

MEMORANDUM

TO: Public Safety Committee

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Worksession/Action:** Bill 35-11, Offenses – Loitering or Prowling – Established

Public Safety Committee recommends disapproval (2-1, Councilmember Andrews recommending approval).
--

Expedited Bill 35-11, Offenses – Loitering or Prowling – Established, sponsored by Councilmembers Andrews, Leventhal, and Rice was introduced on October 25, 2011. A public hearing was held on November 15, and Public Safety Committee worksessions were held on November 17 and December 1.

Background

Bill 35-11 would prohibit certain loitering and prowling, provide for certain defenses, and provide enforcement procedures and penalties. Under the Bill, “loitering and prowling means to remain in a public place or establishment at a time or in a manner not usual for law-abiding persons under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.” Councilmember Phil Andrews explained that he sponsored the Bill as an alternative to the curfew proposed by the Executive in Bill 25-11 in an October 19 memorandum at ©5-6.

The Executive’s Frequently Asked Questions about the County Executive’s Youth Curfew Proposal¹ states:

Police would confront teens called to their attention due to suspected suspicious, menacing, potentially violent, or violent behavior. The police would not be involved in routinely rounding up minors for the sake of enforcing the curfew law, but the curfew would instead be a tool when encountering suspicious or dangerous behavior either on patrol or when dispatched to a complaint from a citizen. Those individuals would be asked to give their age and purpose for being in a public place or establishment.

The Bill would provide the police with a more focused tool to respond to the situations described by the Executive as the target of the curfew without being limited to minors or certain times of the day.

¹ A complete copy of the document is at ©9-14.

Fiscal and Economic Impact

OMB could not determine the fiscal or economic impact of the Bill because the Police Department could not estimate the potential number of arrests or citations that would result from the Bill. See ©68-71.

Public Hearing

There were 8 speakers at the November 15 Public Safety Committee hearing on the Bill. Assistant CAO Kathleen Boucher, testifying on behalf of the Executive, opposed the Bill as “constitutionally questionable and practically unenforceable.” See ©43-44. Max Etin, reading the testimony of Delegate Kirill Reznik, expressed “muted support” for the Bill as a better alternative to the youth curfew. See ©45. James Zepp, speaking on behalf of the Montgomery County Civic Federation (at ©46-47)², and Rebecca Smondrowski (at ©48) supported the Bill as a more focused alternative to the youth curfew. Mike Mage, speaking on behalf of the Montgomery County ACLU (at ©49-50) and Thomas Nephew, speaking on behalf of the Montgomery County Civil Rights Coalition (at ©51-52) opposed the Bill as an unconstitutional measure.

Darian Unger (at ©53) and Fred Evans (at ©54) each opposed the youth curfew that would be established by Bill 25-11 without speaking directly about the merits of this Bill. Finally, Paul Bessel (at ©55-57) and Edward A. Clarke (at ©58-59) submitted written testimony in support of the Bill without appearing at the hearing.

November 17 Worksession

The Committee discussed the Bill at a worksession on November 17. Police Chief Thomas Manger, Assistant Chief Wayne Jerman, Lt. David Anderson represented the Executive Branch. Edward Lattner, Chief, Division of Human Resources and Appeals, Office of the County Attorney, also answered questions. Bob Drummer, Senior Legislative Attorney, represented Council Staff. The Committee discussed the Bill, including the potential for a successful constitutional challenge to the Bill, but did not make any recommendations.

December 1 Worksession

The Committee discussed the Bill at a worksession on December 1. Police Chief Thomas Manger, Assistant Chief Wayne Jerman, and Assistant CAO Kathleen Boucher represented the Executive Branch. Edward Lattner, Chief, Division of Human Resources and Appeals, Office of the County Attorney, also answered questions. Senior Legislative Attorneys Mike Faden and Bob Drummer and Legislative Attorney Amanda Mihill represented Council Staff. The Committee discussed the Bill, including the potential for a successful constitutional challenge to the Bill if the penalty was changed to a civil violation. The Committee recommended an amendment to change the penalty to a Class B Civil Violation and to delete the requirement that

² The Montgomery County Civic Federation formally voted to support Bill 35-11 and oppose Bill 25-11 after the hearing. See ©60-61.

a police officer give a warning before issuing a citation. The Committee recommended disapproval of the Bill (2-1, Councilmember Andrews supported the Bill as amended).

Issues

1. Is the Bill unconstitutional on its face?

Questions have been raised concerning the constitutionality of Bill 35-11. In *Chicago v. Morales*, 527 U.S. 41 (1999), the U.S. Supreme Court held that a Chicago law prohibiting loitering in a public place together with a criminal street gang member was impermissibly vague in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution. However, the Chicago “gang congregation” ordinance struck down in *Morales* is distinguishable from Bill 35-11.

Bill 35-11 is based upon the American Law Institute’s Model Penal Code, §250.6. A copy of the Model Penal Code, §250.6 is at ©7-8. Although ALI drafted this section of the Model Penal Code in 1962, ALI has not updated or modified it since. Council staff contacted ALI and learned that ALI is currently working on updates to other sections of the Model Penal Code, but has no immediate plans to update §250.6. ALI describes itself in its website as:

The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education. ALI has long been influential internationally and, in recent years, more of its work has become international in scope.

By participating in the Institute's work, its distinguished members have the opportunity to influence the development of the law in both existing and emerging areas, to work with other eminent lawyers, judges, and academics, to give back to a profession to which they are deeply dedicated, and to contribute to the public good.

ALI is a 501(c)(3) nonprofit organization incorporated in the District of Columbia.

In its 1980 Commentary to the Model Penal Code, ALI described the purpose of §250.6 as follows:

All in all, the Model code provision states an offense vastly different from the traditional crime of loitering or vagrancy. Liability is based not on a status derived from past behavior – *eg.*, common drunkard – but on present conduct of an unusual sort. Furthermore, the offense is not made out simply by the fact of loitering but requires circumstances such that the actor’s behavior justifies alarm for the safety of persons or property. This formulation limits the offense to its

essential law enforcement rationale of justifying intervention to prevent incipient crime and avoids the extension of liability to persons who are simply socially undesirable. Finally, Section 250.6 includes a special safeguard in the required opportunity to dispel otherwise warranted alarm by identification and explanation of one's presence and conduct. *Model Penal Code and Commentaries*, 1980, p. 391.

Similar laws based upon the Model Penal Code have been upheld in Georgia,³ Florida,⁴ and Wisconsin.⁵ The Supreme Court of Georgia upheld the Georgia loitering law in *Bell v. State*, 252 Ga. 267, 313 S.E.2d 678 (1984). The Supreme Court of Florida upheld the Florida loitering law in *Watts v. State*, 463 So.2d 205 (Fla. 1985). The Supreme Court of Wisconsin upheld the Milwaukee loitering and prowling ordinance in *Milwaukee v. Nelson*, 149 Wis. 2d 434; 439 N.W.2d 562 (1989). Despite the 1999 Supreme Court decision in *Morales*, convictions under the loitering laws in Florida and Georgia were subsequently upheld in *B.J. v. State of Florida*, 951 So.2d 100 (Fla. App. 2007) and *O'Hara v. State*, 241 Ga. App. 855, 528 S.E.2d 296 (2000).

The Supreme Court of Georgia, in *Bell v. State*, described the test to decide if a statute is unconstitutionally void for vagueness as:

The statute, when read as a whole, passes constitutional muster in advising persons of ordinary intelligence of the conduct sought to be prohibited . . . [and] the statute also defines the offense in terms which discourage arbitrary enforcement." 313 S.E.2d at 681.

Although applying the same test to a similar loitering and prowling law based upon the Model Penal Code, §250.6, appellate courts in Washington,⁶ Oregon,⁷ and Idaho⁸ held that the law was unconstitutionally void for vagueness. A similar Omaha, Nebraska ordinance was declared unconstitutionally vague by the United States Court of Appeals for the 8th Circuit in *Fields v. Omaha*, 810 F.2d 830 (8th Cir. 1987). The courts striking down these laws concluded that the law provided too much discretion for a police officer to decide if an individual is violating the law and is therefore susceptible to arbitrary or discriminatory enforcement. It is important to note that a court could use the same theory to conclude that the Executive's proposed enforcement plan for the youth curfew is susceptible to arbitrary or discriminatory enforcement. We could not find any Maryland appellate court decisions reviewing a similar loitering and prowling law for vagueness.

The County Attorney provided a thoughtful legal opinion on Bill 35-11 attached at ©34-38. The County Attorney reviewed the conflicting court decisions in other States, and after conceding that the constitutionality of the Bill is "open to reasonable debate," concluded that the Maryland Court of Appeals would likely hold that the Bill is unconstitutionally void for

³ O.C.G.A. § 16-11-36 (2011)

⁴ Fla. Stat. § 856.021 (2011)

⁵ Milwaukee City Ordinance §106-31

⁶ *Bellevue v. Miller*, 85 Wn.2d 539; 536 P.2d 603 (1975)

⁷ *Portland v. White*, 9 Ore. App. 239; 495 P.2d 778 (1972)

⁸ *State v. Bitt*, 118 Idaho 584; 798 P.2d 43 (1990)

vagueness.⁹ The County Attorney predicted that the Maryland Court of Appeals would “find the reasoning of the Idaho Supreme Court sounder than the opinion of the Florida Supreme Court.” Council staff is less certain of this prediction.

In *State v. Bitt*, the Idaho Supreme Court struck down the loitering or prowling law in a 3 to 2 decision with the Chief Justice dissenting. The decision of the Florida Supreme Court upholding the loitering or prowling law in *Watts v. State* was 6 to 1 with the Chief Justice dissenting. This was a contentious issue even in the States that have ruled on the issue. The decision of the Oregon Court of Appeals in *City of Portland v. White* is not a decision by the highest court in the State. The Oregon Supreme Court, in *City of Portland v. James*, 251 Or. 8, 12, 444 P2d 554 (1968), struck down a loitering law that was not based upon the Model Penal Code, §250.6, but pointed out that the Court was not expressing an opinion as to the constitutionality of a loitering or prowling law based upon the Model Penal Code. The decision of the US Court of Appeals for the 8th Circuit striking down a loitering or prowling law in *Fields v. City of Omaha* is based upon facts that do not support any reasonable application of the law. In *Fields*, a police officer noticed 2 women walking in the median strip of a divided highway and asked them to stop walking in the street. They initially ignored the officer who then told them to walk over to his vehicle. The 2 women complied. The officer asked them for identification. One woman complied, the other refused. The officer arrested the woman who refused to identify herself for loitering. The Court noted that walking down the median strip of a divided highway and refusing to provide identification was not sufficient to satisfy any possible interpretation of the loitering or prowling law.

In *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998), the Court upheld a youth curfew adopted by the City of Charlottesville and expressly held that the statutory exception for exercising First Amendment rights was not unconstitutionally void for vagueness. The Court explained:

Striking down ordinances (or exceptions to the same) as facially void for vagueness is a disfavored judicial exercise. Nullification of a law in the abstract involves a far more aggressive use of judicial power than striking down a discrete and particularized application of it. Of course there will be hard cases under any law. And of course all the particular applications of any general standard will not be immediately apparent. That is no reason, however, for courts to scrap altogether the efforts of the legislative branch. It is preferable for courts to demonstrate restraint by entertaining challenges to applications of a law as those challenges arise. 159 F.3d at 853.

Although the Maryland Court of Appeals has not reviewed the constitutionality of a loitering law based upon the Model Penal Code, the Court has applied the “void for vagueness” test to uphold a challenge to a law prohibiting harassment and stalking in *Galloway v. State*, 365 Md. 599 (2001). In *Galloway*, the Court started its analysis by pointing out the basic rule that a statute is presumed valid. The Court reviewed conflicting decisions across the Country

⁹ It is interesting to note that the County Attorney relies, in part, on the decision of the Court of Appeals in *Ashton v. Brown*, 339 Md. 70 (1995), which struck down a juvenile curfew in Frederick City due to the vagueness of one of the exceptions.

considering whether a harassment statute was unconstitutionally vague and decided to follow the jurisdictions upholding harassment statutes. The Court explained:¹⁰

Although ultimately we shall not follow those jurisdictions that have found harassment statutes to be unconstitutionally vague, we briefly identify now the reasons that tip our analysis in the other direction and to which reasons we shall return later in our discussion for amplification. In short, even if arguably otherwise deficient, § 123 is salvageable because we shall employ a limiting construction to the statute to ensure that it provides a standard of conduct and indicates whose sensibilities are to be offended. *See, e.g., Schochet v. State*, 320 Md. 714, 729, 580 A.2d 176, 183 (1990) (stating that "general statutes . . . , which, if given their broadest and most encompassing meaning, give rise to constitutional questions, have regularly been the subject of narrowing constructions so as to avoid the constitutional issues" and providing examples of such cases). Moreover, § 123 has inherent limitations. The statute requires a reasonable warning to desist, does not apply to "any peaceable activity intended to express political views or provide information to others," and mandates that there be no "legal purpose" for the activity. *Cf. Boychuk, supra*, at 791-92 (contending that providing an exemption of constitutionally protected activity or a court's assuming that a state legislature did not intend to prohibit any constitutionally protected conduct remedies vagueness problems (citing Richard H. Fallon, Jr., *Making Sense of Over breadth*, 100 YALE L.J. 853, 862 (1991))). Lastly, § 123 requires specific intent on the part of the offender, which assists in alleviating vagueness difficulties. *See, e.g., Williams*, 329 Md. at 9, 616 A.2d at 1279.

As the County Attorney pointed out at ©36-37, the Florida Supreme Court interpreted the loitering or prowling law to require the officer to reasonably believe that the defendant's conduct creates an imminent breach of the peace or an imminent threat to public safety. The underlying facts supporting the decisions of the various State courts upholding the law met this standard. A description of the facts by the Court for each case upholding the law is attached at ©39-42. Council staff agrees with this interpretation of the Model Penal Code, §250.6 and Bill 35-11.

In conclusion, Council staff agrees with the County Attorney's assessment that the constitutionality of Bill 35-11 is open to reasonable debate. However, the decision of the Maryland Court of Appeals in *Galloway* to join those jurisdictions upholding harassment statutes indicates a reasonable likelihood that the Maryland Court of Appeals would resolve this conflict between the jurisdictions similarly and uphold the Model Penal Code. For this reason, Council staff recommends that the Committee make its decision on this Bill on policy grounds rather than legal predictions.

The Committee requested Council staff to draft an amendment to incorporate the interpretation of the Model Penal Code, §250.6 by the Florida courts that upheld the law. See the Staff Amendment at ©67.

¹⁰ 365 Md. at 618-619.

2. How would the Bill be enforced?

To determine whether a person is loitering or prowling under the Bill, a police officer *may* consider if the person:

- (A) takes flight after the appearance of the officer;
- (B) refuses to identify himself or herself; or
- (C) attempts to conceal himself or herself or any object.

Unless impracticable, a police officer must give the person the opportunity to dispel the officer's "reasonable alarm or immediate concern for the safety of persons or property in the vicinity" by requesting the person identify himself or herself and explain his or her presence and conduct. In order to issue a citation or make an arrest, a police officer must reasonably believe that the person's conduct justifies alarm or immediate concern for the safety of persons or property in the vicinity. Finally, the officer must first warn the person and the person must fail or refuse to cease the conduct.

The Bill would also provide certain defenses. It would not be a violation if the arresting officer fails to provide the opportunity to explain the conduct or if the explanation given to the officer was true and would have dispelled the alarm or immediate concern.

