Rochester City Council violates
the Federal and New York State Constitutions. We hold that it
does.

I

In 2006, the Rochester City Council (City Council)

- 2 -

No. 81

adopted chapter 45 of the Code of the City of Rochester (City Code) which established a nighttime curfew for juveniles. Under the curfew:

"It is unlawful for minors to be in or upon any public place within the City at any time between 11:00 p.m. of one day and 5:00 a.m. of the immediately following day, except that on Friday and Saturday the hours shall be between 12:00 midnight and 5:00 a.m. of the immediately following day"

(Rochester City Code § 45-3). A minor is defined as "[a] person under the age of 17 [but] [t]he term does not include persons under 17 who are married or have been legally emancipated"

(Rochester City Code § 45-2). The curfew provides for certain exceptions which make the prohibition under the curfew inapplicable "if the minor can prove that:

A. The minor was accompanied by his or her parent, guardian, or other responsible adult;

B. The minor was engaged in a lawful employment activity or was going to or returning home from his or her place of employment;

C. The minor was involved in an emergency situation;

D. The minor was going to, attending, or returning home from an official school, religious or other recreational activity sponsored and/or supervised by a public entity or a civic organization;

E. The minor was in the public place for the specific purpose of exercising fundamental rights such as freedom of speech or religion or the right of assembly protected by the First Amendment of the United States Constitution or Article I of the Constitution of the State of New York, as opposed to

- 2 -

- 3 -

No. 81

generalized social association with others;
or

F. The minor was engaged in interstate
travel"

(Rochester City Code § 45-4).¹

Under § 45-6 of the City Code, "a police officer may approach a person who appears to be a minor in a public place during prohibited hours to request information, including the person's name and age and reason for being in the public place" and "may detain a minor or take a minor into custody based on a violation of [the curfew] if the police officer . . . reasonably believes that the [curfew has been violated] and . . . that none of the exceptions . . . apply" (Rochester City Code § 45-6 [A], [B], [B][1], [B][2])). "A police officer who takes a minor into custody based on a violation of [the curfew] [must] take the minor to a location designated by the Chief of Police" (Rochester City Code § 45-6 [C]).² Additionally, the ordinance states that "a violation of [the curfew] shall constitute a 'violation' as

¹ A responsible adult is defined as "[a] person 18 years of age or older specifically authorized by law or by a parent or guardian to have custody and control of a minor" (Rochester City Code § 45-2).

² Rochester Police Department General Order 425, titled "Curfew Ordinance Enforcement," provides for actions a police officer can take in his or her discretion (such as directing the minor to proceed home with a warning, take the minor into protective custody, or transport the minor to a parent, guardian, or responsible adult or to a curfew facility) and procedures for searching, transporting, and handcuffing minors taken into custody for a violation of the curfew (56 AD3d at 143).

- 3 -

- 4 -

No. 81

. . . defined in the [] Penal Law" (Rochester City Code § 45-5).

The "Findings and purpose" with respect to the curfew were set forth by the City Council in § 45-1. They state that:

"A. A significant number of minors are victims of crime and are suspects in crimes committed during the nighttime hours, hours during which minors should generally be off the streets and getting the sleep necessary for their overall health and quality of life. Many of these victimizations and criminal acts have occurred on the streets at night and have involved violent crimes, including the murders of teens and preteens.

B. While parents have the primary responsibility to provide for the safety and welfare of minors, the City also has a substantial interest in the safety and welfare of minors. Moreover, the City has an interest in preventing crime by minors, promoting parental supervision through the establishment of reasonable standards, and in providing for the well-being of the general public.

C. A curfew will help reduce youth victimization and crime and will advance the public safety, health and general welfare of the citizens of the City"

(Rochester City Code § 45-1).

Plaintiffs, father and son, commenced the instant action challenging the validity of the curfew. They seek a declaration that the ordinance is unconstitutional and to enjoin defendants, the City of Rochester (City) and other City officials, from enforcing the ordinance on the grounds that the curfew violated Jiovon's Federal and State constitutional rights to freedom of movement, freedom of expression and association, and equal protection under the law, and Thomas' due process

- 4 -

- 5 -

No. 81

rights under the Federal and State Constitutions to raise his children without undue interference from the government. In addition, plaintiffs assert that the ordinance conflicts with, among other statutes, § 305.2 of the Family Court Act (FCA) and § 30.00 of the Penal Law. Supreme Court granted the City's motion to dismiss finding that the curfew (1) was not inconsistent with New York Statutes, (2) did not violate the constitutional rights of the minor, (3) does not unreasonably interfere with the rights of the parent, and (4) is not facially defective.

