

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAYTON GAFFNEY, RUSSELL	:	
GAFFNEY, and CHRISTINA GAFFNEY	:	
Plaintiffs,	:	
v.	:	
	:	Civ. No. 97-4455
THE CITY OF ALLENTOWN, THE	:	
ALLENTOWN POLICE DEPARTMENT	:	
Defendants.	:	

MEMORANDUM AND ORDER

Cahn, C.J. September _____, 1997

Before the court is the constitutionality of a juvenile curfew enacted by the city of Allentown, Pennsylvania ("the City") in June 1997. For the reasons that follow, the court finds the curfew unconstitutional.

I. BACKGROUND

The curfew before the court is the second curfew passed by the City. The first curfew was enacted on August 7, 1991,¹ but was not challenged until Clayton and Russell Gaffney, ages 16 and 15, were ticketed on September 27, 1996.² The Gaffneys had gone to a diner after an Allentown High School Football game, and were walking home. At 11:53 p.m. they were stopped by the Police and transported to the Police Department, where they were ticketed

¹ The curfew was amended on September 22, 1995 and October 5, 1995. In its final form, the first curfew applied to all juveniles 18 and under, and was effective from 11:00 p.m. to 6:00 a.m.

² The parties all agree that the curfew, though passed in 1991, was not enforced until 1996.

and released to the custody of their mother after she had been ticketed as well. Thereafter, the Gaffney children and their mother challenged the curfew in the Court of Common Pleas of Lehigh County.³ On February 26, 1997, Judge Ford of that court found the curfew unconstitutional and granted Plaintiffs' request for a preliminary injunction. Judge Ford stated that he would hold a final hearing at the request of either party, but neither party has requested one.

In June 1997, in response to Judge Ford's ruling, the City passed a second curfew. Allentown, Pa. Codified Ordinances, Arts. 729.01-.05 (1997). This second curfew prevents anyone under 18⁴ from being or remaining⁵ in a public place or on the premises of any establishment between midnight and 5:30 a.m., unless

- (1) Such minor is accompanied by his or her custodian; or
- (2) Such minor is on the sidewalk abutting the minor's residence or abutting the residence of a next-door neighbor, with the next-door neighbor's consent; or
- (3) Such minor's custodian appears at the City of Allentown, Department of Police, and signs a release granting permission to the minor to be or remain in public or on the premises of an establishment during the curfew hours;

³ In a separate proceeding on November 14, 1996, the Honorable District Justice Michele Verrichio found the Gaffneys not guilty of violating the curfew because their activities fell within one of the permitted exceptions to the ordinance.

⁴ Persons who have been emancipated under Pennsylvania law are not subject to the curfew even if they are under age 18.

⁵ "Remain" is defined as "to stay, linger, tarry, wait, or remain." Allentown, Pa. Codified Ordinances, Art. 729.02(6).

(4) Such minor is in a motor vehicle involved in interstate travel; or

(5) Such minor is engaged in an employment activity or going to or returning from such an employment activity without any detour or stop; or

(6) Such minor is exercising his or her First Amendment rights . . . The minor shall evidence the bona fides of such exercise by first delivering, to the person designated by the Chief of Police to receive such notification at the City of Allentown Department of Police Headquarters, a written communication signed by the minor with his or her home address and home telephone number specifying when, where and in what manner said minor will be in a public place during the hours when the Curfew Ordinance is applicable to said minor.

(7) Such minor is attending an official school, religious, or other recreational activity sponsored by the City of Allentown or another public body, civic organization, or similar entity that takes responsibility for the minor, or going to or returning from such an activity, without any detour or stop; or

(8) Such minor is involved in an emergency.

Allentown, Pa. Codified Ordinances, Art. 729.03(B)(1)(a)-(h).

For first violations of the curfew a minor shall be taken into custody and released after a report is made. Those reports are maintained by the Police Department. Second violations result in a fine of up to \$600 or community service, and any minor who violates the curfew more than three times shall be reported to the proper juvenile authorities. When taking minors into custody, the police officer is to rely on his or her professional judgment as well as other available sources, and in doubtful cases may require proof of age. Parents are not liable under this second curfew, but accomplices, defined as anyone who solicits or aids a minor in violating the curfew, are subject to

a fine of up to \$600, imprisonment not exceeding ninety days, or community service.