3. How is Bill 35-11 different from the County's prior loitering law?

Prior to 2006, the County Code prohibited certain loitering. However, the prior loitering law was not based upon the Model Penal Code, §250.6. Under the former version of Code §32-13, loitering was defined as:

To circulate, stand around or remain or to park, or remain parked in a motor vehicle at a public place or place open to the public and to engage in any conduct prohibited under this law. Loiter also means to collect, gather, congregate or to be a member of a group or a crowd of people who are gathered together in any public place or place open to the public and to engage in any conduct prohibited under this law.

Bill 15-06, enacted on July 11, 2006, deleted the term "loitering" from the Code and replaced it with the current provision prohibiting certain "disturbing the public peace or disorderly conduct." The legislative history for Bill 15-06 does not indicate that the former loitering law was challenged in court. The deletion of the term "loitering" was made by the Council at the suggestion of the ACLU. See the Council Action packet at ©15-33. County Code §32-14 currently provides:

Sec. 32-14. Disturbing the public peace or disorderly conduct—Prohibited conduct.

An individual must not at, on, or in a public place or place open to the public:

- (a) interfere with or hinder the free passage of pedestrian or vehicular traffic; or

- (b) incite unlawful conduct, by words or intentional conduct, which is likely to produce imminent unlawful conduct.

Although some behavior may violate both Section 32-14 and the proposed loitering or prowling offense that would be established by Bill 35-11, the removal of the term "loitering" by Bill 15-06 does not affect the legal sufficiency of Bill 35-11.

4. Should the Bill be amended to remove the requirement that the officer first warn the person of the possible violation?

The County Attorney also pointed out a potential conflict between the requirement in subsection (c) that the officer give the person the opportunity to dispel the officer's alarm unless the person flees the scene and the requirement in subsection (e) that the person first warn the person of a possible violation. As the County Attorney points out, an officer may arrest a person who flees, but may not be able to charge that person because no warning was given. We agree with the County Attorney's analysis and recommend that subsection (e) be modified to eliminate the required warning. This would make the law consistent with the Model Penal Code, §250.6. **Committee recommendation (2-1, Councilmember Elrich opposed):** delete lines 50-53 of the Bill at ©3.

5. Should the penalty be reduced to a civil citation?

All of the cases striking down a loitering or prowling law based upon the Model Penal Code, §250.6 as unconstitutionally void for vagueness rely upon protection against a criminal penalty. An alternative would be to amend the Bill to reduce the penalty to a Class B Civil Violation subject to a maximum fine of \$100 for the first offense and \$150 for subsequent offenses. This is the same penalty proposed by the Executive's amendments for curfew violations under Bill 25-11. This would eliminate a potential civil rights suit for false arrest, but would also eliminate the ability of the police to take an offender into custody.

The U.S. Supreme Court, in *Hoffman Estates v. The Flip Side*, 455 U.S. 489 (1982), held that an Illinois municipal ordinance requiring a business license to sell drug paraphernalia with a civil penalty for non-compliance was not void for vagueness. The Court distinguished the need for clarity of a law with a civil penalty from a law with a criminal penalty in the following statement:

The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. 455 U.S. at 498-499.

In *Hoffman Estates*, the Court held that in the absence of a restriction on 1st Amendment rights, a civil penalty law can survive a facial attack on vagueness unless the plaintiff can "demonstrate that the law is impermissibly vague in all of its applications." (455 U.S. at 497)

At the November 17 worksession, the Committee requested the County Attorney to provide an opinion on the constitutionality of the Bill if the penalty was reduced to a civil violation with no criminal penalty. The County Attorney, in a November 28 legal opinion (©62-66), concluded that although it is open to reasonable debate:

Amending Bill 35-11 to make the offense of loitering and prowling enforceable as a civil infraction only would remove the void for vagueness and Fourth Amendment concerns identified in our November 14, 2011, memorandum. Nonetheless, we believe that it is more likely than not that the Bill continues to be unconstitutional because the Bill imposes, in an overly broad manner, an infringement on an individual's right to travel.

The County Attorney concluded that the Bill's restriction on the right to travel would be struck down under the Supreme Court's application of the strict scrutiny test. As the County Attorney pointed out, courts have differed on whether an infringement of the right to travel is a fundamental right subject to the strict scrutiny test that is almost always fatal or the more lenient intermediate scrutiny test. The County Attorney predicted that the Maryland Court of Appeals would apply the strict scrutiny test to this Bill and conclude that it was not narrowly tailored to remedy the County's compelling governmental interest in preventing crime. Once again, although Council staff agrees that this question is open to reasonable debate, we do not agree with the County Attorney's prediction.

First, as the County Attorney pointed out in a footnote, the decision of the Idaho Supreme Court striking down a criminal statute based upon the Model Penal Code, §250.6 did not find that the same law unconstitutionally infringed on the right to travel. The Idaho Supreme Court, in *State v. Bitt*, 798 P.2d 43, 48, concluded that the Model Penal Code, §250.6 does not regulate a significant amount of the right to free movement. The County Attorney also pointed out in a footnote that the Court in *Lutz v. City of York*, 899 F.2d 255, 271 (3rd Cir. 1990) applied intermediate scrutiny to uphold a challenge to the right to travel posed by a law prohibiting repeated cruising around a congested city block in an automobile.

Finally, the County Attorney relied on the Supreme Court decisions in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) and *City of Chicago v. Morales*, 527 U.S. 41 (1999) to conclude that the freedom to travel is a fundamental right requiring strict scrutiny similar to the 1st Amendment rights of free speech and association. However, the criminal law struck down in *Aptheker* infringed on the 1st Amendment right of association by prohibiting a member of the Communist Party from applying for a passport and traveling outside the country. The criminal law struck down in *Morales* also infringed upon the 1st Amendment right of association by prohibiting loitering in public with a known gang member. Bill 35-11 does not infringe upon the 1st Amendment right of association because it does not limit enforcement against a person based upon membership in a group.

In conclusion, amending Bill 35-11 to remove criminal penalties would enhance its ability to survive legal challenges, but whether it would survive a facial attack as an unconstitutional infringement on the right to travel remains open to reasonable debate.

Committee recommendation (2-1, Councilmember Elrich opposed): amend the penalty to a Class B Civil Violation. See lines 48-49 at ©3.

This packet contains:

	<u>Circle #</u>
Bill 35-11	1
Legislative Request Report	4
October 19, 2011 Andrews Memorandum	5
Model Penal Code, §250.6	7
Executive's FAQ for the Curfew	9
Council staff packet for Bill 15-06	15
County Attorney Opinion dated November 14	34
Facts underlying decisions to uphold law	39
Testimony	
Kathleen Boucher	43
Delegate Kirill Reznik	45
James Zepp	46
Rebecca Smondrowski	48
Mike Mage	49
Thomas Nephew	51
Darian Unger	53
Fred Evans	54
Paul Bessel	55
Edward Clarke	58
MCCF Letter of November 21	60
County Attorney Opinion dated November 28	62
Staff Amendment	67
Fiscal and Economic Impact Statement	68

F:\LAW\BILLS\1135 Loitering & Prowling\Action Memo.Doc

Bill No. 35-11
Concerning: Offenses – Loitering or
Prowling – Established
Revised: December 1, 2011 Draft No. 3
Introduced: October 25, 2011
Expires: April 25, 2013
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Andrews, Leventhal and Rice

AN ACT to:

- (1) prohibit certain loitering or prowling;
- (2) provide for certain defenses;
- (3) establish enforcement procedures and penalties; and
- (4) generally amend County law relating to offenses.

By adding

Montgomery County Code
Chapter 32, Offenses
Section 32-23B

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec 1. Sections 32-23B is added as follows:**

2 **32-23B. Loitering or Prowling.**

3 (a) **Definitions.**

4 As used in this Section:

5 Establishment means any privately-owned place of business to which
6 the public is invited, including any place of amusement or
7 entertainment.

8 [[Loitering or prowling]] Loiter or prowl means to remain in a public
9 place or establishment at a time or in a manner not usual for law-
10 abiding persons under circumstances that warrant a justifiable and
11 reasonable alarm or immediate concern for the safety of persons or
12 property in the vicinity.

13 Public place means any place to which the public, or a substantial
14 group of the public, has access. Public place includes any street,
15 highway, and common area of a school, hospital, apartment house,
16 office building, transport facility, or shop.

17 Remain means to linger, stay, or fail to leave a public place or
18 establishment when requested to do so by a police officer or the
19 owner, operator, or other person in control of the public place or
20 establishment.

21 (b) **Prohibitions.**

22 (1) A person must not loiter or prowl in any public place or
23 establishment in the County.

24 (2) In determining whether a person is violating this Section, a
25 police officer may consider if the person:

26 (A) takes flight after the appearance of the officer;

27 (B) refuses to identify himself or herself; or

(C) attempts to conceal himself or herself or any object.

(c) **Enforcement Procedure.**

(1) Unless flight by the person or other circumstances make it impracticable, a police officer must, prior to any arrest for a violation of this Section, give the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person:

(A) to identify himself or herself; and

(B) to explain his or her presence and conduct.

(2) The police officer must not issue a citation or make an arrest under this Section unless the officer reasonably believes that the person's conduct justifies alarm or immediate concern for the safety of persons or property in the vicinity.

(d) **Defenses.** [[(1)] It is not a violation of this Section if:

[[(A)] (1) the arresting officer did not comply with the requirements of subsection (c); or

[[(B)] (2) the explanation given to the police officer by the person was true and would have dispelled the alarm or immediate concern.

(e) **Penalties.**

[[(1)] A person who violates this Section has committed a Class B civil violation.

[[(2) A person must not be charged with a violation of this Section unless the arresting officer has first warned the person of the violation and the person has failed or refused to stop the violation.]]

LEGISLATIVE REQUEST REPORT

Bill 35-11

Offenses – Loitering or Prowling – Established

DESCRIPTION: Bill 35-11 would prohibit certain loitering and prowling, provide for certain defenses, and provide enforcement procedures and penalties.

PROBLEM: This Bill is an alternative to the youth curfew that would be established by Bill 25-11, Offenses – Curfew – Established.

GOALS AND OBJECTIVES: The Bill would provide the Police with a more focused tool to prevent problems that may occur as a result of people gathering for the purpose of causing trouble.

COORDINATION: Police, County Attorney

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: Similar laws have been enacted in Florida and Georgia. The Bill is based upon the American Law Institute Model Penal Code, §250.6.

SOURCE OF INFORMATION: Robert H. Drummer, Senior Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: Class B Violation

F:\LAW\BILLS\11xx Loitering & Prowling\Legislative Request Report.Doc

MEMORANDUM

October 19, 2011

TO: Councilmembers

FROM: Phil Andrews, Chair Public Safety Committee



SUBJECT: A better approach than a youth curfew to addressing crime

Many community members and organizations have voiced opposition or concerns about the County Executive's proposed youth curfew. Regardless of what you think about the County Executive's proposal, there is a better path for the Council to take and a better tool to give County Police to address the same concerns that the County Executive says he wants to address.

The Executive's document "Frequently Asked Questions about the County Executive's Youth Curfew Proposal", states, "Current laws are not adequate to manage large groups of teens that gather for the purpose of causing trouble." The document also says "Police would confront teens called to their attention due to suspected suspicious, menacing, potentially violent, or violent behavior" and that " . . . the curfew would be "a tool when encountering suspicious or dangerous behavior either on patrol or when dispatched to a complaint from a citizen. Those individuals would be asked to give their age and purpose for being in a public place or establishment."

A far better approach than a youth curfew to address the behavior that the Executive Branch wants to address -- behavior that can occur anytime by people of any age -- would be a law prohibiting loitering and prowling modeled after a long-standing and recently upheld state law in Florida. Unlike a youth curfew, a loitering and prowling law wouldn't discriminate based on age, wouldn't be limited to late-night hours when a small percentage of youth crime and overall crime occurs, and would target criminally suspicious behavior by anyone, rather than making it illegal (with exceptions) for certain people (youth) to be out in public after certain hours. Loitering laws can be drafted to withstand a court challenge. In fact, the Florida law prohibiting loitering/prowling recently withstood one. The draft law would enable police to take action if the person moved along but continued the suspicious behavior while lingering in a public place, including any place to which the public has access, including a street. The Class B violations proposed in the law can be civil (\$100 for first offense) or criminal, as circumstances warrant.

It is encouraging that crime by youth in our County has steadily declined since 2007, from 3,844 that year to 3,104 incidents in 2010. Gang-related incidents declined by 50% from 2008 to 2010, and youth arrests during the proposed curfew declined 18% from 2009 to 2010 (while increasing significantly during non-curfew hours). In addition, since the Council approved additional police officers for the Third District -- a proven approach to reducing crime -- robberies and aggravated assaults have declined dramatically in the

Silver Spring Central Business District from an average of six per month to an average of 1.5 this August and September, as have robberies and residential burglaries in the Rt. 29 corridor (the Ida sector). Credit is due to the fine work done by County police, as well as to County and non-profit personnel who administer and run our positive youth development programs. But more needs to be done to prevent and suppress crime, including expanding organized activities for youth, helping youth get out of gangs, and increasing police presence in targeted areas.

I invite you to co-sponsor the attached bill prohibiting loitering and prowling. The measure would provide County Police with an effective tool to address suspicious behavior by people of any age and any time of the day. Please let me or Lisa Mandel-Trupp know if you would like to sign on to the bill or have any questions or suggestions. I am hopeful that this is an approach that the Council can unite behind. Thanks for your consideration.

Attachment: Draft bill on loitering and prowling



Model Penal Code
Copyright 1962, American Law Institute

PART II. DEFINITION OF SPECIFIC CRIMES
OFFENSES AGAINST PUBLIC ORDER AND DECENCY
ARTICLE 250. RIOT, DISORDERLY CONDUCT, AND RELATED OFFENSES

Model Penal Code § 250.6

§ 250.6. Loitering or Prowling.

A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

NOTES:

Explanatory Note for Sections 250.1-250.12

Article 250 covers riot, disorderly conduct, and related offenses. This article deals with a vast area of penal law, which, at the time the Model Code was drafted, had received little systematic consideration by legislators, judges, or scholars. The penalties involved were generally minor, the defendants usually came from the lower social and economic levels, and appeals were consequently infrequent. For these reasons, pressures for legislative reform were minimal. Yet, disorderly conduct and related offenses form a critically important area of the criminal justice system. Offenses in this category affect a large number of defendants, involve a great proportion of public activity, and powerfully influence the view of public justice held by millions of people.

The purposes of Article 250 are the following:

- (1) to systematize the chaotic provisions of prior law penalizing a wide variety of petty misbehavior under such vague headings as "disorderly conduct" or "vagrancy";
- (2) to provide a rational grading of penalties and especially to limit the discretion of the minor judiciary to impose substantial imprisonment for petty infractions;
- (3) to safeguard civil liberty by careful definition of offenses so that they do not cover, for example, arguing with a policeman, peaceful picketing, or disseminating religious or political views;
- (4) to minimize the overlap of disorderly conduct offenses and offenses dealt with by more specific provisions of the Model Code so that policies embodied in other offenses will not be disregarded by prosecuting the same behavior as disorderly conduct;
- (5) to eliminate obsolete or unconstitutional provisions frequently found in prior law, e.g., against blasphemy, or creating "status crimes," such as being a common scold, common prostitute, common gambler, or common drunkard;

Model Penal Code § 250.6

(6) to extend the penal law to new areas of misbehavior involving public or aggravated assault on the feelings of individuals and groups, e.g., by false bomb scares, harassing telephone calls, illegal wire-tapping, and other invasion of privacy; and

(7) to improve criminal statistics by requiring prosecuting and reporting agencies to distinguish the widely differing forms of misbehavior often lumped together under the common heading "disorderly conduct."