Declaring the ordinance unconstitutional, the Appellate Division, with two Justices dissenting, reversed and enjoined its enforcement. The court determined that the curfew was inconsistent with FCA § 305.2 and Penal Law § 30.00 because it authorized what was indistinguishable from an arrest of a minor under the age of 16 upon an alleged violation of the curfew and created criminal responsibility for a "violation" as defined in the Penal Law (56 AD3d 144-145). The court further determined that, as to minors between the ages of 16 and 17, the curfew violated the constitutional rights of both the parent and child. The court held that neither the crime statistics for the City³ nor the statements and opinions from political officials and the

³ The City's crime statistics showed that "minors [were] substantially more likely to be involved in crime or to be victims of crime during hours outside the curfew" and "the vast majority of violent crime during curfew hours [are] committed by persons over 18, and that adults are far more likely to be victims of such crime during those hours" (56 AD3d at 148).

- 5 -

- 6 -

No. 81

chief of police provided the requisite nexus to withstand even intermediate scrutiny; in other words, there was no demonstrated substantial relationship between the ordinance and its stated goals (id. at 147-149). The court also determined that the curfew impermissibly interfered with parents' fundamental substantive due process right to direct and control the upbringing of their children (id. at 150).

In arguing that the curfew should be upheld, the dissenting Justices concluded that intermediate scrutiny was the proper standard of review and that crime statistics from Dallas, Texas, a City with a similar curfew, provided the necessary substantial relationship because defendants "need not produce evidence to a scientific certainty" (id. at 153 [Lunn, J. dissenting]). The dissent argued that the ordinance imposed no unconstitutional burden on a minor's First Amendment Rights and that its interference with a parent's due process rights was minimal. Additionally, the dissent found no inconsistency between the ordinance and FCA § 305.2 because the ordinance only authorized a "temporary detention" and not an arrest (id. at 156-157 [Lunn, J. dissenting]). Defendants appealed to this Court as of right, and we now affirm on different grounds.

II

Plaintiffs challenge the curfew on multiple constitutional and non-constitutional grounds. Because plaintiffs' non-constitutional arguments do not wholly dispose of

- 6 -

this appeal, we address only their constitutional arguments here (see generally Matter of Clara C. v William L., 96 NY2d 244, 250 [2001]); id. at 251 [Levine, J., concurring]). Specifically, we focus primarily on the substantive due process rights of minors to enjoy freedom of movement and of parents to control the upbringing of their children.⁴

Curfew ordinances have long been enacted in cities around the country and numerous cases, both state and federal, have addressed similar constitutional issues implicated by these curfews (see e.g., State v J.P., 907 So2d 1101 [Fla 2005]; Treacy v Municipality of Anchorage, 91 P3d 252 [Alaska 2004]; Ramos v Town of Vernon, 353 F3d 171 [2d Cir 2003]; City of Sumner v Walsh, 148 Wash2d 490 [2003]; Hutchins v District of Columbia, 188 F3d 531 [DC Cir 1999]; Schleifer v City of Charlottesville, 159 F3d 843 [4th Cir 1998]; Nunez v City of San Diego, 114 F3d 935 [9th Cir 1997]; Outb v Strauss, 11 F3d 488 [5th Cir 1993]; Johnson v City of Opelousas, 658 F2d 1065 [5th Cir 1981]). Recent decisions analyzing the constitutionality of curfews have differed as to the appropriate level of scrutiny to apply: some courts have favored intermediate scrutiny (see e.g., Hodgkins, 355 F3d at 1057; Ramos, 353 F3d at 181; Hutchins, 188 F3d at 541; Schleifer, 159 F3d at 847), while others have adopted strict

⁴ We note that this case was not rendered moot when plaintiff Jiovon turned seventeen because he may still be detained under the curfew if, to an officer, he appears to be under 17 and fails to offer proof of his age.

scrutiny (see e.g., J.P., 907 So2d at 1116; Treacy, 91 P3d at 265-266; Nunez, 114 F3d at 946; Outb, 11 F3d at 492). Regardless of the level of scrutiny ultimately applied, these cases highlight a number of important factors relevant to constitutional review of a curfew ordinance.

Initially, we note that a municipality has general police powers and, under the traditional powers of parens patriae, a strong interest in preserving and promoting the welfare of children (see Hutchins, 188 F3d at 539). Plaintiffs do not dispute that the City Council, pursuant to its broad police powers, has the authority to enact a curfew ordinance. The issue, however, is whether that power was exercised in a manner consistent with the Federal and State Constitutions (see Ramos, 353 F3d at 172). We first turn to how the curfew may interfere with a minor's constitutional right to freely move about in public.

"[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" (Aptheker v Secretary of State, 378 US 500, 520 [1964] [Douglas, J., concurring]). For an adult, there is no doubt that this right is fundamental and an ordinance interfering with the exercise of such a right would be subject to strict scrutiny (see Chicago v Morales, 527 US 41, 54 [1999]). The

critical question, however, is whether a minor has a corresponding right that is equally fundamental, and therefore warrants the same restrictive level of scrutiny.

In many situations, children do not possess the same constitutional rights possessed by their adult counterparts; for example, children are afforded lesser freedom of choice than adults with respect to marriage, voting, alcohol consumption, and labor. On the other hand, a child's otherwise-criminal actions do not carry the same consequences as those of adults (see e.g., Penal Law § 30.00). The inherent differences between children and adults -- specifically their immaturity, vulnerability, and need for parental guidance -- have been recognized by the Supreme Court as the basis to justify treating children differently than adults under the Federal Constitution (see Bellotti v Baird, 443 US 622, 634-635 [1979]). "So 'although children generally are protected by the same constitutional guarantees . . . as are adults, the State is entitled to adjust its legal system to account for children's vulnerability' by exercising broader authority over their activities" (Hutchins, 188 F3d at 541 quoting Bellotti, 443 US at 635).

