

# Juvenile Curfews

## Generally

The common understanding of the term “curfew”<sup>1</sup> is defined in Black’s Law Dictionary as “a regulation that forbids people (or certain classes of them, such as minors) from being outdoors or in vehicles during specified hours.”<sup>2</sup> The vast majority of existing municipal curfews are juvenile curfews, requiring that children of a specified age be indoors or otherwise in the presence of a guardian during night hours.<sup>3</sup> According to one authority, the first juvenile curfew in the United States was enacted in 1880 in Omaha, Nebraska.<sup>4</sup> Curfews gained prominence in the 1890s as a response to rising crime attributed to immigrant children. According to a 1995 survey by the United States Conference of Mayors, 70 percent of 387 cities responding had curfew ordinances in place.<sup>5</sup> Juvenile curfews have historically attained a similar level of prominence in Pennsylvania municipalities.<sup>6</sup>

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<sup>1</sup> The term “curfew” derives from the French, “couvre feu,” to cover the fire, and is associated with public safety regulations requiring, at a given time or upon a signal such as the ringing of a bell, that fires in homes be “covered or protected for the night.” Its introduction into England is attributed to William the Conqueror (reign: 1066-1087 A.D.) who reportedly used the regulation to prevent the English from gathering together at night. See Jeffrey F. Ghent, Annotation, *Validity and Construction of Curfew Statute, Ordinance or Proclamation*, 59 A.L.R.3d 321 (2004), citing *Thistlewood v. Trial Magistrate for Ocean City*, 204 A.2d 688 (Md. 1964).

<sup>2</sup> Bryan A. Garner (ed.), *Black’s Law Dictionary*, 11<sup>th</sup> ed., West Group, St. Paul, Minn., 2019.

<sup>3</sup> The issue of “daytime curfews,” designed primarily to combat truancy in addition to the other reasons for curfews, is not addressed in this article. The Public School Code (Code) permits municipal police to enforce the truancy provisions of the Code. See Act 14 of 1949, § 1341 (24 P.S. § 13-1341). In any event, daytime curfews should provide adequate exceptions for home-schooled children and other potential legitimate reasons for the presence of an apparently school-aged child to be on the public streets during school hours. Because the Code contains exemptions for children in specific circumstances, enforcement of the ordinance could conflict with state law to the extent a juvenile is exempt from school attendance. See *id.* § 1330.

<sup>4</sup> C. Hemmens and K. Bennett, *Juvenile curfews and the courts: Judicial response to a not-so-new crime control strategy*, *Crime and Delinquency*, January 1999, pp. 99-121.

<sup>5</sup> See “Cities with Curfews Trying to Meet Constitutional Test,” *Washington Post*, December 26, 1995.

<sup>6</sup> For example, the Pennsylvania League of Cities and Municipalities, now the Pennsylvania Municipal League, conducted a Juvenile Curfew Survey in October 1998. Of the 57 municipalities that participated, 42 had curfew ordinances in place.

Absent a specific statutory delegation of power to enact curfews,<sup>7</sup> Pennsylvania municipalities enact juvenile curfews pursuant to their general police powers<sup>8</sup> for the following purposes:

- To reduce juvenile crime and thus promote the community welfare.
- To reduce perpetration of crime on juveniles that may be vulnerable during curfew hours.
- To promote and support the parent-child relationship and provide an additional layer of supervision when appropriate.

Juvenile curfew ordinances typically have a number of characteristics in common, including an age threshold, a time period within which the regulation applies, exceptions, administrative provisions and penalties.<sup>9</sup>

While juvenile curfews in Pennsylvania are prevalent and have not been subject to an inordinate number of court challenges, municipalities and their solicitors should carefully research and draft curfews in a manner designed to weather any number of potential challenges, usually founded on alleged constitutional violations. The need for caution is based on several factors, the foremost of which is that the United States Supreme Court has yet to establish clear guidelines regarding the constitutional validity of juvenile curfews.<sup>10</sup>

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<sup>7</sup> There is no current explicit statutory authorization for Pennsylvania municipalities to establish juvenile curfews. Such authorization exists for emergency curfews. *See, e.g.*, The Third Class City Code, 11 Pa.C.S. § 11203 (emergency power of mayor to declare curfew); Borough Code, 8 Pa.C.S. § 10A06 (emergency power of mayor to declare curfew).