Section 250.1 defines the offense of riot, which is the only felony in this article, and a subsidiary offense of failure of disorderly persons to disperse upon official order. The objectives of this offense are to provide aggravated penalties for disorderly conduct where the number of participants makes the behavior especially alarming or dangerous and to establish penal sanctions for persons who disobey lawful police orders directing a disorderly crowd to disperse.

Section 250.2 covers the offense of disorderly conduct, which is defined in ways significantly different from prior law. Perhaps most notably, Section 250.2 prohibits only conduct that is itself disorderly and does not punish lawful behavior that prompts others to respond in a disorderly manner. Another significant innovation in the law of disorderly conduct is the reduction of the offense to a violation, which does not authorize imprisonment, unless the actor's purpose is to cause substantial harm or serious inconvenience or unless he persists in disorderly conduct after reasonable warning or request to desist, in which case the offense is a petty misdemeanor.

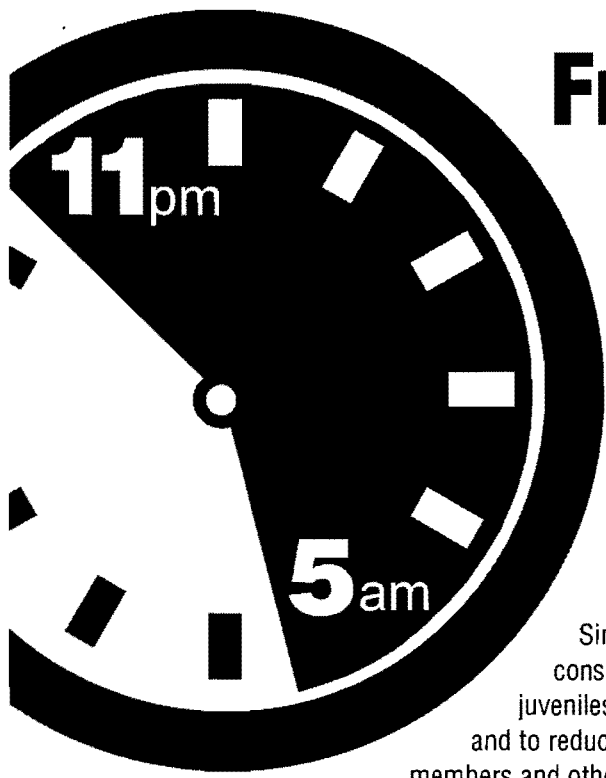
The next six sections of Article 250 deal with special cases of conduct that is disorderly or otherwise constitutes a public nuisance. Section 250.3 punishes false public alarms as a misdemeanor. Section 250.4 defines the petty misdemeanor of harassment. This offense covers a variety of harassing events, including making a telephone call without purpose of legitimate communication, insulting another in a manner likely to provoke violent response, making repeated communications anonymously or at extremely inconvenient hours or in offensively coarse language, and engaging in any other course of harmful conduct serving no legitimate purpose of the actor. Section 250.5 states the Model Code offense of public drunkenness and drug incapacitation. It differs from prior law principally in requiring that the person be under the influence of alcohol or other drug "to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity." Additionally, Section 250.5 departs from earlier practice in punishing public drunkenness as a violation unless the actor has been convicted twice before within a period of one year, in which case the crime is a petty misdemeanor.

Section 250.6 defines the crime of loitering or prowling. This offense replaces the extremely broad vagrancy laws typical of an earlier time with an offense carefully designed to nip incipient crime in the bud. Specifically, Section 250.6 punishes a person who loiters or prowls "under circumstances that warrant alarm for the safety of persons or property in the vicinity." The section further requires that, save where impracticable, the police officer shall, before making an arrest for this offense, afford the actor an opportunity to dispel alarm for persons or property by identifying himself and explaining his presence and conduct. Section 250.7 punishes the obstruction of highways and other public passages and deals particularly with police control over a person whose speech or other lawful behavior attracts an obstructing audience. Section 250.8 covers disrupting meetings and processions. This offense is distinct from the general provision against disorderly conduct in that it reaches some instances of behavior not in itself disorderly but calculated to outrage the sensibilities of the group involved.

Finally, Article 250 includes several offenses addressed to disparate kinds of conduct that, although not likely to generate disorder, are widely recognized as instances of public nuisance. For example, Section 250.9 punishes the purposeful desecration of venerated objects, including most notably the national flag. Section 250.10 deals with abuse of corpse. Section 250.11 punishes cruelty to animals, and Section 250.12 covers violation of property in a variety of different contexts.

Two comments of a more general nature should also be made at this point. First, it should be noted that regularization of the state penal code will not suffice to bring reform to this area of the law. It will also be necessary to suppress or align innumerable local ordinances under which much prosecution of disorderly conduct and related offenses takes place. Second, the constitutional background of these offenses has changed significantly since promulgation of the Model Code in 1962. In general, judicial concern with the vagueness of penal legislation has increased; and expanding concepts of liberties protected under the first amendment have withdrawn many areas of expressive activity from legislative competence. The various constitutional questions raised by the offenses in Article 250 are discussed in the Comments to specific sections.

For detailed Comment to 250.6, see MPC Part II Commentaries, vol. 3, at 383.



Frequently Asked Questions about the County Executive's Youth Curfew Proposal

From the Montgomery County Office of Public Information

► Why is Montgomery County considering a curfew?

Simply put, a youth curfew will help protect young people. The County is considering a limited youth curfew as an additional method to improve the safety of juveniles, the safety of residents and visitors to our increasingly urbanized communities, and to reduce juvenile-related crimes. In the past several months police have seen gang members and other young adults coming from neighboring areas that have curfews and engaging in unlawful or violent activities – at times including county youth or directed at them. Current laws are not adequate to manage large groups of teens that gather for the purpose of causing trouble. A youth curfew would complement already existing public safety activities and positive youth development programs to protect underage youth from being the victims of crime or being involved in crime.

► What could a curfew accomplish?

A limited curfew could help prevent our youth, other residents, and businesses from becoming victims of unlawful behavior close to and during the curfew hours. It would give the Montgomery County Police Department the same tool that Prince George's County and Washington D. C.'s Metropolitan Police have to prevent unlawful behavior and victimization. It would help manage the influx of youth coming from other curfew-regulated jurisdictions who engage in criminal activity. A by-product could be assisting parents and guardians who have difficulty getting their teens to adhere to family-established curfews. A curfew is a management tool that police could use to disperse large groups of juveniles, such as the approximately 25-member group who participated in the August mass theft at a 7-Eleven store in Germantown just before 2:00 a.m.

► What does the curfew law include?

The curfew basically restricts youths under the age of 18 from gathering and remaining in public places between 11:00 p.m. and 5:00 a.m. Sunday through Thursday and between midnight and 5:00 a.m. on Friday and Saturday. Its purpose is to prevent unlawful behavior and safeguard law-abiding teens. It includes a list of exemptions for which it would not restrict minors during a portion of or all of the curfew hours.

► Which other jurisdictions have curfews?

According to a survey by the United States Conference of Mayors, more than 500 U.S. jurisdictions have youth curfews, including 84 percent of cities with populations over 180,000.

In our area, two of the largest urban areas, the District of Columbia and Prince George's County have curfew laws. So does Baltimore. Virginia state law allows local jurisdictions the authority to establish curfews for minors between the hours of 10:00 p.m. and 6:00 a.m. In 1996, President Bill Clinton recommended a 9:00 p.m. youth curfew to protect young people from becoming victims. Over 70 cities have **daytime** youth curfew laws to hold parents accountable and keep kids in school. Montgomery County has revitalized or developed urban centers in Bethesda, Clarksburg, Germantown, Rockville, Silver Spring, and Wheaton, so it would make sense to have a **county-wide** curfew.

► How will it work?

Police would confront teens called to their attention due to suspected suspicious, menacing, potentially violent, or violent behavior. The police would not be involved in routinely rounding up minors for the sake of enforcing the curfew law, but the curfew would instead be a tool when encountering suspicious or dangerous behavior either on patrol or when dispatched to a complaint from a citizen. Those individuals would be asked to give their age and purpose for being in a public place or establishment.

If they are 17 or younger and their purpose for being out does not fall within the exemptions, the minor would be advised of the curfew law and directed to return home. If the minor leaves, no further action would be taken. If the minor refuses to leave, the minor would be issued a civil citation. If the minor still refuses to leave, he could be “failing to obey the lawful order of a law enforcement officer to prevent a disturbance of the public peace” and could be taken into custody.

The now “juvenile defendant” would be transported to a Police District station and processed for that misdemeanor charge. The defendant’s parents and/or guardian would be notified to come and take custody of the minor. If the appropriate adult responds, the juvenile is released to that person pending any follow-up action by the Department of Juvenile Services (DJS). If the parent/guardian or their designee refuses or is unable to respond to take custody, the DJS is contacted by the arresting officer. The DJS has its own protocols that determine if the juvenile will be placed in a facility pending action the following day. Youth who are repeat offenders and who appear to lack adult supervision and support may be brought to the attention of Montgomery County’s Department of Health and Human Services so that some follow up or assessment may be completed and the needs of the youth may be addressed.

► What are the penalties?

A curfew violation would be a civil violation punishable by a fine of \$100 for the first offense and \$150 for a second offense according to amendments the County Executive is proposing to the original bill. As amended, minors would not be ordered to perform up to 25 hours of community service. If arrest authority is needed a juvenile offender could be charged with “failure to obey an order made by a police officer to prevent a disturbance of the public peace.”

The penalty for the criminal offense of “failure to obey” is up to 60 days in jail and/or up to a \$500 fine.

A parent of a minor commits an offense if he or she knowingly permits, or allows, a minor to remain in any public place during curfew hours. Parents would also be liable for a fine of \$100 for the first offense and \$150 for a second offense. Parents of a minor cited under the law would not be required to attend parenting classes.

An owner or operator of an establishment commits an offense if he or she knowingly allows a minor to remain on the premises of the establishment within curfew hours.

Any owner or operator of an establishment not exempted under the curfew - after being given a warning - is subject to a fine of \$100 for the first offense and \$150 for a second offense.

► When is a juvenile exempt from the curfew?

1. When accompanied by a parent or guardian.
2. When accompanied by another adult authorized by the parent or guardian to accompany the juvenile for a designated purpose and period of time.
3. When on an errand at the direction of the parent or guardian without any detour or stop until 12:30 a.m.
4. When in a motor vehicle, train, or bus in interstate travel through the County or starting or ending in the County.
5. When going to, engaged in or returning home from employment without any detour or stop.
6. Responding to an emergency.
7. When on the property where the minor lives.
8. On the sidewalk next to the minor’s residence or the next-door neighbor’s residence if the neighbor does not complain to police about the minor’s presence.
9. When attending, or returning from an official school, religious, or other type of recreational activity sponsored by the County, a civic organization, or another similar entity that takes responsibility for the minor at the event.
10. When exercising First Amendment rights protected by the U.S. Constitution, including free exercise of religion, freedom of speech, and the right of assembly.

► **What additional exemptions are being considered?**

The County Executive has proposed an additional exemption when a minor is attending and/or returning from a movie, concert, play, or sporting event.

► **How can you ensure that a curfew will not cause police to engage in racial and age profiling?**

Police would be asked to respond to groups of young people and particular situations that appear threatening or where trouble has erupted. The response would be based on activity, not race. Officers would not be stopping someone solely based on their race or potential juvenile status. There would need to be probable cause to believe that trouble would occur. Montgomery County Police have consistently been vigilant about not engaging in profiling. There is no reason to believe that a new law would cause that to change. Prevention of any type of profiling is based on hiring the right caliber of officers, giving officers appropriate and continuing training, and having consequences in place for failure to perform to defined standards.

► **Curfews fail to address the causes of juvenile delinquency. Why doesn't the County put more efforts into prevention programs which would target the offenders, not the law-abiding teens?**

The County has invested and does invest in prevention and suppression programs. The County has spent over \$8 million in prevention-based programming over the past four years as part of the County Executive's "Positive Youth Development" initiative which includes out-of-school -time programs across the County. Programs are offered throughout the year at both the middle school and high school levels with the goal of providing youth with safe, supervised and constructive activities that prevent negative behavior. The Police, Health & Human Services and Recreation Departments join together with other agencies in efforts to educate about, intervene to prevent, and suppress gang activity in the County.

The youth curfew would complement these and other efforts by government and community and non-profit groups and organizations. The problem of youth violence and victimization needs immediate attention by police who are in need of another means to control unruly groups of minors. The curfew is not meant to take the place of other types of assistance to at-risk teens and their parents.

► **Why don't you take the money you would spend on administering a curfew and spend it on youth programs to help prevent violence?"**

The cost to administer a curfew would be low and offset by the prevention of situations that would tax Police resources even more. The County is already investing in a broad range of positive youth programs.

► **The crime statistics posted on the police website show that crime is down in the county and that there is a decrease in "youth offenses." Why a curfew when youth crime is down?**

Total crime has been on a downward trend in the County for the past four years. That's good news. However, the "juvenile offenses" category of statistics under the Uniform Crime Reporting standards refers only to "runaways, "out of control youth", and "runaways-other jurisdictions" which are exclusive to juveniles. It is not a measure of such crimes as robberies, assaults, sexual offenses, etc. that may be committed by either juveniles or adults.

Still, existing County data shows that the total number of youth arrests increased from 1,548 in 2006 to 2,626 in 2010. Juvenile arrests as a percentage of all arrests increased from 12 percent in 2006 to 21 percent in 2010.

The curfew proposal did not come after a study of statistics that showed a dramatic increase in crimes committed by juveniles. Rather, it came as a proactive measure to address an emerging potentially dangerous situation and to better protect young people from being victims of crime or being involved in criminal activity.

► **Why not limit curfews to, say, the Central Business Districts in the County?**

That would simply cause the problem to shift across the street, just outside the business districts or to other parts of the County. Not all juvenile-related crimes and juvenile victimization occur in Central Business Districts.

► **Do curfews really cut down on youth crime?**

If you do some research you'll find that there are valid studies that say they don't and others that say they do. However, one of the benefits of a curfew is that it can act as a deterrent to crime; and that aspect of a curfew — what **doesn't** happen — can't be statistically measured.

We do know for certain that serious traffic crashes involving our youngest drivers have dropped significantly since Maryland tightened teen driving laws. According to preliminary state data released in June of this year, teen fatalities dropped 25 percent from 48 deaths in 2009 to 36 in 2010. Teen injuries fell by 17 percent, from 5,479 in 2009 to 4,543 in 2010. Teen drivers can't obtain a license without restrictions, including driving between midnight and 5:00 a.m., until they are 18 years old. The curfew would apply the same types of restrictions to teens who are on foot or who use mass transit.

► **If you are basing the need for a curfew on actual crimes being committed by young people during the overnight hours, why am I not seeing that reflected in the crimes listed in the Recent Crime Summaries that are posted on the police website on each District's webpage?**

The Recent Crime summaries are not a listing of every crime reported in the county. The summaries provide a sampling of trends of crimes reported to police. There is no suspect description for the majority of the crimes listed, so the age of a suspect is not known at that phase of reporting. Because of that, reviewing what is printed in the crime summaries would not be a means of determining how many crimes are committed by juveniles and/or how many crimes are committed during proposed curfew hours. Those crime listings do not include calls for service that come through the police computer-aided dispatch system. Some of those calls for service do not require that a report be written but still mandate a police response. An example might be a fight in progress or a disorderly conduct incident.