We find the rationale in Bellotti persuasive in the context of a curfew because it is hard to imagine that, even absent a curfew, the police may not take a vulnerable 5-year-old child found alone at night on a city street into custody for the child's own safety and well being. Even if we assume that the

- 10 -

No. 81

police may not do the same to a 17-year-old under the parens patriae function, an unemancipated minor still does not have the right to freely "come and go at will" (Vernonia Sch. Dist. 47J v Acton, 515 US 646, 654 [1995]). Moreover, "juveniles, unlike adults, are always in some form of custody" (Schall v Martin, 467 US 253, 265 [1984]) and their right to free movement is limited by their parents' authority to consent or prohibit such movement (see Ramos, 353 F3d at 182-183). As one court observed, "it would be inconsistent to find a fundamental right here, when the [Supreme] Court has concluded that the state may intrude upon the 'freedom' of juveniles in a variety of similar circumstances without implicating fundamental rights" (Hutchins, 188 F3d at 539 citing Prince v Massachusetts, 321 US 158, 166-167 [1944] [prohibiting children from selling magazines on the street]; Flores, 507 US 292, 301-303 [1993] [detention of deportable juveniles]; Schall, 467 US at 263-264 [pretrial detention of juvenile delinquents]; Ginsberg v New York, 390 US 629, 637-643 [1968] [prohibiting sale of non-obscene material to minors]).

Rather than categorically applying strict scrutiny to a curfew which implicates a minor's right to free movement simply because the same right, if possessed by an adult, would be fundamental, courts have found that intermediate scrutiny is better suited to address the complexities of curfew ordinances -- it is sufficiently skeptical and probing to provide rigorous protection of constitutional rights yet flexible enough to

- 10 -

accommodate legislation that is carefully drafted to address the vulnerabilities particular to minors (see Ramos, 353 F3d 171; see also Schleifer, 159 F3d at 847; Hutchins, 188 F3d at 541). In the context of juvenile curfews, we find persuasive the reasoning which recognizes that although children have rights protected by the Constitution, they can be subject to greater regulation and control by the state than can adults (see Ramos, 353 F3d at 180-181).

Next, we turn to the constitutional right asserted by the parents. Our precedent has repeatedly emphasized the "primacy of parental rights" to the care and custody of the child absent abandonment, surrender, or unfitness (Matter of Bennett v Jeffreys, 40 NY2d 543, 546-547 [1976]). Although it is settled that parents have a fundamental due process right, in certain situations, to raise their children in a manner as they see fit (see Wisconsin v Yoder, 406 US 205, 213-214 [1972]; see also Ginsberg, 390 US at 639), this is not the end of the analysis. Were the ordinance directly aimed at curbing parental control over their children, it might be that strict scrutiny would apply. However, that is not the case here.

Parental rights are not absolute and are subject to reasonable regulation (see Runyon v McCrary, 428 US 160, 178 [1976]; Prince, 321 US at 166 ["[a]cting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance,

regulating or prohibiting the child's labor, or in many other ways"])). The Supreme Court has stated that "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare" (Prince, 321 US at 167) specifically when it concerns the government's interest in the "moral, emotional, mental, and physical welfare of the minor" (Stanley, 405 US at 652 [internal quotations omitted]). Because the purpose of the juvenile curfew is, in part, to prevent victimization of minors during nighttime hours, it easily falls within the realm of the government's legitimate concern under Stanley.

Moreover, "[t]o the extent that the curfew is enforced against minors moving about in public with no purpose or with an improper purpose" (Treacy, 91 P3d at 269), how it impinges on a parent's rights is surely less clear and more indirect. Because the curfew is aimed primarily at minors, only peripherally burdening parents' rights, the reflexive labeling of a fundamental right, and accompanying analysis under strict scrutiny, is inadequate for taking into account the complexities and governmental concerns of this kind of regulation. As with the minor's due process rights, we agree that a searching review of the curfew is required but that a strict scrutiny analysis is not. We conclude that intermediate scrutiny, and the rationale of Ramos, are persuasive and we agree with the Appellate Division that the curfew is constitutionally infirm.

III

Under intermediate scrutiny, defendants must show that the ordinance is "substantially related" to the achievement of "important" government interests (see Craig v Boren, 429 US 190, 197 [1976]). Here, defendants assert that their governmental interest is to prevent minors from perpetrating and becoming victims of crime during nighttime hours. While this is clearly an important governmental interest, its expression does not end the intermediate scrutiny analysis. In addition to identifying an important governmental interest, defendants must show a substantial nexus between the burdens imposed by this curfew and the goals of protecting minors and preventing juvenile crime. The Supreme Court has explained that although the government need not produce evidence of this relationship to a scientific certainty (see Ginsberg, 390 US at 642-643), the "purpose of requiring [proof of] that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions" (Hogan, 458 US at 725-726).