<sup>8</sup> *Baker's Appeal*, 40 Pa.C. 515 (Court of Quarter Sessions of the Peace of Pennsylvania, Dauphin County 1912). In *Baker*, the court held that the Borough of Steelton could lawfully enact and enforce a juvenile curfew under its general police powers. In dismissing the argument that the ordinance unlawfully interfered with parental authority, the court cited *Ex parte Crouse*, 1839 WL 3700 (Pa. 1839) for the proposition that Pennsylvania law reflects acceptance of the doctrine of *parens patriae*, literally “parent of the country,” whereby the government has both the power and the obligation to regulate for persons suffering from some legal disability, such as minors or the mentally ill. This doctrine remains well-established in Pennsylvania law. *See, e.g.*, *In the Interest of F.C. III*, 607 Pa. 45 (2010).

<sup>9</sup> Municipal juvenile curfews often contain provisions requiring the temporary detention of minors. Municipalities must take care to draft any ordinance provisions that involve the detention of minors in a manner that conforms with Chapter 63 (Juvenile Matters) of Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes, a statutory structure that tracks the core requirements of the federal Juvenile Justice and Delinquency Prevention Act of 2002, 42 U.S.C.A. § 5601 et seq. The acts are designed to prohibit detention of juveniles in adult lock-ups and provide other specific limitations on the time, place and manner of juvenile confinement.

<sup>10</sup> The state of Pennsylvania federal case law on this issue is also questionable. Pennsylvania was the first state to entertain a federal court challenge of a curfew in *Bykofsky v. Borough of Middletown*, 401 F.Supp. 1242 (M.D. Pa. 1975), *aff'd without opinion*, 535 F.2d 1245 (3d Cir. 1975) (table), *cert. denied*, 429 U.S. 964 (1976). In this case, the federal District Court for the Middle District of Pennsylvania upheld the Middletown curfew as constitutional pursuant to a more relaxed, less stringent judicial review. The case was affirmed without opinion by the Third Circuit Court of Appeals, and the United States Supreme Court declined to review the case. The latest Pennsylvania federal court decision of prominence in the field of juvenile curfews is *Gaffney v. City of Allentown*, 1997 WL 597989 (E.D. Pa. 1997), wherein the federal district court for the Eastern District of Pennsylvania struck down the curfew ordinance of the City of Allentown. In this case, the court held that the “right to roam freely” is a fundamental right under the United States Constitution. The court applied a test established by the United States Supreme Court case of *Bellotti v. Baird*, 443 U.S. 622 (1979), a case involving a minor’s consent to an abortion, to hold that, in the case of the juvenile curfew, there is insufficient justification to treat the constitutional rights of minors differently than those of adults. The court, in applying strict scrutiny, persuasively proclaimed that it “joined . . . every other federal court that has recently reviewed

Furthermore, the various federal circuits that have passed on the question have established a broad spectrum of approaches. In these cases, many federal constitutional provisions have been invoked to challenge juvenile curfews.

## Constitutional Implications

Curfews impact the personal autonomy of juveniles, the ability of juveniles to engage in religious, political or civic endeavors, the relationship between parents and their children, and the arrest powers of the government. Issues involving unconstitutional vagueness may also be raised. Many of these issues may involve “fundamental rights,” which are afforded great protection by the courts. Of the various constitutional provisions implicated by challenges to curfews, the following are of some prominence:

- **First Amendment Interests – Speech, Association and Expression:** Although the First Amendment to the United States Constitution<sup>11</sup> has been interpreted as not providing a right to generally “socialize,” it could be impermissibly infringed upon when a curfew provides no exceptions for purposes of “protected speech,” such as religious or political activities. Furthermore, a curfew ordinance could be challenged as unconstitutionally overbroad when it adversely affects a substantial amount of protected activities.
- **The Ninth Amendment – the Fundamental Right of Parents to Raise Children without Undue Interference:** The Ninth Amendment to the United States Constitution<sup>12</sup> has been construed to contain a right to privacy that protects family autonomy and is related to substantive due process under the Fifth and Fourteenth Amendments. While there is disagreement in the federal circuits whether a curfew promotes or interferes with parental rights, a challenge under this amendment is more likely when a curfew ordinance prohibits activities that would be permitted or encouraged by a responsible parent.
- **Fourteenth Amendment Interests – Due Process and Equal Protection – the “Right of Locomotion”/Freedom of Movement:** For Pennsylvania purposes, courts have determined that the right to locomotion or to move freely is a fundamental right of juveniles.<sup>13</sup> To the extent that a curfew may affect interstate travel, freedom of movement or other

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a curfew.” *Gaffney* \*. 5. However, because *Gaffney* has limited legal precedential value and *Bykofsky* is arguably outdated because it was decided prior to *Bellotti*, it is difficult to determine exactly how any given court will examine a challenge to a municipal juvenile curfew.

<sup>11</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

<sup>12</sup> “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. Const. amend. IX.