► **What data do you have on juvenile crime and victimization occurring in the County?**

A recent analysis of reported crime regarding juveniles revealed:

- The percentage of juvenile arrests (out of total arrests) increased from 12% in 2006 to 21% in 2010.
- For each year from 2008 through 2010, juvenile victims accounted for approximately 4% of all victims reporting incidents in the county.
- The percentage of robberies occurring between 11:00 p.m. and 5:00 a.m. with any juvenile arrest has increased steadily since 2008. However, the percentage of robberies in that same time period with any juvenile victim has decreased.
- The percentage of assaults occurring between the above hours with any juvenile arrest has increased steadily since 2008, and the percentage of assaults occurring between those hours with a juvenile victim has increased.
- The percentage of weapon offenses occurring between the above hours with any juvenile arrest has increased since 2008.

► **Don't you think the curfew will cause a loss of revenue to local businesses?**

No. Business owners know that groups of rowdy and intimidating teens keep their adult customers (who typically spend more) away. Many adults have expressed fear in the presence of groups of young people who speak loudly and act in a threatening manner. Businesses in Prince George's County and in the District of Columbia have been supportive of the youth curfews there, according to the police chiefs in those jurisdictions. Some Montgomery County Chambers of Commerce have already provided their supportive feedback for the curfew.

► **What about other municipalities like Gaithersburg, Rockville, and Takoma Park — are they going along with the curfew proposal?"**

Some municipalities adopt legislation enacted by the County. The governing body of each municipality will likely examine the final proposal and after discussion with their jurisdiction's police department make the determination if they will accept the curfew legislation. Any jurisdiction that does not accept a curfew law may open itself up to becoming a haven for those juveniles who are seeking a gathering place to cause trouble.

From young people affected by the curfew:

► **"The curfew doesn't seem fair, why penalize the majority of good teens because of the actions of a few?"**

We know that the vast majority of our teens are responsible members of our community. That's why with a list of exemptions to the curfew and the manner in which it will be enforced, the curfew is designed to have a minimum impact on our young people who aren't causing any trouble. The curfew's purpose is to protect you and adults from becoming victims of crime, as well as to provide a tool for police to prevent crimes committed by minors who are posing a threat to public safety.

As Police Chief Tom Manger said in his testimony before the County Council: "As a parent and a Police Chief, I do not want to limit the legitimate opportunities for entertainment and interaction for our young people. Nor do I want to stand idly by and not have at our disposal a tool which can help us manage situations before they turn ugly."

► **"Will teens be able to work past the curfew hours?"**

Yes. If you have a job that requires you to work past curfew hours you are exempt from the curfew law. However, when your work shift ends, you would be expected to return directly home without making any other stops along the way.

► **“Will kids still be able to go to late-night movies?”**

Yes, if the movie begins before the curfew hour. It does not have to end before curfew. The current proposal was never meant to be the final product. It was presented to get the process started. Input from members of the County Council and the community, especially our young adult community members, is welcomed as a final drafting of the law is in process.

The County Executive has proposed an amendment to the bill that would exempt minors attending and/or returning from movies, concerts, plays, and sporting events.

► **“Will kids be able to stop by an open establishment on their way to a Metro or bus stop after curfew hours?”**

The goal is compliance with the curfew so try to get what needs to be done prior to the curfew hours. If there is a very particular reason that causes you to need to make a stop on the way home, chances are that will not arouse concern. If you are stopped and asked your age and purpose of being out past curfew, you just need to comply with an officer's or business owner's direction that you are in violation of the curfew and continue home.

► **“Why does the curfew law apply to youth under age 18?”**

One of the goals of the curfew is to provide police with an additional tool to prevent criminal activity committed by juveniles. A juvenile does not legally become an adult until age 18. That's why there are restrictions on the sale of alcohol and the purchase of tobacco products to underage individuals. So it makes sense for the curfew to cover those 17 and under. Once you are 18, adult laws apply to the offender.

► **“Why can't the County police use the existing laws such as loitering, disorderly conduct, and trespassing, instead of creating a new curfew law?”**

Loitering laws are now strictly drawn to comply with recent court decisions. Loitering is now defined only as blocking an entrance or exit to a place or area. Disorderly conduct must be observed by the responding officer. Trespassing laws are not applicable to public spaces unless that space is explicitly posted as closed between certain hours (such as County parks). The youth curfew is designed to apply to situations where none of these laws are options.

► **“Don't you think a curfew will foster distrust of police and government by youth?”**

No. Young people are providing their input to the proposal; they will have a voice in the final product. Once everyone understands that the curfew is important to improve everyone's safety, and that its enforcement will have little impact on minors who aren't breaking the law, there should be greater acceptance.

► **“According to the Youth Rights Association, statistical studies don't show a correlation between curfew enforcement and decreased juvenile crime. So why have a curfew if it isn't going to be effective?”**

The curfew wasn't proposed based on statistics, it was based on what police are seeing as an emerging concern. We could sit back and wait until the situation gets worse, but the County Executive didn't want to hold back if there was something that could be more quickly done that could make everyone safer.

There are a variety of studies on the subject and studies can be found to both support and that disprove the effectiveness of curfews.

According to a survey by the United States Conference of Mayors, more than 500 U.S. jurisdictions have youth curfews, including 84 percent of cities with populations over 180,000.

A survey by the group of 347 cities with populations over 30,000 found the following:

- 90 percent of jurisdictions with curfews said that enforcing a curfew was a good use of Police time.
- 93 percent said a nighttime curfew was a useful tool for police officers.
- 88 percent said curfews helped make their streets safer for residents.
- 83 percent said curfews helped to curb gang violence.

While comparisons and cause-and-effect can be difficult, San Antonio saw victimization of youth drop 53 percent after enactment of a curfew. The rate in Dallas fell 17 percent. In San Diego, violent crime by juveniles dropped by 20 percent and violent crimes against juveniles fell by 40 percent.

In our region, two of the largest urban areas, the District of Columbia and Prince George's County have curfew laws. So does Baltimore. Virginia state law allows local jurisdictions the authority to establish curfews for minors between the hours of 10:00 p.m. and 6:00 a.m.

The District of Columbia experienced a 50 percent reduction in juvenile victims of violent crime and a 43 percent reduction in juveniles arrested during curfew hours when a 10:00 p.m. curfew was in effect during a 2006 crime emergency.

In 2010, the District of Columbia police had 4,326 cases of curfew violations; Prince George's County had 78 cases. In both jurisdictions this represents only those underage who have refused to go home. Obviously, hundreds and thousands have been told to go home and complied – and/or complied in the first place by not being out after curfew. Those much larger numbers are not reflected in the statistics.

The County Executive and Police Chief Tom Manger spoke directly to Washington D.C.'s Metropolitan Police Chief Cathy Lanier and Prince George's Police Chief Mark Magaw who believe that the youth curfew has been an effective tool in their jurisdictions for protecting young people. Though, as in Montgomery, there were questions raised at the beginning of the process, the youth curfew now enjoys broad support and, according to the chiefs, any public comment now tends toward supporting broader use of the youth curfew.

Police have confirmed that minors in neighboring jurisdictions with curfews are entering Montgomery County and getting into trouble here because there isn't currently a curfew in our county and that issue needs to be addressed

From concerned parents:

▶ "Will parents be able to pick up their children at establishments such as fast food restaurants after curfew hours?"

Yes, in a situation where you are unavoidably delayed. It is expected that parents will support the curfew hours and make arrangements to pick up their children to avoid them being out after those hours. The curfew targets groups of teens in public places who are engaging in menacing or violent actions. A small group of teens eating quietly at a restaurant or waiting to be picked up by a parent, is not likely to cause anyone to call police.

▶ "Why should the government set a curfew, isn't that the right and responsibility of parents?"

Many parents do set and are able to enforce curfews for their children. However, the at-risk teens that this curfew is designed to prevent getting into trouble frequently resist parental control or belong to challenged families where the parents need additional support to manage the actions of their children. The curfew can aid parents in carrying out their responsibilities to reasonably supervise children entrusted to their care. It is important to note again that there has been a de facto motor vehicle operator curfew in effect for many years now – the curfew simply applies that same concept to pedestrians and people traveling by mass transit.

From business owners:

▶ "Can my businesses provide goods and services to teens past the curfew — i.e. sell movie tickets past the curfew; serve them dinner, etc?"

Businesses are expected to support the curfew by not allowing their property to become a gathering place for groups of teens who could potentially cause trouble. There will be exemptions to the curfew and owners of entertainment and sports-related businesses should know those exemptions. A quiet gathering of young people should not pose a problem, but if a group gets rowdy business owners can use the curfew in the same way police officers would, as a means to move the troublemakers out of their establishment. Business managers should not put themselves in harm's way and can also call for police to disperse a group becoming out of control.

▶ "Can my business get into trouble for providing goods and services to teens after the curfew?"

Owners of businesses not exempt from the curfew are obligated to reasonably uphold the curfew. A business owner could be held legally accountable for knowingly providing a location for an unruly group of juveniles to gather during curfew hours.

▶ "Can my business hire a teen when I know that their shift will go beyond the curfew?"

Yes. Teens with jobs are exempt from the curfew.

▶ "Should I notify the police if teens are coming into my establishment after the curfew without an adult, or notify the police if teens are gathering outside of my business after the curfew?"

Business owners should notify police if a group of underage teens is causing trouble inside their establishment or on their property, just as they would be expected to do outside of curfew hours.



For more information go to: <http://www.montgomerycountymd.gov/curfew>

Action

MEMORANDUM

July 7, 2006

TO: County Council 
FROM: Sonya E. Healy/Legislative Analyst
SUBJECT: Action: Bill 15-06, Offenses - Loitering

On April 18, 2006, the Council President, at the request of the County Executive, introduced Bill 15-06, Offenses - Loitering. The Council held a public hearing on Bill 15-06 on June 13, 2006 and testimony was provided by the ACLU (© 9-11). At the public hearing, Councilmember Subin expressed concern about treating loitering as a criminal offense. The Public Safety Committee reviewed Bill 15-06 on June 19, 2006, and (2-0) recommended approval with amendments.

Public Safety Committee Recommendation

As introduced, Bill 15-06 does not regulate all loitering, it only regulates loitering that interferes, impedes, or hinders the free passage of pedestrian or vehicle traffic or that incites by words or other conduct imminent unlawful conduct. **In response to issues raised by the ACLU, the Committee recommended removing all references to the term "loitering" and instead recommended using "disturbing the public peace or disorderly conduct" to describe prohibited activities.** The Committee stated that since loitering, in and of itself, is not a criminal offense, this reference should be eliminated to remove potential confusion for the public.

At the request of the County Attorney's Office, the Committee also added "violating a condition of parole or probation" as a reason for temporary detention (line 70 © 4). This change is consistent with the Nevada "stop and identify" statute, which was upheld by the Supreme Court in *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004).

In addition, the Committee recommended replacing "orderly" with "lawful" to describe picketing (line 86, © 5). If the behavior associated with picketing is unlawful it can be stopped and prosecuted. The Committee also made technical amendments to Bill 15-06 (© 1-5).

Background

Bill 15-06, drafted by the County Attorney's Office, amends the County's existing loitering law to more narrowly define the circumstances under which (1) a police officer may require an individual to produce identification and (2) an individual can be charged with disturbing the public peace. Both changes are needed to assure compliance with constitutional requirements.

Loitering, vagrancy, and disorderly conduct statutes have been challenged in numerous jurisdictions and many have been found to be overbroad or unconstitutionally vague. Statutes may be invalidated if they implicate First Amendment rights of freedom of speech or assembly; however, this does not mean that counties may never enact legislation that may impinge to some extent on the exercise of First Amendment rights. For example, counties are "free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct." *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

Loitering as a Criminal Violation

Loitering has long been recognized as a criminal violation. Many statutes are based on the text proposed in the Model Penal Code. According to the Supreme Court in *Hiibel v. Sixth Judicial District Court of Nevada*, "statutes are based on the text proposed by the American Law Institute as part of the Institute's Model Penal Code. See *ALI, Model Penal Code*, § 250.6, *Comment 4*, pp. 392—393 (1980). The provision, originally designated in § 250.12, provides that a person who is loitering 'under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes.'" *Id.* § 250.12 (1961). In some states, a suspect's refusal to identify himself is a misdemeanor offense or civil violation; in others, it is a factor to be considered in whether the suspect has violated loitering laws. In other states, a suspect may decline to identify himself without penalty." *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004).

Some jurisdictions, including Maryland, do not have loitering statutes. Maryland has criminal sanctions for disturbing the peace and disorderly conduct (Maryland Code, Criminal Law § 10-201, © 12-13); trespass (*Id.* § 6-402 & 6-403, © 14-15); and refusal or failure to leave a public building or grounds (*Id.* § 6-409, © 16).

Under County law the difference between criminal and civil sanctions for a Class B violation is as follows: a \$200 fine and up to 30 days in jail for a criminal violation, and \$100 for a first offense and \$150 for a subsequent offense for a civil violation. Chief King from the Police Department told the Committee that it is important for the statute to remain a criminal violation because there are instances where individuals clearly provide police officers with incorrect names (i.e. Santa Clause), and the threat of criminal sanctions can often persuade an individual to provide accurate information. In addition, the State's Attorney can choose to

prosecute a violation as either a criminal or civil offense depending on the facts of a particular case. **In light of the other Committee recommendations, the Committee recommended maintaining the statute as a criminal violation.**

This packet contains:

Bill 15-06

Legislative Request Report

Memo from County Executive

Fiscal Impact Statement

Testimony from ACLU

Maryland Code Sections

Circle #

1

6

7

8

9

12

F:\LAW\BILLS\0615 Offenses - Loitering\Action Memo.Doc

Bill No. 15-06
Concerning: Offenses – **[[Loitering]]**
Disturbing the public peace or
disorderly conduct
Revised: 6-19-06 Draft No. 4
Introduced: April 18, 2006
Expires: October 18, 2007
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the Request of the County Executive

AN ACT to:

- (1) prohibit **[[certain types of loitering]]** disturbing the peace or disorderly conduct;
- (2) require certain persons to provide a law enforcement officer with the person's name;
- (3) prohibit certain activity at certain public places;
- (4) impose certain penalties; and
- (5) generally amend the County loitering law.

By amending

Montgomery County Code
Chapter 32, Offenses – Victim Advocate
Sections 32-13 through 32-17

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 32-13 through 32-17 are amended as follows:**

2 **32-13. [[Loitering]] Disturbing the public peace or disorderly conduct -**
3 **Definitions.**

4 [For the purposes of sections] As used in Sections 32-14 ~~[[to]]~~ through 32-17,
5 the following terms [shall] have the following meanings [respectively ascribed to
6 them in this section]:

7 **[[Loiter:** To circulate, stand around or remain or to park, or remain parked in
8 a motor vehicle, either as an individual or as a member of a group, at a public place
9 or place open to the public and to engage in any conduct prohibited under this law.
10 Loiter also means to collect, gather, congregate or to be a member of a group or a
11 crowd of people who are gathered together in any public place or place open to the
12 public and to engage in any conduct prohibited under this law.]]

13 ***Place open to the public:*** Any place [open to the public or any place to] ~~[[in~~
14 which]] where the public is invited or permitted [and in, on or around any privately
15 owned place of business, private parking lot or private institution, including places of
16 worship, cemetery or any place of amusement and entertainment whether or not a
17 charge of admission or entry thereto is made. It includes the elevator, lobby, halls,
18 corridors and areas open to the public of any store, office or apartment building.],
19 including:

20 (a) a place of business;

21 (b) a parking lot;

22 (c) a place of worship;

23 (d) a cemetery;

24 (e) a place of amusement ~~[[, whether or not admission is charged; and]];~~ or

25 (f) an elevator, lobby, or hallway ~~[[in a building where the public is~~
26 permitted]].