Quite simply, the proof offered by the City fails to support the aims of the curfew in this case. As the Appellate Division observed, "a common theme of the [affidavits of political officials and affidavits and reports of police officials] is that city officials perceived a pressing need to

respond to the problem of juvenile victimization and crime as a result of the . . . tragic deaths of three minors" (56 AD3d at 148). These incidents would not have been prevented by the curfew because two of the victims were killed during hours outside the curfew and the third, as a result of being adjudicated a person in need of supervision, was already subject to an individualized curfew. Thus, these incidents do not provide the necessary nexus between the curfew and the ordinance's stated purpose.

Further, we conclude that the crime statistics produced by defendants do not support the objectives of Rochester's nocturnal curfew. Although the statistics show that minors are suspects and victims in roughly 10% of violent crimes committed between curfew hours (11:00 p.m. to 5:00 a.m.), what they really highlight is that minors are far more likely to commit or be victims of crime outside curfew hours⁵ and that it is the adults, rather than the minors, who commit and are victims of the vast majority of violent crime (83.6% and 87.8% respectively) during curfew hours. The crime statistics are also organized by days of the week and despite that minors are 64% to 160% more likely to be a victim and up to 375% more likely to be a suspect of violent crimes on Saturdays and Sundays as compared to a given weekday,

⁵ Looking at the hourly breakdown of minors as crime suspects and victims, more than three-quarters (75% to 86%) of all crimes that minors commit and are victims of take place during non-curfew hours.

surprisingly, the curfew is less prohibitive on weekends. We also note that the methodology and scope of the statistics are plainly over-inclusive for purposes of studying the effectiveness of the curfew.⁶

To be sure, minors are affected by crime during curfew hours but from the obvious disconnect between the crime statistics and the nighttime curfew, it seems that "no effort . . . [was] made by the [City] to ensure that the population targeted by the ordinance represented that part of the population causing trouble or that was being victimized" (Ramos, 353 F3d at 186). If, as the dissent argues, it is enough that from 2000 to 2005 a number of juveniles were victimized at night, then the same statistics would justify, perhaps even more strongly, imposing a juvenile curfew during all hours outside of school since far more victimization occur during those hours.

Nor can defendants simply rely on the studies and statistics of other municipalities with juvenile curfews without showing how the decrease in juvenile crime in those other cities is pertinent to Rochester. Without support from the City's own empirical data, we conclude that the justifications made by the Mayor and the Chief of Police for the nighttime curfew, based

⁶ For tallying the number of crimes committed by minors, the statistics include minors from ages "0 - 17" notwithstanding that the curfew does not apply to seventeen year olds. Although the curfew only applies to minors in public areas, the statistics provide no indication of where the crimes counted took place (i.e., whether on private or public property).

- 16 -

No. 81

primarily on opinions, are insufficient since they do not show a substantial relationship between the curfew and goals of reducing juvenile crime and victimization during nighttime hours.

We also conclude that the curfew imposes an unconstitutional burden on a parent's substantive due process rights. The City asserts that the ordinance promotes "parental supervision" of minors (Rochester City Code § 45-1 [B]). But the curfew fails to offer parents enough flexibility or autonomy in supervising their children (cf. Outb, 11 F3d 495-496 [exception for minor being on errand for parent]). Indeed, an exception allowing for parental consent to the activities of minors during curfew hours is of paramount importance to the due process rights of parents. "The . . . notion that governmental power should supersede the parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to the American tradition" (Hodgson v Minnesota, 497 US 417, 446-447 [1990]). If a parental consent exception were included in this curfew, it would be a closer case -- courts have upheld curfews having, among other things, such an exception as only minimally intrusive upon the parent's due process rights (see e.g., Treacy, 91 P3d at 258; Hutchins, 188 F3d at 535; Schleifer, 159 F3d at 851-852; Outb, 11 F3d at 490).

It is puzzling that the City purported to rely on curfews from other municipalities in the adoption of what was claimed to be a "similar" curfew ordinance yet failed to include

- 16 -

the critical exceptions which supported the constitutionality of those other curfews.⁷ For example, in Hutchins, the court reasoned that the District of Columbia curfew, with exceptions for parental consent, actually enhanced parental authority rather than challenged it (see Hutchins, 188 F3d at 545) and in Outb, the court found that the broad exceptions in a Dallas, Texas curfew only minimally intruded into the parents' rights (see Outb, 11 F3d at 495-496). But the Rochester curfew "does not allow an adult to pre-approve even a specific activity after curfew hours unless a custodial adult actually accompanies the minor. Thus, parents cannot allow their children to function independently at night, which some parents may believe is part of the process of growing up" (Nunez, 11 F3d at 952). Consequently, we conclude that the challenged curfew is not substantially related to the stated goals of promoting parental supervision.

Accordingly, the order of the Appellate Division should be affirmed without costs.