Included in the curfew ordinance is the City's statement of its legislative intent. In relevant part, the City makes the following findings:

(1) Studies and statistics demonstrate a proliferation of violent and other serious crimes committed in the City during the nighttime or evening hours. These crimes committed in the City threaten the health, safety and general welfare of the residents of the City. Minors are particularly susceptible by their lack of maturity and experience to participate in and/or be victims of such crimes. Minors may, accordingly, be deemed to be in imminent danger from hazardous conditions that exist within the [C]ity.

(2) Studies and statistics demonstrate a rise in crimes committed by minors in the City during the nighttime or evening hours. These crimes committed by minors threaten the health, safety and general welfare of the residents of the City.

(3) The following curfew restrictions are the least restrictive measures possible to protect minors from being victims of crimes and to otherwise protect their overall well-being, as well as, to protect the public from being victims of crimes committed by minors and to aid parental control over minors.

Allentown, Pa. Codified Ordinances, Art. 729.01(1)-(3).

Essentially, the City passed the curfew to protect minors from nighttime crime, to prevent minors from committing nighttime crimes and to aid parental control.

Following the enactment of this second curfew, but before they had been ticketed under it, the Gaffneys filed a Motion for Preliminary Injunction in this court⁶ alleging that both the

⁶ The parties do not dispute the Gaffneys' standing. In any event, the Gaffneys have standing because they have alleged a

first and second curfews are unconstitutional on vagueness, overbreadth, Equal Protection, Due Process, First Amendment and Fourth Amendment grounds.⁷ Thereafter, the City made an offer of judgment in Plaintiffs' favor with respect to the first curfew, and Plaintiffs accepted. Accordingly, the only matter before this court is the nighttime portion of the curfew passed in June 1997.⁸

Although Plaintiffs filed a Motion for Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65(a), the court, upon notice to the parties and pursuant to Federal Rule of Civil Procedure 65(a)(2), consolidated the hearing on the preliminary injunction with a final trial on the merits. The parties agree that there are no contested issues of fact in this case. Therefore, the court gave notice to the parties that it would decide this issue as one for summary judgment. The parties have submitted briefs, and a hearing was held on August 15, 1997. Plaintiffs presented no testimony. Defendants submitted the testimony of Scott Mitchell, Assistant Chief of Police for the City of Allentown; William L. Heydt, Mayor of Allentown; and Emma

well founded fear that the ordinance will be enforced against them. See Virginia v. American Booksellers Assoc., Inc., 484 U.S. 383, 393 (1988).

⁷ Because the court holds that the curfew does not satisfy strict scrutiny, the court does not address Plaintiffs' First Amendment, Fourth Amendment, vagueness, and parents' rights arguments.

⁸ The curfew has both a nighttime and daytime (school truancy) provision. Plaintiffs challenge only the nighttime provisions of the curfew.

Tropiano, Allentown City Council member. In addition, the court accepted post-hearing letter briefs, and both parties agree that the record of the proceeding before Judge Ford in state court is part of the record before this court. The court now makes the following conclusions of law.

II. DISCUSSION

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court's role is to determine whether the evidence is such that a reasonable jury could return a verdict for the non-moving party, with all reasonable inferences viewed in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, 477 U.S. 242, 249, 255 (1986). The moving party has the burden of demonstrating that no genuine issue of material fact exists; however, if the nonmoving party fails to produce sufficient evidence in connection with an essential element of a claim for which it has the burden of proof, then the moving party is entitled to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In this case, both parties agree that the facts are undisputed.

B. DUE PROCESS AND EQUAL PROTECTION

Government statutes are generally entitled to a presumption of constitutionality, such that the statute survives judicial review if there is a legitimate state interest and the means chosen to achieve that interest are rationally related to it. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-40 (1985). If the statute implicates a suspect class or a fundamental right, however, it is subject to strict scrutiny. Under strict scrutiny the government bears the burden of showing that there is a compelling state interest and that the means chosen to achieve that interest are narrowly tailored. Plyler v. Doe, 457 U.S. 202, 216-17 (1982).

1. Level of Judicial Review

Plaintiffs argue that the curfew abridges the fundamental right to move freely, and is therefore subject to strict scrutiny.⁹

The right to move freely is a fundamental right. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972). The Supreme Court does not treat the right to travel lightly; it is one of "the amenities of life as we have known them . . . [it]

⁹ Age is not a suspect class. Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (citations omitted). Thus, to trigger strict scrutiny, Plaintiffs must argue that the curfew regulates a fundamental right.

ha[s] been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity, . . . [and] ha[s] dignified the right of dissent and honored the right to be nonconformists and the right to defy submissiveness." Id.; See also United States v. Wheeler, 254 U.S. 281, 293 (1920) (citations omitted) ("In all the states, from the beginning down to the 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."); 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.").