27 ***Public place:*** [Any public street, road, or highway, alley, lane, sidewalk,

crosswalk or other public way, or any public resort, place of amusement, park, playground, public building or grounds appurtenant thereto, school building or school grounds, public parking lot or any vacant lot.]

(a) Any public way, including

(1) a street, road, or highway;

(2) a sidewalk;

(3) an alley or lane; [[and]] or

(4) a crosswalk.

(b) Any public facility, including

(1) a park;

(2) a playground;

(3) a school; [[and]] or

(4) a government building.

(c) Any vacant lot or parcel of land.

32-14. [Same] [[Loitering]] Disturbing the public peace or disorderly conduct- Prohibited conduct.

[(a) It shall be unlawful for any person to] An individual must not [[loiter]] at, on, or in a public place or place open to the public [[in such manner a way that]]:

[(1)] (a) [To interfere, impede or hinder] interfere[[s]] with or hinder[[s]] the free passage of pedestrian or vehicular traffic[.]; or

[(2) To interfere with, obstruct, harass, curse or threaten or to do physical harm to another member or members of the public.

(3) That] (b) incite[[s]] unlawful conduct, by words or intentional conduct, [it is clear that there is a reasonable likelihood a breach of the peace or disorderly conduct shall result] which is likely to produce [[any]] imminent unlawful conduct.

55 [(b) It shall be unlawful for any person to loiter at a public place or place
56 open to the public and to fail to obey the direction of a uniformed police
57 officer or the direction of a properly identified police officer not in
58 uniform to move on, when not to obey such direction shall endanger
59 public peace.]

60 **32-15. [Same-Identification.] Temporary detention by police officer of an**
61 **[[person]] individual suspected of criminal behavior.**

62 [It shall be unlawful for any person at a public place or place open to the
63 public to refuse to identify himself by name and address at the request of a uniformed
64 police officer or of a properly identified police officer not in uniform, if the
65 surrounding circumstances are such as to indicate to a reasonable man that the public
66 safety requires such identification].

67 (a) A police officer may temporarily detain any individual under
68 circumstances that reasonably indicate that the individual [[either]]:

69 (1) has engaged in conduct prohibited under Section 32-14[[, or]];

70 (2) has violated or is violating a condition of parole or probation[[,]];

71 or

72 (3) has committed, is committing, or is about to commit a crime.

73 (b) A police officer may detain an individual under this Section only to
74 determine the individual's identity and the circumstances surrounding
75 [[the]] suspected criminal behavior. Any [[person so]] detained
76 individual must truthfully identify himself, but must not be compelled
77 to produce identification or answer any other question from any police
78 officer.

79 (c) An individual must not be detained under this Section longer than is
80 reasonably necessary to achieve the purposes of this Section[[, and in
81 no case longer than 60 minutes]]. Unless the individual is arrested,

the detention must not last longer than 60 minutes or extend beyond the place, or the immediate vicinity of the place, where the individual was first detained.

32-16. [Same-] Lawful assembly exempted.

Nothing in this Article, except Section 32-23, prohibits ~~[[orderly]]~~ lawful picketing or other lawful assembly.

32-17. [Same] [~~Loitering~~] Disturbing the public peace or disorderly conduct— Penalties; Warning.

(a) [Any person violating any of the provisions herein shall be subject to punishment for a class B violation as set forth in section 1-19 of chapter 1 of the County Code.] An individual who violates Section 32-14 or Section 32-15 has committed a Class B violation.

(b) [No person shall] An individual must not be charged with a violation of [sections 32-13 to 32-16] Section 32-14 or Section 32-15 unless [and until] the arresting officer has first warned the individual of the violation and [such person] the individual has failed or refused to stop [such] the violation.

Approved:

George L. Leventhal, President, County Council

Date _____

Approved:

Douglas M. Duncan, County Executive

Date _____

LEGISLATIVE REQUEST REPORT

Bill 15-06

Offenses - Disturbing the public peace or disorderly conduct

- DESCRIPTION:** This bill amends the County's loitering law to more narrowly define the circumstances under which an individual may be required to produce identification and be cited for or charged with disturbing the public peace or disorderly conduct to ensure compliance with constitutional requirements.
- PROBLEM:** For many years, Section 32-15, which makes it unlawful to fail or refuse to identify oneself when requested by a police officer, has been viewed by judges of the County's circuit and district courts as unconstitutionally vague. There is also a concern that the loitering prohibition does not provide a person of ordinary intelligence adequate notice of what conduct is forbidden by the statute.
- GOALS AND OBJECTIVES:** To more narrowly define the circumstances under which an individual may be cited for or charged with disturbing the public peace or disorderly conduct. This in turn will adequately advise individuals and police officers alike of the circumstances under which an individual may be required to truthfully provide his or her name to a police officer.
- COORDINATION:** Department of Police
- FISCAL IMPACT:** None
- ECONOMIC IMPACT:** No fiscal impact.
- SOURCE OF INFORMATION:** Marc Hansen, Chief, Division of General Counsel, (240) 777-6740.
William A. Snoddy, Associate County Attorney, (240) 773-5004.
- APPLICATION WITHIN MUNICIPALITIES:** Barnesville, Brookville, Chevy Chase Village, Chevy Chase View, Chevy Chase Section 3, Chevy Chase Section 5, Glen Echo, Martin's Additions, North Chevy Chase, Takoma Park
- PENALTIES:** Subject to Class "B" violation.



OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Douglas M. Duncan
County Executive

MEMORANDUM

March 21, 2006

TO: George L. Leventhal, President
Montgomery County Council

FROM: Douglas M. Duncan, County Executive

SUBJECT: County Loitering Law - Amendment

Following the Supreme Court's decision in *Hiibel v. Sixth Judicial District*, which upheld a Nevada "stop and identify" statute, an examination of the County's loitering law indicates that it may not pass constitutional muster. More specifically, Section 32-15, which makes it unlawful to fail or refuse to identify oneself when requested by a police officer, has been viewed by judges of the County's circuit and district courts as unconstitutionally vague. The Office of the State's Attorney takes the same position. There is also a concern that the loitering prohibition does not provide a person of ordinary intelligence adequate notice of what conduct is forbidden by the statute.

I am now forwarding for Council action expedited legislation to amend Sections 32-13, 32-14, 32-15 and 32-17. The proposed amendments will modify the definitions of the terms "loitering", "public place" and "place open to the public." This legislation will also more narrowly define the circumstances under which an individual may be cited for or charged with loitering. This, in turn, will adequately advise individuals and police officers alike of the circumstances under which an individual may be required to truthfully provide his or her name to a police officer.

I look forward to working with the Council on this important matter.

DMD:tjs

Enclosure

cc: Bruce Romer, Chief Administrative Officer
J. Thomas Manger, Chief, Department of Police
Charles W. Thompson, Jr., County Attorney

2006 MAR 23 PM 2:28

RECEIVED
MONTGOMERY COUNTY
COUNCIL

LL 15-06



MT
CC
SBF
LL

OFFICE OF MANAGEMENT AND BUDGET

Douglas M. Duncan
County Executive

Beverley K. Swaim-Staley
Director

MEMORANDUM

May 9, 2006

022588

TO: George L. Leventhal, President
Montgomery County Council

VIA: Bruce Romer
Chief Administrative Officer

FROM: Beverley K. Swaim-Staley, Director
Office of Management and Budget

SUBJECT: Bill 15-06, Offenses - Loitering

The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The bill amends the County's loitering law to more narrowly define the circumstances under which an individual may be required to produce identification and be cited for or charged with loitering to ensure compliance with constitutional requirements.

FISCAL SUMMARY

The legislation is not expected to have an additional fiscal impact on the County.

The following contributed to and concurred with this analysis: Nicholas Tucci, Department of Police, and Dana Brassell, MNCPPC.

BSS:brg

cc: Nicholas Tucci, Police
Dana Brassell, MNCPPC
Belinda Bunggay, OMB
Jennifer Bryant, OMB

RECEIVED
MONTGOMERY COUNTY
COUNCIL
2006 MAY 10 AM 8:58



Office of the Director

Testimony
Of
Robert Coe, Board Member
ACLU Chapter of Montgomery County
Before the Montgomery County Council
On
Bill 15-06, Loitering
June 13, 2006

On behalf of the ACLU Chapter of Montgomery County, I would like to share our reservations about Bill 15-06.

Personal autonomy, what Justice Brandeis famously called "the right to be let alone,"¹ is the foundation of our system of limited government. For our purposes today, that means that the individual has a constitutional right to "loiter," as defined by Bill 15-06, provided that he is not violating some other law. In lay terms, "just hanging out" is constitutionally protected activity. For this reason, proposals to criminalize loitering must be viewed with a certain skepticism and carefully scrutinized.

Loitering can appropriately be made the premise for a crime only when it interferes with the rights of others. Bill 15-06 is on solid ground in section 32-14(a) when loitering is coupled with "interfer[ing] with or hinder[ing] the free passage of pedestrian or vehicular traffic." That makes sense because as a

¹ *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

matter of fact loitering can interfere with the ability of others to pass on sidewalks or streets. But it can only be made a crime when it actually does interfere or hinder – the real crime is the interference or hindrance, not the loitering by itself. Indeed, it would be far better if the reference to loitering were removed from the bill. The offense should be interfering with or hindering the free passage of pedestrian or vehicular traffic – an offense that can be committed by someone who is loitering, or by someone who has never loitered.

On the other hand, there is no connection at all between loitering and incitement to unlawful conduct, criminalized in section 32-14(b). Indeed, the active nature of incitement seems quite contradictory to the passive nature of loitering.

There is a large body of law as to when incitement to unlawful conduct may be criminalized based on the Supreme Court's 1969 decision in *Brandenburg v. Ohio*.² The Court held that the state may not "forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."³ Section 32-14(b) requires only that the unlawful conduct "incites by word or conduct any imminent unlawful conduct," and omits two elements required by *Brandenburg*: that the conduct be intentional and that it is likely to produce the intended unlawful conduct. ✓

While Section 32-14(b) could perhaps be repaired by adding these missing elements, there is no reason to do so. *As a matter of fact*, there is no

² *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³ *Brandenburg*, 395 U.S. at 447.

connection between loitering and incitement to unlawful conduct. Loitering adds nothing to an unlawful incitement. An incitement is lawful or not without reference to whether the accused was loitering.

We urge the Council to delete section 32-14(b), since there is no reason for it.

As for the offense of disorderly conduct or breach of the peace in the current version of section 32-14, that offense is already more than adequately covered by the Maryland Criminal Code section 10-201(c). Once again, it is irrelevant whether a person was or was not loitering before he engaged in the conduct that constitutes disorderly conduct or breach of the peace

And finally, we have a comment concerning section 32-16: "Nothing in this Article, except Section 32-23, prohibits orderly picketing or other lawful assembly." We suggest the deletion of the word "orderly." If picketing is otherwise unlawful, e.g., it prevents the passage of others on a sidewalk, it can be enjoined or prosecuted. The statute should not suggest to a judge that she may apply her own notions of "orderliness" to determine if picketing is lawful.

Thank you for your consideration of our views. I would be pleased to answer your questions.

(b) *Suspension of fine.* — If a defendant is found guilty of a violation under this part and a fine is imposed, a court may direct that the payment of the fine be suspended or deferred under conditions determined by the court.

(c) *Failure to pay.* — A defendant's willful failure to pay a fine imposed under this part may be treated as a criminal contempt punishable as provided by law.

(d) *Appeal.* — A defendant who is found guilty of a violation under this part, as provided by law for a criminal case, may file:

- (1) an appeal;
- (2) a motion for a new trial; or
- (3) a motion for a revision of a judgment.

(e) *Authority of State's Attorney.* — The State's Attorney for each county may:

(1) prosecute a violation under this part in the same manner as a prosecution of a criminal case, including entering a nolle prosequi or placing the case on violation on a stet docket; and

(2) exercise authority in the same manner prescribed by law for a violation of the criminal laws of the State. (2002, chs. 108, 109.)

SPECIAL REVISOR'S NOTE

Chapters 108 and 109 each added this section as § 10-117 under a new part "Part II. Alcoholic Beverage Consumption or Possession of Open Container in Passenger Area of Motor Vehicle". However, Ch. 213, § 1, Acts of 2002, transferred Article 2B, §§ 22-101 through 22-

108, as enacted by Ch. 26, § 4, Acts of 2002, to be §§ 10-113 through 10-120, under the new part "Part II. Alcoholic Beverages Violations". Precedence in numbering has been given to Ch. 213 as the later enactment. See Art. 1, § 17. Accordingly, this section appears as § 10-127.

Editor's note. — See Editor's note under § 10-123 of this article.

Subtitle 2. Disturbing the Peace, Disorderly Conduct, and Related Crimes.

§ 10-201. Disturbing the public peace and disorderly conduct.

(a) *Definitions.* — (1) In this section the following words have the meanings indicated.

(2) (i) "Public conveyance" means a conveyance to which the public or a portion of the public has access to and a right to use for transportation.

(ii) "Public conveyance" includes an airplane, vessel, bus, railway car, school vehicle, and subway car.

(3) (i) "Public place" means a place to which the public or a portion of the public has access and a right to resort for business, dwelling, entertainment, or other lawful purpose.

(ii) "Public place" includes:

1. a restaurant, shop, shopping center, store, tavern, or other place of business;
2. a public building;
3. a public parking lot;

§ 10-201

ANNOTATED CODE OF MARYLAND

4. a public street, sidewalk, or right-of-way;
5. a public park or other public grounds;
6. the common areas of a building containing four or more separate dwelling units, including a corridor, elevator, lobby, and stairwell;
7. a hotel or motel;
8. a place used for public resort or amusement, including an amusement park, golf course, race track, sports arena, swimming pool, and theater;
9. an institution of elementary, secondary, or higher education;
10. a place of public worship;
11. a place or building used for entering or exiting a public conveyance, including an airport terminal, bus station, dock, railway station, subway station, and wharf; and
12. the parking areas, sidewalks, and other grounds and structures that are part of a public place.

(b) *Construction of section.* — For purposes of a prosecution under this section, a public conveyance or a public place need not be devoted solely to public use.

(c) *Prohibited.* — (1) A person may not willfully and without lawful purpose obstruct or hinder the free passage of another in a public place or on a public conveyance.

(2) A person may not willfully act in a disorderly manner that disturbs the public peace.

(3) A person may not willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace.

(4) A person who enters the land or premises of another, whether an owner or lessee, or a beach adjacent to residential riparian property, may not willfully:

- (i) disturb the peace of persons on the land, premises, or beach by making an unreasonably loud noise; or
- (ii) act in a disorderly manner.

(5) A person from any location may not, by making an unreasonably loud noise, willfully disturb the peace of another:

- (i) on the other's land or premises;
- (ii) in a public place; or
- (iii) on a public conveyance.

(6) In Worcester County, a person may not build a bonfire or allow a bonfire to burn on a beach or other property between 1 a.m. and 5 a.m.

(d) *Penalty.* — A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 60 days or a fine not exceeding \$500 or both. (An. Code 1957, art. 27, § 121; 2002, ch. 26, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former Art. 27, § 121. Subsection (b) of this section is revised as a construction provision for clarity.

In subsection (a)(2)(i) and (3)(i) of this section, the former references to the "general" public are deleted as unnecessary. In subsection (a)(2)(ii) of this section, the

former reference included in the co "vessel".