⁷ Many of the cases cited by defendants which upheld the constitutionality of a curfew have three exceptions: (1) where the minor is on an errand at the direction of the parent, (2) where the minor is on the sidewalk that abuts the minor's or the next-door-neighbor's residence, and (3) where the minor is generally exercising First Amendment rights (as opposed to being in public specifically for the exercise of such rights) (see Treacy, 91 P3d at 258; Hutchins, 188 F3d at 535; Schleifer, 159 F3d at 851-852; Outb, 11 F3d at 490).

Matter of Jiovon Anonymous et al. v City of Rochester et al.

No. 81

GRAFFEO, J. (concurring):

I vote to affirm because I conclude that the City of Rochester's juvenile curfew ordinance must be invalidated since the law conflicts, in part, with the Family Court Act. I further believe that the objectionable portion of the curfew law cannot be severed from the remainder of the ordinance and, consequently, the ordinance is invalid in its entirety.

Rochester's juvenile curfew ordinance specifies that children under the age of 17 cannot be in a public place between 11:00 P.M. and 5:00 A.M. Sunday through Thursday and from 12:00 A.M. to 5:00 A.M. on Friday and Saturday. There are delineated exceptions to the curfew, as set forth by the majority, where the minor can demonstrate that his or her conduct was covered by an exception. In drafting the curfew statute, the City Council decided that a minor who breaks curfew commits a violation as defined in the Penal Law. Under section 10.00 (3) of the Penal Law, a violation is an offense punishable by up to 15 days in jail. The curfew ordinance authorizes a police officer to "detain" or "take a minor into custody" if the officer reasonably believes that the minor has violated curfew and that none of the

- 2 -

No. 81

enumerated exceptions to the curfew restrictions apply.

The State Constitution's "home rule" provision (article IX, § 2) "confers broad police power upon local government relating to the welfare of its citizens" (New York State Club Assn. v City of New York, 69 NY2d 211, 217 [1987], affd 487 US 1 [1988]). This grant of authority includes the ability of a municipality to enact local laws regarding the "protection, order, conduct, safety, health and well-being of persons or property" within its borders (NY Const art IX, § 2 [c] [10]; see Municipal Home Rule Law § 10 [1] [a] [12]). There are, however, important limitations on municipal police powers (see New York State Club Assn. v City of New York, 69 NY2d at 217). First, under the doctrine of conflict preemption, a "local government . . . may not exercise its police power by adopting a local law inconsistent with constitutional or general law" (id.). Second, under the doctrine of field preemption, a municipality "may not exercise its police power when the Legislature has restricted such an exercise by preempting the area of regulation" (id.; see e.g. Albany Area Bldrs. Assn. v Town of Guilderland, 74 NY2d 372, 377 [1989]). Field preemption may occur by express legislative direction or may be "implied from a declaration of State policy by the Legislature . . . or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area" (Consolidated Edison Co. of N.Y. v Town of Red Hook, 60 NY2d 99, 105 [1983]).

- 2 -

- 3 -

No. 81

Nothing in the laws of this State indicate that the Legislature intended to prohibit municipalities from enacting juvenile curfews. Through the exercise of its police powers, a municipality may be able to justify the need for a juvenile curfew as a matter of permissible local concern. A curfew that is designed to reduce juvenile crime and victimization has "some fair, just and reasonable connection" to the promotion of the safety and welfare of vulnerable minors (People v Bunis, 9 NY2d 1, 4 [1961] [internal quotation marks omitted]). Clearly, the City of Rochester was motivated by laudable public safety concerns in attempting to get children off the streets late at night and into the safety of their homes.

But the curfew ordinance in this case raises a conflict preemption concern because the Family Court Act limits the instances when police can take children into custody. Section 305.2 (2) of the Family Court Act specifies that a police officer "may take a child under the age of sixteen into custody without a warrant in cases in which he may arrest a person for a crime under article one hundred forty of the criminal procedure law" (emphasis added). The term "crime" includes only misdemeanors and felonies, not violations (see Penal Law § 10.00 [6]). An infraction of the Rochester ordinance results in a "violation," punishable by up to 15 days in jail. Because a violation is not a "crime" for the purposes of section 305.2 (2), it necessarily follows that the constraints of Family Court Act § 305.2 prohibit

- 3 -

- 4 -

No. 81

the City of Rochester from authorizing the custodial detention of children aged 15 and under (see Matter of Victor M., 9 NY3d 84, 87 [2007]; Matter of Michael G., 99 Misc 2d 699, 701 [Family Ct, Rockland County, 1979]). Based on conflict preemption principles, this provision of Rochester's curfew ordinance contradicts the Family Court Act and is therefore invalid.*

The City of Rochester responds that its ordinance does not violate State law because it merely authorizes the police to engage in the "temporary detention" of a child, not to make an arrest. Semantics aside, the reality is that the ordinance permits a police officer to take custody of a minor, perhaps handcuff the offender, conduct a pat-down search (which could lead to the discovery of illegal contraband or a weapon), place the child in the back of a police car and transport the child to a detention facility. This, in my view, bears all of the hallmarks of a traditional arrest, not some short-term custodial intervention conducted solely for the safety and welfare of the child detained. And the punishment that can be inflicted for a violation of Rochester's curfew ordinance makes it easily distinguishable from Matter of Shannon B. (70 NY2d 458 [1987]), which upheld the authority of a police officer to detain a truant

* The dissent concludes that there is no preemption problem. But this ignores the fact that a curfew infraction is a "violation" as that term is defined in the Penal Law, thereby authorizing the possible imposition of a sentence of up to 15 days in jail for a minor who breaks curfew.