If the City had regulated an adult's right to travel, there is no question but that strict scrutiny would apply. The City argues, however, that it is allowed greater flexibility to regulate a minor's right to travel because states have the ability to curtail minors' rights in ways that they cannot restrict adults' rights. See Prince v. Massachusetts, 321 U.S. 158, 168 (1944). This ability, however, is not absolute. Prior

to 1979, courts struggled to identify those situations in which minors could be more restricted than adults.¹⁰ The Supreme Court resolved this dilemma in Bellotti v. Baird, in which it set forth a three part test for determining whether differential treatment of minors is permissible. The three factors are (1) the peculiar vulnerability of minors, (2) their inability to make critical decisions, and (3) the importance of the parental role in child rearing. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

There is some dispute about the relevance of Bellotti to curfew cases, considering that Bellotti addressed whether a minor could consent to an abortion. The Fifth Circuit Court of Appeals held that a Bellotti analysis is used to determine if the state's interest is compelling, and since the parties all agreed that the interests involved in the curfew were compelling, a Bellotti analysis was unnecessary. Outb v. Strauss, 11 F.3d 488, 492 n.6 (5th Cir. 1993). The Ninth Circuit Court of Appeals held that Bellotti allows a court to "determine whether the state has a compelling interest justifying greater restrictions on minors than on adults," but that in the context of a fundamental right

¹⁰ The City relies heavily on Bykofsky v. Borough of Middleton, 401 F. Supp. 1242 (M.D.Pa. 1975) to support its argument that strict scrutiny is not warranted in this case. In Bykofsky, the court did not apply strict scrutiny when reviewing a juvenile curfew. In so holding, however, the court explicitly noted that "[t]he Supreme Court has not yet articulated the special factors that determine how existing frameworks for analyzing the rights of adults are to be applied to minors." Bykofsky, 401 F. Supp. at 1253. As the Supreme Court has since spoken on this issue, this court respectfully declines to follow Bykofsky.

such an analysis was inappropriate. Nunez v. City of San Diego, 114 F.3d 935, 945 (9th Cir. 1997). Other courts use Bellotti to decide whether minors' and adults' rights should be treated in the same manner. Hutchins v. District of Columbia, 942 F. Supp. 665, 673 (D.D.C. 1996); Waters v. Barry, 711 F. Supp. 1125, 1136-37 (D.D.C. 1989). After reviewing Bellotti, this court believes that a Bellotti analysis is appropriate where, as here, the state justifies the restriction of minors' rights in part on the basis of their status as minors. If such a justification withstands a Bellotti analysis, a lower level of scrutiny would be appropriate.

The first Bellotti factor does not convince this court that differential treatment is justified, because the City presents no evidence that minors are more vulnerable than adults during curfew hours or that a greater percentage of minors than adults are victims of nighttime crime. A similar lack of evidence persuaded the District Court for the District of Columbia and the Court of Appeals for the State of Washington, when those courts applied Bellotti in the context of a curfew challenge, that minors were not peculiarly vulnerable under such circumstances. Hutchins v. District of Columbia, 942 F. Supp. 665, 673 (D.D.C. 1996); State v. J.D., 937 P.2d 630, 634 (Wash.Ct.App. 1997). The District Court for the Western District of Virginia, however, when faced with this same issue, ignored the lack of statistical evidence, stating "[n]o statistical evidence need be presented to 'prove' this point, for it is common knowledge and common sense

[that] [c]hildren are peculiarly vulnerable to the dangers of the night hours." Schleifer v. City of Charlottesville, 963 F.Supp. 534, 542 (W.D.Va. 1997). This court is not comfortable adjudicating constitutional questions solely on the basis of common knowledge and common sense. The court is not convinced that minors are more likely than adults to be victims of nighttime crime, and notes that it may in fact be "common sense" that nighttime violent crime is especially prevalent among young adults, not minors. The first Bellotti factor, therefore, does not convince this court of the state's greater need to restrict a minor's right to travel.