Also in subsection former reference light of the con "school vehicle".

In subsection (

University of
For note, "Constitutional Freedom of Loud and Unseer Regulation Balt. L. Rev. 507

Constitutiona
prior similar ve makes it unlawfu turb any neighb town or county by constitutional wh the volume level First Amendment tution. Eanes v. 604 (1990), cert. d 3218, 110 L. Ed. :

This section is lored to serve a s does not inhibit t channels of comm Md. 436, 569 A.2d U.S. 938, 110 S. (1990).

Language pr
embrace only Nawrocki, 15 Md. denied, 266 Md. :

And they do
pression. In re 289 A.2d 846, cer

The statutes p cannot apply to offensive, that is Fourteenth Amer Md. App. 252, 28 Md. 741 (1972).

Whether the "l "an unreasonably the statutes are expression depen of them, a quest facts of the partic Md. App. 252, 28 Md. 741 (1972).

Construction.
proscribed two ge about any public disorderly mann public peace may one indecently e prohibited, or by

(c) *Vehicle*. — "Vehicle" has the meaning stated in § 11-176 of the Transportation Article.

REVISOR'S NOTE

This subsection is new language derived without substantive change from former Art. 27, § 576(c)(1)(i).

Because the term "off-road vehicle" as formerly defined applied to on-road as well as

off-road vehicles, contrary to standard usage, the revision of this subtitle uses the newly defined term "vehicle" as well as the redefined term "off-road vehicle" in instances where the former defined term "off-road vehicle" was used.

(d) *Wanton*. — "Wanton" retains its judicially determined meaning.

REVISOR'S NOTE

This subsection formerly was Art. 27, § 576(d). No changes are made.

(An. Code 1957, art. 27, § 576(a), (c)(1), (d); 2002, ch. 26, § 2.)

Arrest in violation of Fourteenth Amendment. — An arrest under former section 577, article 27, by an amusement park's special policeman, acting under color of his dual authority as a deputy sheriff, is State

action in enforcing segregation in violation of the Fourteenth Amendment. *Griffin v. Maryland*, 378 U.S. 130, 84 S. Ct. 1770, 12 L. Ed. 2d 754 (1964).

§ 6-402. Trespass on posted property.

(a) *Prohibited*. — A person may not enter or trespass on property that is posted conspicuously against trespass by:

- (1) signs placed where they reasonably may be seen; or
- (2) paint marks that:

(i) conform with regulations that the Department of Natural Resources adopts under § 5-209 of the Natural Resources Article; and

(ii) are made on trees or posts that are located:

1. at each road entrance to the property; and
2. adjacent to public roadways, public waterways, and other land adjoining the property.

(b) *Penalty*. — A person who violates this section is guilty of a misdemeanor on conviction is subject to imprisonment not exceeding 90 days or a fine not exceeding \$500 or both. (An. Code 1957, art. 27, § 577(a)(1), (b); 2002, ch. 26, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former Art. 27, § 577(a)(1) and (b).

In the introductory language of subsection (a) of this section, the reference to property being posted against "trespass" is substituted for the former reference to property being posted against "trespassers" for clarity and consistency within this subtitle.

In subsection (a)(1) of this section, the phrase "signs placed where they reasonably may be seen" is substituted for the former phrase "[s]igns where they may reasonably be seen" to clarify that the requirement that signs be posted conspicuously applies to the location as well as the content of the signs.

In subsection (a)(2)(i), the reference to regulations that the Department of Natural Re-

§ 6-403

ANNOTATED CODE OF MARYLAND

sources adopts "under § 5-209 of the Natural Resources Article" is added for clarity.

For the statutory requirement that the Department of Natural Resources adopt regulations that prescribe the type and color of paint to be used for posting private property under

the provisions of this section, see *N.D.* 209(e). As to the content of the regulations, see COMAR 08.01.05.01.

Defined term:
"Person"

Maryland Law Review. — For note discussing whether public works projects should anchor the navigation servitude, see 41 Md. L. Rev. 156 (1981).

University of Baltimore Law Review. — For note, "The 1977 Maryland Wiretapping and Electronic Surveillance Act," see 7 U. Balt. L. Rev. 374 (1978).

§ 6-403. Wanton trespass on private property.

(a) *Prohibited — Entering and crossing property.* — A person may not enter or cross over private property or board the boat or other marine vessel of another, after having been notified by the owner or the owner's agent not to do so, unless entering or crossing under a good faith claim of right or ownership.

(b) *Same — Remaining on property.* — A person may not remain on private property including the boat or other marine vessel of another, after having been notified by the owner or the owner's agent not to do so.

(c) *Penalty.* — A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 90 days or a fine not exceeding \$500 or both.

(d) *Construction of section.* — This section prohibits only wanton entry on private property.

(e) *Applicability to housing projects.* — This section also applies to property that is used as a housing project and operated by a housing authority or State public body, as those terms are defined in Article 44A of the Code, if an authorized agent of the housing authority or State public body gives the required notice specified in subsection (a) or (b) of this section. (An. Code 1957, art. 27, § 577(a)(2), (b); 2002, ch. 26, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former Art. 27, § 577(a)(2) and (b).

In subsection (a) of this section, the former references to "land" and "premises" are deleted as included in the reference to "private property".

* Also in subsection (a) of this section, the former reference to being "duly" notified is deleted as surplusage.

In subsection (d) of this section, the reference to entry "on private property" is added for clarity and consistency with subsection (a) of this section. Correspondingly, the reference to "private property" is substituted for the former reference to "land".

In subsection (e) of this section, the former reference to a "duly" authorized agent is deleted as implicit in the reference to an "authorized agent".

The Criminal Law Article Review Committee notes, for the consideration of the General Assembly, that subsection (d) of this section appears to prohibit only "wanton" entry onto private property, but not "wanton[ly]" remaining on private property after being notified not to do so.

Defined terms:
"Person"
"Wanton"

§ 1-101
§ 6-401

Maryland Law Review. — Discussing whether public works projects should anchor the navigation servitude, see 41 Md. L. Rev. 156 (1981).

University of Baltimore Law Review. — For note, "The 1977 Maryland Wiretapping and Electronic Surveillance Act," see 7 U. Balt. L. Rev. 374 (1978).

"Wanton." — Wanton by extreme recklessness the rights of others." 422, 171 A.2d 717 grounds, 378 U.S. 130 2d 754 (1964).

The criminal trespass that the putative trespasser stands in mark trespass. In re Jaso 456, 733 A.2d 351 (1999).

Construction with accommodations law (see now this section) and both be executed repugnant and in irreconcilable State, 236 Md. 356, 357.

Notification. — a notification to state occasion does not occasions in the buildings and grounds

§ 6-404. Use of private property.

(a) *Scope of*

(1) a vessel

(2) a military

(3) a farm

purposes, or c
moving;

(4) earth

(5) a law

being used for

(b) *Prohibited*

driveway, a p

unless the pe

owner or ten

(c) *Penalty*

and on convi

exceeding \$5

2002, ch. 26

This section

substantive c

§§ 576(c)(2) a

University of Baltimore Law Review. — Electronic Surveillance Act," see 7 U. Balt. L. Rev. 374 (1978).
For note, "The 1977 Maryland Wiretapping and

§ 6-409. Refusal or failure to leave public building or grounds.

(a) *Prohibited — During regularly closed hours.* — A person may not refuse or fail to leave a public building or grounds, or a specific part of a public building or grounds, during the time when the public building or grounds, or a specific part of the public building or grounds, is regularly closed to the public if:

(1) the surrounding circumstances would indicate to a reasonable person that the person who refuses or fails to leave has no apparent lawful business to pursue at the public building or grounds; and

(2) a regularly employed guard, watchman, or other authorized employee of the government unit that owns, operates, or maintains the public building or grounds asks the person to leave.

(b) *Same — During regular business hours.* — A person may not refuse or fail to leave a public building or grounds, or a specific part of a public building or grounds, during regular business hours if:

(1) the surrounding circumstances would indicate to a reasonable person that the person who refuses or fails to leave:

(i) has no apparent lawful business to pursue at the public building or grounds; or

(ii) is acting in a manner disruptive of and disturbing to the conduct of normal business by the government unit that owns, operates, or maintains the public building or grounds; and

(2) an authorized employee of the government unit asks the person to leave.

(c) *Penalty.* — A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 6 months or a fine not exceeding \$1,000 or both. (An. Code 1957, art. 27, § 578(a), (b), (d); 2002, ch. 26, § 2.)

REVISOR'S NOTE

This section is new language derived without substantive change from former Art. 27, § 578(a), (b), and (d).

In the introductory language of subsection (a) of this section, the reference to "the time" is substituted for the former reference to "those hours of the day or night" for brevity.

In subsection (a)(1) and the introductory language of subsection (b)(1) of this section, the references to the person "who refuses or fails to leave" are added for clarity.

In subsections (a)(2) and (b)(1)(ii) and (2) of this section, the phrase "government unit" is

substituted for the former phrase "public agency or institution" for consistency within this article. See General Revisor's Note to article.

In subsection (b)(1)(ii) of this section, the reference to "grounds" is substituted for the former reference to "property" for consistency within this section.

Defined term:

"Person"

§ 1-101



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

TO: Kathleen Boucher
Assistant Chief Administrative Officer

VIA Marc P. Hansen *Marc Hansen*
County Attorney

FROM: Edward B. Lattner *EBL*
Chief, Division of Human Resources & Appeals

DATE: November 14, 2011

RE: Bill 35-11, Offenses—Loitering or Prowling—Established

Bill 35-11 would prohibit certain loitering and prowling, defined as “remain[ing] in a public place or establishment at a time or in a manner not usual for law-abiding persons under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.”

Bill 35-11 is based on § 250.6 of the Model Penal Code. Laws based on the § 250.6 of the Model Penal Code, have met with mixed results in the appellate courts. Courts in Oregon, Washington, Idaho, and the United States Court of Appeals for the Eighth Circuit (reviewing an Omaha, Nebraska law), have found those laws to be unconstitutional, while courts in Florida, Georgia, and Wisconsin have upheld those laws. Even the Florida court acknowledged that its loitering and prowling statute “reaches the outer limits of constitutionality and must be applied with special care.”

Although open to reasonable debate, we believe that it is more likely than not that the Maryland Court of Appeals would find Bill 35-11 unconstitutional, because it vests a police officer with virtually unfettered discretion to determine whether a person is committing the crime of loitering and prowling. We believe that the Court of Appeals’ analysis would be heavily influenced by the impingement Bill 35-11 places on the otherwise constitutionally protected right of a person to move about in a public place.

Kathleen Boucher, Assistant Chief Administrative Officer
November 14, 2011
Page 2

Background

Loitering laws have a long and checkered history in American jurisprudence.¹ These laws typically permit the arrest of individuals suspected of having committed or of being about to commit a criminal offense, but they require little or no proof of actual misconduct by the accused. The Model Penal Code's loitering and prowling statute was an attempt to fashion a constitutional loitering statute, narrowly designed to reach only alarming loitering. Model Penal Code Commentary 388. This approach has not gained universal approval in the courts.

Courts finding loitering and prowling laws unconstitutional.

In *State v. Bitt*, 798 P.2d 43 (Idaho 1990) the Idaho Supreme Court affirmed the dismissal of a criminal complaint charging a violation of Pocatello, Idaho's loitering and prowling statute finding that the statute was unconstitutionally vague on its face, violating the Due Process Clause of the Fourteenth Amendment. The statute, like Bill 35-11, provided that a person could not be arrested or convicted unless he fails to identify himself and offer an explanation of this presence and conduct which dispels the police officer's alarm. The court concluded that this vague language vested "virtual complete discretion in the hands of the police to determine whether the suspect has satisfied the identification and explanation provisions" of the statute. *Id.* at 48-49. The court likened this provision to the California stop and identify law the Supreme Court found unconstitutionally vague in *Kolender v. Lawson*, 461 U.S. 352 (1983). The California statute at issue in that case was unconstitutionally vague, because it failed to clarify what was contemplated by the requirement that a suspect provide a credible and reliable identification upon request and therefore vested complete discretion in the hands of the police to determine whether the suspect had satisfied the statute and was therefore free to go in the absence of probable cause to arrest. The Court further held that the statute implicated consideration of the constitutional right to freedom of movement. The Idaho court also found the statute violated the Fourth Amendment because it criminalized "behavior which amounts to nothing more than the type of suspicious conduct which justifies a *Terry* stop."² *Id.* at 49. This made the Idaho statute similar to the Texas stop and identify statute the Supreme Court invalidated on Fourth Amendment grounds in *Brown v. Texas*, 443 U.S. 47 (1979); the Texas statute permitted the police to stop an individual without any specific, objective facts establishing reasonable suspicion to believe that the individual was involved in criminal activity.

In *City of Bellevue v. Miller*, 536 P.2d 603 (Wash. 1975), the Washington Supreme Court

¹ These laws usually outlawed vagrants, rogues, vagabonds, and "idle and disorderly persons."

² A *Terry* stop is a term that takes its name from *Terry v. Ohio*, 392 U.S. 1 (1968) in which the Supreme Court concluded that a police officer could constitutionally stop a person for a brief investigative detention where the officer has articulable suspicion that the person is involved with criminal activity (but not probable cause for an arrest). The police officer may also frisk that person for weapons where the officer reasonably suspects that the person is armed and presents a danger to the officer or others.

Kathleen Boucher, Assistant Chief Administrative Officer

November 14, 2011

Page 3

reversed the defendant's conviction under a city wandering or prowling statute because that statute was unconstitutionally vague on its face. That statute, again based upon § 250.6 of the Model Penal Code, prohibited wandering or prowling "in a place, at a time, or in a manner and under circumstances, which manifest an unlawful purpose or which warrant alarm for the safety of person or property in the vicinity." The court wrote that "legislation which purports to define illegality by resort to such inherently subjective terms as 'unlawful purpose' or 'alarm' permits, indeed requires, an *ad hoc* police determination of criminality." *Id.* at 607. And although it did not specifically identify the Fourth Amendment as a touch point, the court expressed concern that the statute permitted an officer to arrest an individual who engages in suspicious or questionable behavior. *Id.* at 607-08. Finally, the court noted that the Model Penal Code treated loitering and prowling as a "violation," a non-criminal act, while the city statute provided criminal penalties for its violation.

In *City of Portland v. White*, 495 P.2d 778 (Or. App. 1972), the court upheld the dismissal of a charge under Portland, Oregon's loitering and prowling statute, concluding that the statute was unconstitutionally vague.

Enforcement of an unconstitutional statute can not only lead to a reversal of a criminal conviction, but also an award of damages against the enforcing government and officer. In *Fields v. City of Omaha*, 810 F.2d 830 (8th Cir. 1987), the Eighth Circuit found Omaha, Nebraska's loitering and prowling statute unconstitutionally vague on its face and remanded the case to the trial court for a determination of compensatory and punitive damages. Specifically, the court found that the identification and explanation provisions vague, based upon the Supreme Court's decision in *Kolender*. The court also concluded that the arresting officer violated the Fourth Amendment when he stopped and detained Fields in the absence of articulable suspicion of criminal activity. Moreover, the arresting officer was not entitled to qualified immunity because, at the time of the arrest, it was clearly established that an officer could not stop and detain an individual absent reasonable suspicion of criminal activity. *Id.* at 835-36.