- 4 -

student, because truancy, unlike a violation of Rochester's curfew law, is not punishable by incarceration.

Nor is it possible to sever the offending provision of the ordinance from the remainder of the law. Under our traditional severability analysis, the "'question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots'" (CWM Chem. Servs., LLC v Roth, 6 NY3d 410, 423 [2006], quoting People ex rel. Alpha Portland Cement Co. v Knapp, 230 NY 48, 60 [1920], cert den 256 US 702 [1921])). In conducting this review, we first examine "the statute and its legislative history to determine the legislative intent and what the purposes of the new law were, and second, an evaluation of the courses of action available to the court in light of that history to decide which measure would have been enacted if partial invalidity had been foreseen" (CWM Chem Servs., 6 NY3d at 423, quoting Matter of Westinghouse Elec. Corp. v Tully, 63 NY2d 191, 196 [1984])).

Rochester's curfew ordinance does not contain a severability provision and nothing in the record before us indicates that the City Council considered this issue. From a practical perspective, severing the provision of the law that

- 6 -

No. 81

conflicts with the Family Court Act would make the curfew apply only to persons who are 16 years old. It is unlikely that the City of Rochester was interested in such a limited curfew, especially since the enactment of the ordinance was motivated in significant part by the murders of three local children, all of whom were under the age of 16. And restricting the curfew only to 16-year-olds would result in a law that covers a much smaller percentage of the minors that the City Council was seeking to protect. I therefore conclude that the objectionable portion of the ordinance cannot be severed and Rochester's curfew law is void in its entirety.

- 6 -

Jiovon Anonymous, et al. v City of Rochester, et al.

No. 81

PIGOTT, J. (dissenting):

At community meetings addressing violent crime in the City of Rochester in the mid-2000s, the Chairman of the City Council's Public Safety Committee was frequently asked by members of the public about the feasibility of a curfew in that city. The discussions occurred in the wake of three killings of children in Rochester, all of which occurred late at night. The councilman traveled to Minneapolis, accompanied by two Rochester police commanders, to investigate the curfew in place there. The Rochester Chief of Police concluded, after meetings with the police commanders and other staff, that a curfew ordinance such as the one successful in Minneapolis would be an effective tool for preventing juveniles from committing, or becoming the victims of, nighttime crime. Public hearings were held, and the City Council received a large quantity of information concerning curfews implemented in other U.S. cities. The Mayor of Rochester, a former Rochester Police Chief, strongly advocated passage of a curfew ordinance.

In 2006, the Rochester City Council adopted a curfew ordinance, codified as chapter 45 of the Municipal Code of the City of Rochester, which took effect on September 5 of that year.

- 2 -

No. 81

The curfew is applicable -- in "any public place" in the City of Rochester -- to persons under the age of 17. It applies between the hours of 11 p.m. and 5 a.m., except that it does not apply until midnight on Friday and Saturday nights. First introduced as a three-month pilot program, the Rochester curfew has been extended several times, most recently to December 31, 2009.

The many exceptions built into the curfew ordinance and the methods of its application are described in the opinion above (see maj opn at 2-3). It is worth adding that a Rochester Police Department General Order provides that the "location designated by the Chief of Police" referred to in the ordinance (see Rochester City Code § 45-6 [C]) is "a curfew facility designated by the Chief of Police," where police will assist staff to notify the minors's parent or guardian of the minor's location, with a view to reuniting the two (see Rochester Police Department General Order 425). The designated curfew center is at Hillside Children's Center, in Rochester.*

* I cannot accept the concurring view that taking a minor to the curfew center "bears all of the hallmarks of a traditional arrest" (concurring opn at 4) and that the ordinance therefore violates Family Court Act § 305.2 (providing that warrantless arrest of a juvenile is authorized only in cases where an adult could be arrested for a crime). The temporary detention of a juvenile until a responsible adult takes charge of him -- authorized by an ordinance enacted for the minor's protection, rather than prosecution -- is within the scope of a municipality's police power (see generally Matter of Shannon B., 70 NY2d 458, 462-463 [1987]) and not prohibited by Family Court Act § 305.2. Moreover, I reject the idea that the City of Rochester could make an invalid curfew valid simply by repealing the language stating that breaking curfew is a "violation."