<sup>13</sup> See, e.g., *Bykofsky v. Borough of Middletown*, 401 F.Supp. 1242 (M.D. Pa. 1975), *aff’d without opinion*, 535 F.2d 1245 (3d Cir. 1975) (table), *cert. denied*, 429 U.S. 964 (1976).

fundamental rights, the Fourteenth Amendment to the United States Constitution<sup>14</sup> is implicated. The Equal Protection Clause of this Amendment is sometimes invoked by challengers asserting that a juvenile curfew creates an impermissible classification based on age. This amendment is used as justification for the more rigorous “strict scrutiny” standard of judicial review when an ordinance infringes on fundamental rights.

- **“Vagueness” Issues:** Related to the guarantees of due process and the Fourth Amendment,<sup>15</sup> an ordinance may be facially challenged on the basis of unconstitutional vagueness. This occurs where a citizen must speculate as to what constitutes a violation of the regulation, and where law enforcement officials are impermissibly delegated too much discretion as to what constitutes a violation of the regulation.<sup>16</sup> *This doctrine appears to be one of the major methods by which curfew regulations are challenged.*

## Drafting Municipal Curfews

Given the history of challenges to juvenile curfews both within and outside of Pennsylvania, a prudent municipality would be well-advised to prepare for a “strict scrutiny” standard to be applied to their curfew ordinance. In other words, “strict scrutiny” implies that courts will deem a curfew unconstitutional unless it is narrowly tailored to serve a compelling governmental interest.<sup>17</sup> The potential application of this standard largely stems from the fact that curfews impact the fundamental rights of minors and many federal courts have determined that those rights deserve the same level of protection as those of adults. While preventing juvenile crime and protecting juveniles generally satisfy the “compelling interest” prong of the test, a lack of a statistical basis for the curfew and exceptions that inadequately allow for the exercise of constitutional rights often

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<sup>14</sup> Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

<sup>15</sup> The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

<sup>16</sup> An excellent example of this occurred in *Bykofsky* where the court struck a provision of the Middletown ordinance that permitted the mayor to authorize a curfew exception permit “when normal or necessary night-time activities of a minor, particularly a minor well along the road of maturity, may be inadequately provided for...” *Bykofsky*, 401 F. Supp. at 1248-49. The court struck the terms “normal” and “minor well along the road to maturity” as being unconstitutionally vague. *Id.*

<sup>17</sup> See *Gaffney* at \*3, \*5. For a discussion of the various levels of judicial scrutiny applied to regulations that allegedly violate constitutional rights, see the *Deskbook* article entitled “Substantive Due Process.”

cause ordinances to fail the “narrow tailoring” requirement. Furthermore, strict scrutiny demands that a sufficient “nexus” exist between the goals of the ordinance and the means used.<sup>18</sup>

In reviewing a curfew ordinance, a municipality should consider the following questions, among others:

- Can the municipality point to specific statistics that warrant the imposition of a curfew?
- Is the proposed ordinance drafted to address these issues in the least intrusive manner possible?
- Are there adequate exceptions for legitimate activities or situations that may inadvertently be unauthorized by the proposed ordinance?
- Does the proposed ordinance contain terms that are vague?

The number of municipalities that have enacted curfews and the lack of challenges to such ordinances indicate that they remain a popular public safety tool in Pennsylvania, despite any potential constitutional difficulties. Because curfews represent a restriction on personal freedom by the state and require municipalities, in essence, to insinuate themselves in the parent/child relationship, they have sometimes been met by public resistance.<sup>19</sup> As one commentator suggests, “[c]urfews place not only limitations on the activities of the 2/10<sup>th</sup> of 1 percent of youths who commit serious offenses, but also on the 99.8 percent who seek to engage in legitimate interests during nighttime hours.”<sup>20</sup>

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<sup>18</sup> This “nexus” requirement was instrumental in the striking of the Allentown ordinance in *Gaffney*. After discussing the statistics presented by the city, the court held as follows:

In fact, in 1996, the only year in which the City enforced its curfew, . . . juvenile crime actually rose. Thus, the curfew was an ineffective tool to reduce total juvenile crime . . . . In light of the paucity of support for the City’s argument that the curfew protects minors, and the inability of the City to show that the curfew protects the rest of the society by significantly reducing crimes committed by minors, this court must hold that the curfew does not meet strict scrutiny.

*Gaffney* at \*8.

<sup>19</sup> See, e.g., Michael Molitoris, “Curfew proposal moves forward/Council presented with petition opposing curfew,” *The Derrick*, October 29, 2002, p. 1.

<sup>20</sup> Robert E. Shepherd, Jr., “The Proliferation of Juvenile Curfews,” *Criminal Justice Magazine*, Vol. 12, No. 1, Spring 1997.