Finally, faced with Indianapolis' loitering and prowling law, the United States Court of Appeals for the Seventh Circuit abstained from deciding the issue, concluded that it was best resolved by the Indiana state courts. *Waldron v. McAtee*, 723 F.2d 1348 (7th Cir. 1983). In so doing, the court acknowledged that the law was vague, but not "so hopelessly vague that no feat of interpretation could save it from being invalidated as an undue burden of freedom of speech and assembly." *Id.* at 1352. Because only a state court can authoritatively interpret its own statutes, the court abstained from deciding the matter in order to permit the state court to put a gloss on the ordinance "and maybe save the ordinance from being struck down." *Id.* at 1353.

Courts upholding loitering and prowling laws.

While Florida has upheld the constitutionality of its state loitering and prowling statute, it

has done so by interpreting the statute to require an imminent breach of the peace or imminent threat to public safety before an arrest can be made. In *D.A. v. State*, 471 So.2d 147 (Fla. Dist. Ct. App. 1985), the court noted that there are two elements to a loitering and prowling charge: (1) that the defendant loitered or prowled in a place, at a time, or in a manner not usual for law-abiding individuals and (2) such loitering took place under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. *Id.* at 150. "The gist of the first element is aberrant and suspicious criminal conduct which comes close to, but falls short of, actual commission or attempted commission of a substantive crime." *Id.* at 151. As to the second element, which the court described as the heart of the offense, the state must establish that the behavior described in the first element "must be alarming in nature; that is, it must threaten the physical safety of persons in the area or the safety of property in the area." The court concluded: "It must, in a word, amount to an imminent breach of the peace or an imminent threat to public safety."³ *Id.* at 152. The court conceded that while this second element is akin to the type of conduct that justifies a temporary investigative detention (a *Terry* stop), "a much greater showing of alarm or concern" is required under the loitering and prowling statute." *Id.* at 153. "Stated differently, the statute must not be applied so as to criminalize conduct which amounts to nothing more than a basis to temporarily detain or arrest a person for committing some other crime." *Id.* at 153. Even with this judicial gloss, the Florida has acknowledged that "the statute, although constitutional, plainly reaches the outer limits of constitutionality and must be applied by the court with special care so as to avoid unconstitutional applications. *Id.* at 153.

The Georgia loitering and prowling law is patterned after the Florida law and the Georgia Supreme Court has upheld the law as constitutional based upon Florida case law. *Bell v. State*, 313 S.E.2d 678 (Ga. 1984).

Finally, the Wisconsin Supreme Court upheld Milwaukee's loitering and prowling law against vagueness, overbreadth, and Fourth Amendment challenges. *City of Milwaukee v. Nelson*, 439 N.W.2d 562 (1989). The court determined the law was not unconstitutionally vague because "it provides sufficient notice and guidelines to law enforcement officials, judges, and ordinary citizens by limiting the term 'loiter' in scope, place, or purpose." *Id.* at 448. The court concluded the law was not overbroad because it "is not aimed at constitutionally protected conduct but at conduct which causes alarm for the safety of person or property." *Id.* at 453.

Conclusion

Although prognostication of how the Maryland Court of Appeals might view a loitering and prowling statute based on the Model Penal Code is an inexact science, we believe that the

³ By applying this judicial gloss to the statute, the conduct prohibited by the loitering and prowling law becomes substantially similar to disturbing the peace/disorderly conduct already prohibited by Maryland law. Md. Code An., Crim. Law § 10-201 and Montgomery County Code § 32-14.

Kathleen Boucher, Assistant Chief Administrative Officer
November 14, 2011
Page 5

Court of Appeals would find the reasoning of the Idaho Supreme Court sounder than the opinion of the Florida Supreme Court. Bill 35-11 vests a police officer with "virtual complete discretion . . . to determine whether the suspect has satisfied the identification and explanation provisions" of the statute. *State v. Bitt*, 798 P.2d at 48-49.

In *Ashton v. Brown*, 339 Md. 70 (1995), the Court of Appeals struck down Frederick City's curfew law because it provided for an exception for events supervised by a "bona fide organization", a term the Court found to be unconstitutionally vague. The Court concluded,

In addition, the curfew ordinance 'fails to provide legally fixed standards and adequate guidelines for [those] . . . whose obligation it is to enforce, apply and administer the penal laws.' [citation omitted]. In the present case, Chief Ashton purported to implement the curfew enforcement action at the Rainbow on the basis of his singular determination that a 'bona fide organization' was one without a profit-making motive. The Frederick ordinance provided no clear standards within which the Police Chief was obliged to act. *Id.* at 93.

Bill 35-11 presents the same problem for County police—there are no clear standards for a police officer to follow in determining whether a suspect has dispelled the officer's alarm. We believe that the Court of Appeal's concern over the broad discretion granted a police officer under Bill 35-11 will be heightened by the impingement this law places on the otherwise constitutionally protected right to move about in a public place. See *Kolender v. Lawson*, 461 U.S. 352.

Finally, Bill 35-11 contains two inherently contradictory provisions. On one hand subsection (c) permits an officer to arrest a person who flees without giving the person an opportunity to dispel the alarm of the officer. On the other hand, subsection (e) provides that a person must not be charged with a violation of the statute unless the officer has first warned the person and the person has refused to stop the violation. These provisions raise the possibility that an officer could arrest a person but no charges could be brought against the person.

If you have any concerns or questions concerning this memorandum please call us.

Cc: Thomas Manger, Chief of Police
Bob Drummer, Senior Legislative Attorney

eb1

A11-01677
M:\Cycrom\Wpdocs\0014\0014\00226042.DOC

Facts Sufficient to Convict for Loitering or Prowling under Model Penal Code

1. *Bell v. State*, Supreme Court of Georgia, 313 S.E.2d 678, 679 (1984)

Quoted facts:

The defendant was convicted under *O.C.G.A. § 16-11-36* (Code Ann. § 26-2616) for "loitering and prowling." The evidence at trial showed that the arresting officer, a veteran patrol officer in the downtown Atlanta area, observed, near midnight, the defendant and another man squeezing between the wall and a locked gate of the Davison's parking garage in order to exit the garage. When the officer attempted to question the men, the defendant's companion fled. The defendant immediately halted and gave no resistance. After the defendant's companion was apprehended, the arresting officer advised both men of their rights under *Miranda v. Arizona*, 384 U. S. 436 (86 SC 1602, 16 LE2d 694) (1966), but did not place them under arrest. The officer then inquired whether they would like to explain why they were exiting the parking garage by squeezing through a locked gate. The defendant responded they were taking a short-cut through the garage.

The arresting officer testified that he believed this to be an unreasonable explanation as the defendant would have had to enter the garage from Carnegie Street, walk 150 feet to the stairwell, go down two flights of steps, then walk another 250 feet to the point where he could squeeze by the locked gate. The officer expressed his opinion that this path did not amount to a short-cut, but, in fact, required far greater effort on the part of the defendant than if he had simply travelled the sidewalk to his intended destination. The officer then placed the defendant and his companion under arrest. The officer testified the arrest was made due to his concern for the safety of the vehicles parked in the Davison's garage. ¹

1 This evidence shows Davison's was not open at the time of arrest, but that the parking garage remained open to serve the hotel district trade. Four cars were parked on the level from which the defendant was observed exiting.

2. *O'Hara v. State*, Georgia Court of Appeals, 528 S.E.2d 296, 856-857 (2000)

Quoted facts:

The evidence, when viewed in that manner, established that at about 5:00 a.m., two men robbed a convenience store clerk at gunpoint. The clerk identified O'Hara as the robber who pointed a pistol at him from the doorway. The victim described the perpetrators' race, height, and clothing to police and stated that both had worn shiny, black pants made from either a nylon or silk material. After robbing the store, the two men immediately fled on foot. Within two minutes of the clerk's 911 call, police began responding. One officer spotted two males who fit the broadcast description of the robbers behind a nearby apartment complex. When this officer directed a spotlight toward them, the suspects fled. He recovered a .32 revolver from the ground where the suspects had been standing moments before. The victim believed this gun was the weapon used in the robbery.

Meanwhile, by chance, Willie Smith, a corrections officer, was in the immediate vicinity where the perpetrators had fled. Smith was in the process of demonstrating his wife's newspaper route to a friend scheduled to assume the route temporarily. After marking a curb, Smith stood up and then noticed a young man, later identified as O'Hara, standing a few feet away. When O'Hara asked for a ride to a specified location, Smith told him if he could wait until he finished marking his route, he would drop him off close to that area. After O'Hara climbed into the bed of the truck and lay down, Smith asked him, "if he'd done anything crazy," "robbed anybody or shot anybody or anything like that." O'Hara denied doing so. With increasing concern for his personal safety, Smith suggested they approach a policeman who was searching in a nearby field. But O'Hara responded, "no, just get me out of here."

Partially because of the anxiety O'Hara displayed, Smith flagged down an officer driving toward him. Noticing that Smith was motioning toward the rear of his truck, Officer Joel McNeal saw O'Hara peering up at him. Officer McNeal also noticed that O'Hara was sweating profusely and that his clothing was dirty and torn. After O'Hara leaped out of the truck bed and "hit the ground running," the officer drew his weapon. O'Hara continued to flee, although he eventually complied with the officer's repeated commands to stop. O'Hara had abrasions and marks on his hands, consistent with being jabbed by a chain link fence. O'Hara was apprehended within three city blocks of the site of the robbery.

Another officer began studying certain footprints newly formed in some dew and extending from a footpath. According to the officer, this trail was about 150 to 200 yards from the location of the robbery. Although unable to take a casting from the wet grass, police were convinced that the tread on O'Hara's tennis shoes provided a match. Upon tracing the footpath, an investigator discovered a pair of discarded black nylon pants with a small cut by the right pocket.

1. O'Hara contends that the evidence was insufficient to support his conviction for loitering.

3. *Watts v. State*, Supreme Court of Florida, 463 So. 2d 205 (1985)

Quoted facts:

At Watts' trial for loitering and prowling the state presented testimony that a police officer had observed Watts in the early evening hours of November 6, 1982 looking into cars in a restaurant parking lot. Watts walked away as the officer approached him. The officer returned to the parking lot a few minutes later and found Watts again engaged in peering into the parked cars. Watts then ran from the area and eluded a police search. When Watts testified at trial, he stated that he knew nothing about the incident related by the police officer. The county court found Watts guilty of violating *section 856.021* and sentenced him to sixty days in the county jail.

4. *BJ v. State, Court of Appeal of Florida, 951 So. 2d 100, 101-102 (2007)*

Quoted facts:

An adjudicatory hearing revealed that at about 1:30 a.m. on September 25, 2005, Officer Terry Wujcik of the Pembroke Pines Police Department responded to a burglary call at a business located in a predominantly commercial area. The business was closed, yet Officer Wujcik saw two vehicles in the parking lot, a Ford F-150 pick-up truck and a smaller four-door car. The doors to the car were ajar. Inside the car, the officer observed two females lying down trying to hide from him.

After Officer Wujcik removed the two females from the car, another officer, Javier Diaz, arrived at the scene. The two females told Officer Diaz that the other people with them "ran that way, went over the fence." Officer Wujcik then went to investigate the warehouse that was the subject of the burglary call. Officer Wujcik noticed a hole five-feet high and three-feet wide in a fence surrounding the business. There had been no hole in the fence when the officer patrolled the area earlier in the evening. Officer Wujcik also saw that a padlock had been ripped off the steel doors at the main entrance to the warehouse. The padlock rested on the ground near the door. The doors had been pried open and metal stripping running down the center of the doors was partially ripped. Electric panels near the steel entry doors had been removed and tampered with. A used latex glove was on the ground near the doors. Based on these observations, the officers were concerned for the safety of people and property in the area.

A K-9 officer arrived on the scene with his dog, which began a "track or search" of the area looking for people. The dog alerted to the F-150. The K-9 officer noticed a person's head in the truck bed, which led to the discovery of four individuals in the back of the truck, whom the officer ordered to get out. Appellant B.J. was one of these persons. The officer also found unused latex gloves in the truck.

Officer Wujcik gave the juveniles, including B.J., the opportunity to dispel his suspicions. B.J. said nothing. The other persons involved gave a variety of inconsistent and unconvincing stories.

While the officers continued to investigate, Isaac Chocron, the warehouse owner, arrived at the scene. Chocron observed that since he had closed and left the business, the structure had been damaged and several items stolen. The door was bent, the door's lock was cut, the fence surrounding the business was cut open, the light above the main entry door was broken, the door to the electrical panel was open, and the electrical meter was missing. Chocron did not work with latex gloves and had not given anyone permission to enter the fenced-in area surrounding his store.

At the close of the evidence, B.J. moved for dismissal. The trial court denied the motion and ultimately adjudicated B.J. delinquent on the loitering and prowling charge.

5. *State v. Nelson, Supreme Court of Wisconsin, 439 N.W.2d 562, 563-564 (1989)*

Quoted facts:

On March 4, 1985, Stefan Nelson (Nelson) was arrested by two Milwaukee police officers for violating Milwaukee City Ordinance 106-31(1)(a), which prohibits loitering and prowling. At approximately 7:30 p.m., the two officers observed Mr. Nelson on a street corner in front of a tavern called the Cobra Club. The area was allegedly a high crime area with reported drug trafficking, loitering, and public drinking. "No loitering" signs were posted at each of the four corners of the intersection near where the arrest occurred.

From about a block and a half away, the officers, using binoculars, observed Nelson and another person shaking hands with pedestrians and automobile passengers. The handshake was described as a clasping of the fingers together, twisting them back and forth and then reclasping them. The handshakes were characterized as "friendly." Nelson would approach the automobiles and lean toward the passenger door, resting his hands just inside the window. At no time did the officers observe an exchange of money or other items. They did not know Nelson and they had no information that he was a suspect or was wanted in connection with any crime. After about fifteen minutes, the officers approached Nelson and his companion in their squad car and Nelson and his companion hurriedly entered the tavern.

The officers circled the block and returned to their initial observation point. Shortly thereafter, Nelson and the other person emerged from the tavern and resumed shaking hands with pedestrians and automobile passengers. The officers waited another five to ten minutes and then reapproached Nelson in their squad car. Nelson quickly reentered the tavern. This time, however, the officers followed him inside and asked him what he was doing outside the tavern to which he replied "nothing." Nelson was then arrested for loitering in violation of Milwaukee City Ordinance 106-31(1)(a).

Nelson was "patted down" but no weapon was found. ' He was placed in a police van which took him to the police station. Shortly after Nelson had left the van, it was searched and a twenty-five caliber handgun was discovered. Nelson admitted the gun was his, that he had concealed it in his pants, and that he had placed it in the van. He also stated he had stolen the handgun. Nelson was subsequently charged with violating sec. 941.23, Stats. (carrying a concealed weapon), and secs. 943.20(1)(a) and (3)(a), (theft).

Bill 35-11**Offenses – Loitering and Prowling - Established****Public Hearing****November 15, 2011**

Good evening. My name is Kathleen Boucher. I am an Assistant Chief Administrative Officer with the Office of the County Executive and am here to testify against Bill 35-11 on behalf of County Executive Isiah Leggett.

Bill 35-11 is constitutionally questionable and practically unenforceable, given its vague provisions. The County Attorney believes that the Maryland Court of Appeals is likely to find the bill unconstitutional because it vests a police officer with virtually unfettered discretion to determine whether a person is committing the crime of loitering and prowling. The Court of Appeals' analysis would be heavily influenced by the impingement that the bill places on the otherwise constitutionally protected right of a person to move about in a public place.