- 2 -

With this background in mind, I turn to the constitutional due process challenges that are the basis for the majority opinion. The majority begins by discussing the "substantive due process rights of minors to enjoy freedom of movement" (maj opn at 7). Initially, it is not clear whether the majority is invoking the constitutional right to travel (see e.g. Saenz v Roe, 526 US 489 [1999]; Shapiro v Thompson, 394 US 618 [1969]) or "the freedom to loiter for innocent purposes . . . protected by the Due Process Clause" (City of Chicago v Morales, 527 US 41, 53 [1999]). See Memorial Hospital v Maricopa County (415 US 250, 255 [1974] [observing that the right to travel cannot simply mean the right to movement and declining to decide whether the right to interstate travel recognized in Shapiro has an analogue in intrastate travel]). But this distinction is of no consequence here because, as the majority notes, the critical question is whether the fundamental right of adults to free movement extends to unsupervised minors.

The majority appears to accept the arguments that recently led the United States Court of Appeals for the District of Columbia Circuit to conclude that children have no fundamental right to free movement. "[I]t would be inconsistent to find a fundamental right here, when the [Supreme] Court has concluded that the state may intrude upon the 'freedom' of juveniles in a variety of similar circumstances without implicating fundamental rights" (maj opn at 10, quoting Hutchins v District of Columbia,

188 F3d 531, 539 [DC Cir 1999])). But instead of following this principle to its logical conclusion and applying a rational basis standard of review in assessing plaintiffs' free movement challenge, the majority selects the intermediate scrutiny standard for the question-begging reason that "courts have found that intermediate scrutiny is better suited to address the complexities of curfew ordinances" (maj opn at 10-11).

The Supreme Court has observed that "unemancipated minors lack some of the most fundamental rights of self-determination -- including even the right of liberty in its narrow sense, i.e., the right to come and go at will" (Vernonia Sch. Dist. 47J v Acton, 515 US 646, 654 [1995]). Here the law mirrors common sense. "Our society recognizes that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted" (Schall v Martin, 467 US 253, 266 n 15 [1984], quoting People ex rel Wayburn v Schupf, 39 NY2d 682, 687 [1976])). Because of the immaturity and consequent vulnerability of children, "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," even where the freedom that is curtailed is one that would be constitutionally protected were the child an adult (Prince v Massachusetts, 321 US 158, 170 [1944])).

Even where constitutionally protected freedoms of choice are implicated, "[s]tates validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences . . . [because] during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them" (Bellotti v Baird, 443 US 622, 635 [1979]). In other words, because children often lack the capacity to make important decisions for themselves, "[t]hey are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as parens patriae. In this respect, the juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's parens patriae interest in preserving and promoting the welfare of the child." (Schall, 467 US at 265 [internal quotation marks and citations omitted].) All states limit children's freedom of movement by requiring them to attend school for much of every weekday -- a requirement never thought to call for either strict or intermediate scrutiny. As the Supreme Court has succinctly expressed it, "juveniles, unlike adults, are always in some form of custody" (Reno v Flores, 507 US 292, 302 [1993], quoting Schall, 467 US at 265).

These well-established premises of constitutional jurisprudence lead to the conclusion that the fundamental right

- 6 -

No. 81

to travel or movement does not extend to unsupervised minors. Because parents have the right to control or forbid children's travel, there can be no such thing as a child's fundamental right to free movement. Quite simply, children do not have the right to wander the streets freely at night. Because the curfew ordinance does not impinge on any cognizable constitutional right of minors, its restriction of minors' movements should therefore be subject to rational basis review (see Ramos v Town of Vernon, 353 F3d 171, 190-191 [2d Cir 2003] [Winter, J., dissenting]).

On the other hand, the majority's choice of intermediate scrutiny to evaluate plaintiffs' assertion that the curfew ordinance violates the substantive due process rights of parents to make decisions concerning the care, custody and control of their children makes sense (see maj opn at 11-13). The majority apparently does not dispute that preventing minors from committing or becoming the victims of nighttime crime is an important government interest (see maj opn at 13). The only remaining question then is whether the curfew ordinance is substantially related to this important objective. I believe it is.

The record contains extensive affidavits of public officials who were involved in the adoption of the curfew ordinance, and the affidavits and reports of experienced police officials responsible for its enforcement, which describe the considerable amount of investigation and research that was

- 6 -

- 7 -

No. 81

carried out before the City Council adopted the ordinance. The record also contains crime statistics for the City, and information concerning the implementation of similar curfews in other municipalities. The decision to enact the curfew, while based in part on objective data, was also based in substantial part on the subjective judgment of experienced civic leaders, who believed the ordinance to be the best way of dealing with a very troubling problem. Their judgment is, in my opinion, entitled to considerable deference. The majority gives it none.

Instead, the majority focuses on the statistics, but does so in a selective manner. It does not mention the statistics which demonstrate that between 2000 and 2005 most of the 13 juvenile murder victims in Rochester would have been in violation of the ordinance at the time of the murders. Nor does it mention that 45% of homicides in Rochester occurred during the curfew hours, a surprisingly high percentage given that the curfew hours make up less than 25% of the hours in a week.