The second factor in the Bellotti analysis, the ability to make critical decisions, also does not support the application of a level of scrutiny less rigorous than strict scrutiny. The Supreme Court in Bellotti included this factor to allow states greater ability to interfere with a minor's rights if the minor was making "important, affirmative choices with potentially serious consequences." Bellotti, 443 U.S. at 635. The issue in Bellotti was whether a minor could consent to an abortion -- clearly a decision with potentially serious consequences. This court agrees with the District Court for the District of Columbia that the "decision to either stay inside or roam at night simply does not present the type of profound decision which Bellotti would leave to the state." Waters v. Barry, 711 F. Supp. 1125, 1137 (D.D.C. 1989). The consequences of a minor choosing to go outside at night are simply not sufficiently serious to justify

greater state interference where such interference with respect to an adult would not be warranted.

Finally, the importance of parental control in child-rearing persuades this court that a curfew is not the context in which the Supreme Court would sanction greater infringement on minors' rights than on adults' rights. Parental control of children is important, especially during the nighttime hours when crime is high. However, the implicit assumption of a curfew -- that parents are not exercising this control in a reasoned and beneficial manner -- is troubling to the court, as there is no evidence to support this assumption. Such an assumption may indeed be partially true, and the family is certainly strengthened by having children in at night. However, the fact that the Allentown City Counsel and indeed, this court, believe that children should be in at night does not justify state intrusion into parental control without some evidence that such intrusion is necessary.

The right to move freely is a fundamental right, and this court is not convinced that a curfew is the context in which minors are in such a different position than adults that a lower level of scrutiny is warranted. Thus, the court applies strict scrutiny. The court notes that in deciding to subject the curfew to strict scrutiny, it is joined by every other federal court that has recently reviewed a curfew. See e.g., Nunez, 114 F.3d at 946 (9th Cir. 1997); Schleifer, 963 F. Supp. at 543 (W.D.Vi. 1997); Hutchins, 942 F. Supp. at 674 (D.D.C. 1996); Outb v.

Strauss, 11 F.3d 488, 492 (5th Cir. 1993); Waters, 711 F. Supp. at 1139 (D.D.C. 1989).

2. Strict Scrutiny

For the curfew to survive strict scrutiny, the City must show a compelling interest and the curfew must be narrowly tailored to achieve that interest. In the ordinance, the City lists three reasons for enacting the curfew: to protect minors from nighttime crime, to prevent minors from committing nighttime crimes, and to aid parental control. The City concedes that the first two are the main reasons for enacting the curfew. Both parties agree that preventing crime and protecting minors from crime are compelling interests. See also, Nunez, 114 F.3d at 946 (9th Cir. 1997) (citations omitted). Thus, the only question before this court is whether the curfew is narrowly tailored to achieve these interests.

The court wishes to make clear that its review in this case is quite narrow. The only issue under consideration is whether the City has sufficient evidence to show that the curfew is a narrowly tailored response to the City's desire to reduce juvenile crime and protect minors.¹¹ As a result, there are a number of questions not before the court. For example, the question of the benefit to families and children of enforcing a

¹¹ The parties stipulated that the Allentown City Council, when enacting the curfew, reviewed the evidence that was presented to this court in support of the curfew.

curfew is not before this court. Nor is the question of the appropriateness of parents who impose a curfew after midnight, or no curfew at all. The court's personal views on these issues do not, and should not, affect the court's review of the constitutionality of the curfew.

In defense of its first goal, the protection of minors, the City presents general statistics on the number of crimes committed in 1996 between the hours of midnight and 5:30 a.m. These statistics show that the following occurred during those hours: 35% of all assaults with guns, 26% of all assaults with knives, 31% of strong armed robberies (muggings), 26% of all armed robberies (highway), 24% of all forcible rapes, and 26% of all assaults with other dangerous weapons. In addition, 35% of all gun shot reports were between midnight and 5:30 a.m. in 1995, and 44% of all gun shot reports were between midnight and 5:30 a.m. in 1996.

The hours of the curfew represent 23% of each day. Thus, the percentage of violent crime that occurs during curfew hours is slightly more than the expected proportion for that portion of the day. These statistics, however, show only that there is a danger of violent crime during the nighttime hours, not that juveniles are more likely than adults to be the victims of such crimes. The City admits this fact, arguing that "some of the statistics that might prove helpful in proving [that minors are more vulnerable] are not maintained by the City. Furthermore, the statistics the City has available do not show such a

circumstance. Therefore, it is difficult for the City to demonstrate through the available statistics that children are more susceptible than adults during these hours." City Letter Br., 8/20/97, at 5.

The City then argues that this court should take notice of the testimony of Assistant Chief of Police Mitchell, who testified that he believes that a danger exists for juveniles during curfew hours.