The majority casts a skeptical eye on the statistics, writing that they show "that minors are far more likely to commit or be victims of crime outside curfew hours and that it is the adults, rather than the minors, who commit and are victims of the vast majority of violent crime during curfew hours" (maj opn at 14). Here, I respectfully suggest, the majority jumbles together two platitudes. Of course minors are more likely to commit or be victims of crime outside curfew hours. For one thing, the curfew

- 7 -

- 8 -

No. 81

hours comprise only 40 out of the 168 hours in a week. As to the likelihood of becoming crime victims, most children are at home during the curfew hours, as the defendant Mayor noted. But it certainly does not follow that a child who goes out at night is less likely to become the victim of a crime than one who goes out during the day. Again, it is completely unsurprising that adults commit and are victims of most crimes during curfew hours. Adults commit more crimes than children at all hours. Indeed, this may simply be an instance of the general truth that adults, who make up some three-quarters of the population, are more likely to do anything.

From these platitudes, the majority infers a "disconnect between the crime statistics and the nighttime curfew . . . no effort was made by the [City] to ensure that the population targeted by the ordinance represented that part of the population causing trouble or that was being victimized" (maj opn at 15, quoting Ramos v Town of Vernon, 353 F3d 171, 186 [2d Cir 2003] [quotation marks omitted]). But here, under the guise of assessing whether the curfew ordinance is substantially related to a government objective, the majority essentially withdraws its earlier concession that protecting minors from becoming the victims or perpetrators of crimes is an important government interest. In essence, the majority is asserting that if adults commit and become victims of more crimes than children, then protecting children from crime cannot be an important city

- 8 -

- 9 -

No. 81

objective, and that if more crimes are committed during the day than at night, then preventing nighttime crime cannot be an important city objective. The problem with that reasoning is obvious.

Putting aside the Rochester crime statistics, which suggest that a significant proportion of violent crime victims in that city are children, I do not believe that it is the judiciary's place to decide that protecting even a small number of minors from crime is an unimportant objective. I would have thought that protecting children from becoming the victims or perpetrators of violent crime is one of the most important goals a municipality could try to achieve, especially in the wake of a series of nighttime murders of minors.

Turning to plaintiffs' challenge based on parental authority, the majority observes that this would be a closer case if the curfew had included an exception for parental consent (majority opinion at 16), a critical "errand" exception present in curfew ordinances upheld in Anchorage, Alaska (Treacy v Municipality of Anchorage, 91 P3d 252 [Alaska 2004]), the District of Columbia (Hutchins), Charlottesville, Virginia (Schleifer v City of Charlottesville, 159 F3d 843 [4th Cir 1998]), and Dallas, Texas (Quibb v Strauss, 11 F3d 488, 490 [5th Cir 1993]). However, even without that exception, I believe that the curfew ordinance in Rochester is merely a minimal intrusion on parents' rights. If the standard of review in this regard were strict scrutiny, I

- 9 -

- 10 -

No. 81

might conclude that the ordinance is not the least restrictive alternative means of achieving the City's purpose. But, applying intermediate scrutiny as the majority professes to, I believe that the curfew -- which contains exceptions for minors who are accompanied by a parent, guardian or other responsible adult, those engaged in lawful unemployment or en route to or from such employment, those facing emergency circumstances, those who are "going to, attending, or returning home from an official school, religious or other recreational activity sponsored and/or supervised by a public entity or a civic organization," those who are in a public place "for the specific purpose of exercising fundamental rights such as freedom of speech or religion or the right of assembly protected by the First Amendment of the United States Constitution or Article I of the Constitution of the State of New York," and those engaged in interstate travel -- is narrowly tailored to serve its important government purpose of preventing juvenile crime.

I do not believe that the Rochester city ordinance -- replete as it is with exceptions guiding the conduct of police officers taking minors into what the majority concedes is protective custody (maj opn at 3 n 2) -- violates minors' rights under the Federal or State constitutions. Equipped with a parental consent exception, I think it might have been a model city curfew. It is regrettable that a curfew was determined to

- 10 -

- 11 -

No. 81

be necessary in Rochester; but it is equally regrettable if this Court prevents Rochester from implementing a reasonable plan to protect its youth.

For these reasons, I respectfully dissent.

* * * * *

Order affirmed, without costs. Opinion by Judge Jones. Chief Judge Lippman and Judges Ciparick and Read concur. Judge Graffeo concurs in result in an opinion. Judge Pigott dissents in an opinion in which Judge Smith concurs.

Decided June 9, 2009

- 11 -

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the
Appellate CM/ECF System

U.S. Court of Appeals Docket Number(s): 07-15763

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) _____ .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the
Appellate CM/ECF System

U.S. Court of Appeals Docket Number(s): 07-15763

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Jun 10, 2009 .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Alan Gura, 101 N. Columbus St., Ste 405, Alexandria VA 22314
C.D. Michel, 180 E. Ocean Blvd., Ste 200, Long Beach CA 90802
Don B Kates, 22608 N.E. 269th Ave., Battleground WA 98604
Richard Winnie, 1221 Oak St., Ste 463, Oakland CA 94612-4296
Vanessa A Zecher, 111 W St. John St., Ste 710, San Jose CA 95113

Signature