The beliefs of an individual, without more, are insufficient to meet strict scrutiny. Strict scrutiny is "the most exacting scrutiny," Hodgson v. Minnesota, 497 U.S. 417, 463 (1990) (Marshall, J. concurring in part and dissenting in part), and this court would be remiss in relying solely on such evidence in judging the constitutionality of the Allentown curfew. Thus, the court must look to the statistics presented by the City.

The Fifth Circuit Court of Appeals, when faced with the same issue, accepted statistics showing that murders were most likely to occur between 10 p.m. and 1:00 a.m., aggravated assaults were most likely to occur between 11:00 p.m. and 1:00 a.m., and rapes were most likely to occur between 1:00 a.m. and 3:00 a.m. That court refused to "insist upon detailed studies of the precise severity, nature, and characteristics of the juvenile crime problem in analyzing whether the ordinance meets constitutional muster when it is conceded that the juvenile crime problem in Dallas constitutes a compelling state interest." Outb, 11 F.3d at 493 n.7. This court notes, however, that such an insistence

upon specific statistics is not preposterous, as the City of San Diego was able to present to the court statistics on juvenile, as opposed to general, victimization during curfew hours, without any indication of difficulty. Nunez, 114 F.3d at 947.

This court is hesitant to invalidate the curfew purely because the City was unable to provide statistics that showed that juveniles in particular, as opposed to citizens in general, are victimized by nighttime crime. At the same time, the court is not convinced that the City's statistics meet strict scrutiny, as the City has presented no evidence that a curfew will affect the number of juveniles that are the victims of nighttime crime, and there is no support for Assistant Chief Mitchell's belief. However, the court will not invalidate the curfew on this basis, as the City has shown that there does exist a disproportionate amount of violent crime during the curfew hours, and, insofar as such crime affects juveniles, it is at least arguable that the curfew is narrowly tailored.

The second goal of the City in enacting the curfew was to prevent nighttime crimes committed by juveniles. Here, the City presents precise statistics which show, for each year, the number of juveniles who were apprehended. The statistics are divided according to type of complaint (i.e., criminal mischief, graffiti, receiving stolen property, etc.) and the three hour time period during which the crime was committed (i.e., midnight to 3 a.m., 3 a.m. to 6 a.m., etc.). The numbers are not exact. For example, they include those juveniles who were merely

interviewed and released to parents, and those who were referred to the Probation Office for Juvenile Court action but subsequently had their case dismissed. They also include out of town children and repeat offenders -- arguably, two categories of juveniles that will not be deterred by a curfew in Allentown. The court does not condemn the statistics for their possible over-inclusiveness, but merely notes that the numbers, as accepted, potentially overstate the problem.

In most other curfew cases, the court reviewing the curfew faced only that information that was presented to the local governing body at the time the curfew was enacted. That is, the court had little or no information on the effectiveness of the challenged curfew, as the curfew was challenged shortly after it was passed. Thus, the Fifth Circuit Court of Appeals in Outb stated that it would not require precise statistics, as proof of the effectiveness of a curfew "can hardly amount to more than mere speculation." Outb, 11 F.3d at 493 n.7.

In the case of the Allentown curfew, however, this court has the luxury of having before it precise statistics from 1990, before the City had a curfew, 1991 through 1995, when a curfew existed but was not enforced, and 1996, when a curfew existed and was enforced. In addition, the statistics are sufficiently specific so that this court is able to determine how many juvenile crimes occurred in a particular time period. Therefore, it is not "mere speculation" for this court to examine the statistics to determine if they rise to the level of a narrowly

tailored response.

The first curfew was from 11 p.m. to 6:00 a.m. The statistics show the following about juvenile crime between 11 p.m. and 6:00 a.m. from 1990 through 1996:¹²

<u>Year</u>	<u>Curfew Hour Arrests</u>	<u>Difference from Prior Year</u>	<u>Percentage of Total Juvenile Crime That Occurs During Curfew</u>
1990	241		20.8%
1991	442	+ 201	28.6%
1992	266	- 176	18.8%
1993	277	+ 11	21.0%
1994	193	- 84	16.1%
1995	194	+ 1	15.5%
1996	159 ¹³	- 35	11.2%

¹² This court calculates the 11 p.m. through 6:00 a.m. statistics by taking all complaints between midnight and 6 a.m. and adding one third of the complaints between 9 p.m. and midnight. In so doing, the court follows the lead of the parties, both of whom used this method to calculate curfew arrests.

¹³ The total of 159 juvenile complaints in 1996 does not include 27 stops for curfew violation. The City, in its submissions to this court, has also subtracted a few curfew stops for the years 1991 through 1995. However, in reviewing the police reports, this court was unable to find any record of curfew stops made in 1991 through 1995. There were a few complaints for "loitering and prowling at night," but because there were complaints in this category in 1990, before the City passed its first curfew, the court assumes that these stops are not curfew stops and did not subtract these stops from the total. Thus, the only year for which the number of total complaints is reduced by the court is 1996, the only year in which "nighttime curfew violations" is a category of complaint on the police statistics.

In addition, the statistics show total juvenile crime from 1989 through 1996:

<u>Year</u>	<u>All Juvenile Complaints</u>	<u>Difference from Prior Year</u>
1989	1,353	
1990	1,159	- 194
1991	1,544	+ 385
1992	1,411	- 133
1993	1,321	- 90
1994	1,197	- 124
1995	1,248	+ 51
1996	1,414	+ 166

This court holds that these statistics do not demonstrate the required tight nexus between the City's goal of reducing juvenile crime and the curfew. First, the statistics from 1990, before the curfew, and 1992, 1993, and 1994, after the curfew, show that the passage of the curfew, without enforcement, had no significant effect on juvenile crime, either as a whole or during curfew hours. Second, it is clear that the curfew, whether enforced or not, had no significant effect on total juvenile crime. In fact, in 1996, the only year in which the City enforced its curfew, the total amount of juvenile crime actually rose. Thus, the curfew was ineffective as a tool to reduce total juvenile crime.

The City points to the fact that the number of curfew-hour

arrests dropped by 35 from 1995, when the curfew was not enforced, to 1996, when it was enforced. The City contends that this is sufficient to show that juvenile crime during curfew hours dropped when the curfew was enforced, and that the nexus requirement has therefore been met. However, there was a much larger drop in crime during those hours between 1991 and 1992, and again from 1993 to 1994. In all four of those years the City had a curfew but did not enforce it. This suggests that factors other than a curfew have a greater effect on juvenile crime, and that the curfew is an overly broad instrument to accomplish the City's goals.

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 society by significantly reducing crimes committed by minors, this court must hold that the curfew does not meet strict scrutiny.

Finally, the City contends that the exceptions to the curfew narrowly tailor the ordinance and cure any unconstitutionality. The Allentown curfew does not survive strict scrutiny because the City failed to show a sufficient nexus between criminalizing the presence of minors out after the curfew and reducing crime. The exceptions to the curfew do not change this analysis. The curfew is not effective at reducing crime, whether committed by or upon minors; the exceptions do not render it more responsive to the problems of the citizens of Allentown.

III. CONCLUSION

The court recognizes and sympathizes with the struggle of the citizens of Allentown. The people of Allentown are faced with a serious crime problem; the tendency to do everything possible to avert future crime is overwhelming. The court also agrees with Mayor Heydt and his constituents that the number of unsupervised children outside at night is troubling. But the solution to these problems cannot infringe upon citizens' constitutional rights, even if those citizens are under the age of eighteen. Our Constitution is not a representation of the majority will, but a protection against the impermissible exercise of that same will. In this case, the solution chosen by the majority unconstitutionally burdens one segment of society without sufficient proof that the burden is justified. Under such circumstances, the will of the majority is outweighed by the need to protect the few. Such a result will undoubtedly seem unjust to many people, but it is precisely this perceived injustice that defines a constitutional democracy.

BY THE COURT:

Edward N. Cahn, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAYTON GAFFNEY, RUSSELL :
GAFFNEY, and CHRISTINA GAFFNEY :
Plaintiffs, :
v. :
: Civ. No. 97-4455
THE CITY OF ALLENTOWN, THE :
ALLENTOWN POLICE DEPARTMENT :
Defendants. :

ORDER

AND NOW, this _____ day of September, 1997, upon consideration Plaintiffs' Motion for Preliminary Injunction and Defendants' response thereto, it is hereby ORDERED as follows:

(1) As discussed between the court and the parties, Plaintiffs' Motion for Preliminary Injunction is converted into a Motion for Summary Judgment, and

(2) Plaintiffs' Motion for Summary Judgment is GRANTED.

(3) Judgment is hereby entered in favor of the Plaintiffs. That portion of the ordinance dealing with the nighttime curfew is invalidated.

BY THE COURT:

Edward N. Cahn, Chief Judge