Based on comments by the lead sponsor, the County Executive believes that this bill has been introduced for the purpose of confusing the debate on the curfew bill. Why else would an idea that was unanimously rejected by the Council in 2006 be resurrected with a slightly new twist in 2011? In 2006, the Council repealed the County's loitering law because it did not "provide a person of ordinary intelligence adequate notice of what conduct is forbidden in the statute."¹ Citing concerns about the constitutionality of the law, the Council deleted the term "loitering" from the County Code altogether and substituted concrete language that prohibited disorderly conduct.² Councilmember Andrews noted at the time that "loitering in and of itself . . . should not be considered a crime".³

Bill 35-11 is modeled after provisions of the Model Penal Code that have existed for almost 50 years, but Council staff has identified only seven states in which those provisions have been adopted. In four of those states (Idaho, Nebraska, Oregon, and Washington) the courts invalidated the laws as unconstitutional. The lead sponsor has indicated that Bill 35-11 is similar to laws in Florida and Georgia, which have been upheld by their respective state courts. The County Executive questions why Montgomery County should follow in the footsteps of Florida and Georgia when it comes to civil rights and constitutional freedoms.

In contrast to the "loitering and prowling" provisions of the Model Penal Code, curfew laws have been widely accepted throughout the United States. There are hundreds of curfew laws on the books throughout the country and they have repeatedly been upheld as constitutional.

¹ See Legislative Request Report for Bill 15-06, Offenses - Loitering.

² See Council Staff Packet for Bill 15-06, Offenses – Loitering on July 11, 2006.

³ See Minutes from the July 11, 2006 Council Session.

A 1997 survey conducted by the U.S. Conference of Mayors showed that four out of five cities with a population over 30,000 have nighttime curfews and city officials in those jurisdictions overwhelmingly believe that the curfew is a good tool for police officers and helps to make the streets safer for residents. Similarly, a 2000 survey of 446 police departments serving populations of at least 15,000 concluded that law enforcement personnel overwhelmingly believe that curfews are an effective tool for reducing various crimes.

Police Chief Thomas Manger has asked the Council to adopt the curfew bill because it will provide law enforcement personnel with an additional and valuable tool for preventing and dealing with nighttime crime. In contrast, he has questioned the value of Bill 35-11 and expressed serious concerns about its enforceability. Why would Council second guess the professional judgment of our highest law enforcement officer as to which bill would provide a useful tool for enhancing public safety? Chief Manger's concerns about the vagueness of Bill 35-11 -- which would make it very difficult for police officers to enforce in a uniform and consistent manner -- dovetail with the County Attorney's concern that the bill would subject the County to significant risk of liability for false imprisonment, false arrest, and civil rights violations.

Bill 35-11 bill does nothing to address the vulnerability of our County that exists simply because youth curfews in neighboring Prince George's County and the District of Columbia drive youth to visit Montgomery County late at night because there is no curfew law here. The loitering bill does nothing to reduce the number of minors who are out late at night and at risk of becoming involved in criminal activity or the victims of criminal activity. There is no authority under the loitering bill for police officers to direct minors to go home if they are out late at night. The loitering bill does nothing to support parental responsibility for children. In sum, there is simply no logical relationship between the loitering and curfew bills.

On behalf of the County Executive, I urge you to reject Bill 35-11 and adopt the curfew bill. Thank you for the opportunity to testify tonight.

KIRILL REZNIK
39th Legislative District
Montgomery County

Health and Government
Operations Committee



THE MARYLAND HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

Annapolis Office
The Maryland House of Delegates
6 Bladen Street, Room 225
Annapolis, Maryland 21401
301-858-3039 · 410-841-3039
800-492-7122 Ext. 3039
Fax 301-858-3126 · 410-841-3126
Kirill.Reznik@house.state.md.us

District Office
301-540-0054 · Fax 301-540-0911

Testimony from State Delegate Kirill Reznik
November 15, 2011

Muted Support of Bill 35-11 – Prohibition of Certain Kinds of Loitering

As a resident and elected representative in Montgomery County, I feel obligated to express my muted support for Councilmembers' Andrews and Leventhal's Bill 35-11, which would prohibit certain kinds of loitering and prowling in public areas. Though my preference is for no legislation to be adopted with regard to this issue, this proposed legislation is a significantly more fair solution to perceived deficiencies in our County laws to deal with groups of trouble makers than taking actions that will discriminate against an entire population demographic.

I want to reiterate my sincere disagreement for the proposed idea of legislation by the County Executive that would institute a curfew in Montgomery County for all individuals under the age of 18. I applaud members of the Council for looking at alternatives to a youth curfew, such as Bill 35-11. As I indicate above, of all choices available to the County, my preference is to do nothing at all on this issue as the dropping crime rate indicates the laws on the books now are sufficient to reach our goals of balancing a safe and fair for all standard of life. However, I understand that there is a strong feeling that some action does need to be taken by the Council and if a law does need to pass I implore the Council to pass a law that applies to everyone equally - a law that is based on one's actions, rather than their age or other discriminatory factors.

I understand that Bill 35-11 has some questions concerning constitutionality, and that does concern me. However, as you well know, the same Constitutional concerns exist for a youth curfew. Though the U.S. Supreme Court has not ruled directly on the issue, enough case law exists to suggest that a youth curfew could be overturned on First Amendment and Equal Protection grounds.

I have followed this issue closely and, to the best of my knowledge, there has been no demonstrated need by the County that discriminating against teenagers will accomplish any of the stated goals of the curfew legislation. I once again strongly urge you to vote unfavorably on the youth curfew legislation, and, should the prevalent feeling among the Council be that some kind of law needs to be adopted, Bill 35-11 would be a reasonable alternative.

**Testimony Submitted to the Montgomery County Council's Public Safety Committee
Regarding Proposed Bill 35-11, Offenses - Loitering or Prowling - Established**

by James Zepp
November 15, 2011

My name is James Zepp and I live at 10602 Lockridge Drive, Silver Spring, MD. I am testifying as chair of the Montgomery County Civic Federation (MCCF)'s Public Safety Committee. My professional background includes over 25 years' of experience in the criminal justice field working at the state and national levels.

At its November general meeting, the MCCF members voted to support Bill 35-11 as a means of addressing concerns about street crime problems occurring in the County. It provides an approach that applies uniformly to all segments of the population at all times of the day and has a reasonable legal basis for enforcement.

However, laws such as this do have the potential for misuse and abuse by law enforcement officers and could threaten basic citizens' rights if applied in a harsh or oppressive manner. We would strongly recommend that the County Council take a proactive approach in this regard by establishing an annual reporting requirement that would document how this law is being applied by the County's law enforcement personnel. Such a report should include the following data items:

- number of incidents involving loitering/prowling charges
- a frequency count of arrests made per incident for these charges
- day of week/time of day frequency counts for incidents involving these charges
- number of arrestees by appropriate age groups, e.g., <18, 18 to 25, 26 to 65, and >65 years of age
- number of arrestees by race/ethnicity
- number of incidents by location type, i.e., commercial, residential, industrial, public facilities/parks, or other places
- incidents displayed on a County map in order to determine their geographic distribution

This would enable the County Council and Executive to assess the effect and application of this law for future decisions regarding its continuation or possible modification.

If the application of this law is primarily intended for periodic crackdowns by the police in particular areas of the County, the cautions raised by the Center for Problem-Oriented Policing for such actions should be heeded.

Poorly planned, ill-conceived, and improperly managed crackdowns, intended merely as a show of police force and resolve, can create more problems than they solve. But carefully planned crackdowns, well supported by prior problem analysis, implemented with other responses to ensure longer-term gains, and conducted in a way that maintains public support and safeguards civil rights, can be an important and effective part of police strategies regarding a range of crime and disorder problems.

Testimony Submitted to the Montgomery County Council's Public Safety Committee
Regarding Proposed Bill 35-11, Offenses - Loitering or Prowling - Established
by James Zepp
November 15, 2011
Page 2

- excerpted from *The Benefits and Consequences of Police Crackdowns*,
www.popcenter.org/responses/police_crackdowns/1

We would hope that these measures would achieve the objective of promoting public safety while also protecting citizen's rights to freedom of movement and to meet and congregate without interference from government.

Thank you for this opportunity to offer our opinion on this matter.

Good Evening-

My name is Rebecca Smondrowski, and I would like to begin by stating for the record, that while I am here testifying tonight strictly as an independent citizen, I do happen to also be an executive board member of the Montgomery County Council of PTA's as well as a Cluster Coordinator for the Quince Orchard Cluster. That said, as a mother of two and an avid advocate for children, I wanted to come and officially express my concerns with, and support for the legislation that is being considered here tonight. As someone who is somewhat active in Montgomery County, our schools and our community, I realize that I am not going to sit here and tell you anything that you haven't already heard. You know the statistics and you have seen all of the various 'data' proving one side or the other. But I fear that you are missing the big picture... which is why I decided to speak tonight in support of the loitering/prowling bill as an alternative to the Curfew Bill that has also been proposed.

I have been a victim of a crime. Several years ago three 'boys' broke into my home while my family slept and robbed us of our possessions and our security. At the time, it was expressed to me by the police that chances were good that they had stood in the street outside my home watching the house for hours; if not for days. Under the curfew law, had a police officer seen them hanging around - there would have been nothing that they could have done. These "boys" were 19 and 20.

Unlike the proposed curfew, the loitering/prowling bill is based on behavior rather than age and time of day. It is a measured and targeted approach to addressing suspicious or menacing behavior that is a threat to people or property, and it allows the authorities to use their discretion in addressing possible issues.

As you know, statistics show that more than 90% of crime is committed by adults, not youth, and that almost 90% of crime is committed before (or after) the proposed curfew hours. Most crime committed by young people occurs after school and during the early evening, and it is with that in mind that we need to be working on strengthening after-school programs and encouraging mentoring within the community.

An unenforceable curfew will not curtail these statistics, and I believe that the loitering/prowling bill would provide police with a more focused tool to respond to the situations that are said to be the target of the curfew. It will also address civil rights concerns through language from the Model Penal Code used in existing loitering/prowling laws in Florida, Georgia and Wisconsin. (HH which have been upheld by their respective state supreme courts) In contrast, the Curfew bill will need an overwhelming number of amendments in order to be reasonably imposed.

Last month, MCCPTA adopted a resolution opposing a youth curfew because the level of crime in the County doesn't justify a curfew, because a group should not be punished for the misbehavior of a few, because the many exceptions in the proposed curfew would make it very problematic to enforce, and because curfew decisions should be left up to parents not governments.

Like the Montgomery County PTA, I urge the Council to reject the proposed youth curfew and instead support alternative approaches that address behavior concerns as opposed to irrelevant variables. What Montgomery County needs most is to combat crime with a targeted approach and through positive prevention programs. **And some extra funding for additional police officers wouldn't hurt either!**

Thank you for your consideration and your time.

Rebecca Smondrowski
101 Short Street
Gaithersburg, MD 20878
301.325.6246

4

Montgomery County Chapter American Civil Liberties Union of Maryland

Representing five thousand members in Montgomery County

Mike Mage, Co-chair, 301-229-0470(h) 240-899-3312 (c)

Bill 35-11, Offenses-Loitering or Prowling-Established Recommend withdrawal.

There are serious problems with bill 35-11.

Chapter Board

Hardip Bakshi
Bob Coe
Stephen Dwyer
Ruth Fort
Julius Ginsburg
Barbara Griffiths
Ana Sol Gutierrez
Ismail Kenessy
Mondi Kumbula-Fraser
Mike Mage
Bill Mertens
Julie Ferguson Queen
Gennie Schiffmann
Sharon Wheeler

Usual meeting date
is the 4th Wednesday
of the month (except
in July, August, and
December, at
The Cedar Lane
Unitarian Church
9601 Cedar Lane
Bethesda Maryland,
at 7:30 p.m. Call to
confirm 301-229-0470

It does not let people know what is prohibited. Instead, it lets proprietors and police decide that on the spur of the moment.

Bill 35-11 creates "thought crimes". It requires the police to be clairvoyant and guess what's in the mind of the loiterer. Such vagueness leads to arbitrary and discriminatory enforcement. As a result, it criminalizes innocent conduct.¹

Whatever happened to probable cause?

What happened to criminal intent?

The bill has no probable cause requirement. It doesn't even mention intent. The Annapolis loitering law was thrown out in 2001 by the United States District Court for lack of criminal intent.

The bill says: "circumstances that warrant alarm". "Alarm" is undefined. This can result in racial profiling. Do I become a criminal because someone is alarmed at my language, or race, or dress?

The bill allows arrests on "immediate concern for the safety of persons or property". But there are no guidelines on what specific circumstances or conduct warrant such concern.

Bill 35-11 gives quasi law-enforcement powers to private establishments. This invites discrimination in violation of federal, state, and county public accommodations civil rights laws.

The bill does give people a chance to identify and explain themselves. But it gives the officer no clarity on what is a satisfactory explanation. And criminalizing the failure to convince an officer of one's innocence stands the 5th amendment on its head. The bill comes dangerously close to criminalizing refusal to identify oneself to a police officer, which would be unconstitutional, and was rejected by the Md General Assembly in 2005 (HB 578).

(over)

Sufficient Criminal Statutes are in place, such as "disturbing the peace" and "disorderly conduct" laws for the circumstances that inspired this bill.

We tried really hard to think positive and come up with helpful suggestions. But the only one that survived analysis is to urge the authors to withdraw the bill.

I thank you for your attention and will try to answer any questions you may have.

Mike Mage, Co-Chair
Montgomery County Chapter, ACLU of Maryland

¹For example, during the term of the former mayor, now governor, the Baltimore loitering law was one of the laws used by police to make thousands of arrests each year of people, mostly African-American, for wholly innocent activities, resulting in successful litigation against the city to rectify this wrong. *Maryland State Conference of NAACP Branches v. Baltimore City Police Department* (D. Md 2010).

TESTIMONY OF THOMAS NEPHEW

5

Thanks for this chance to speak against the loitering/"prowling" bill 35-11. I question its constitutionality, necessity, and likely results.

The October 25 memo about this bill cites cases seeming to show laws based on the same Model Penal Code ordinance have withstood scrutiny around the country.

But in two of those cases -- *BJ v. State* (of Florida) and *O'Hara v. State* (of Georgia) -- the court didn't really rule on the law's validity, it just decided that the facts of the case fit the charge. Similarly, *Watts v. State* merely found that a potentially important precedent (*Kolender v. Lawson*) was inappropriate for the case.

Bell v. State does uphold a Georgia law like 35-11, and so do cases from Florida (*State v. Ecker*) and Wisconsin (*City of Milwaukee v. Nelson*). None of these decisions were unanimous; moreover, in the Florida and Wisconsin cases, very strong dissents were lodged on grounds I'll echo below. More importantly, laws based on the same loitering/"prowling" law were found unconstitutional in Idaho (*State v. Bitt*), Oregon (*Portland v. White*), and Washington (*Bellevue v. Miller*).

The fact that judicial opinions on the matter are about evenly divided -- with Southern states finding loitering laws constitutional, and Western states not -- is itself instructive. One of the main standards for loitering laws is whether they're "void for vagueness" -- sometimes defined as "*so obscure that men of common intelligence must necessarily guess at its meaning.*"

And 35-11 is full of language to guess about: "in a manner not usual", "justifiable and reasonable alarm or immediate concern", "dispel alarm," "explain his or her conduct". In the real world, a dozen officers will interpret these words in a dozen different ways.

My point is that if justices of uncommon intelligence have trouble agreeing whether this law is vague, how much more puzzled the rest of us will be what to expect.

The sponsor's failure to show a need for this bill in his October 19 memo -- which points to declining crime and youth crime rates in the county, and success in Downtown Silver Spring by assigning additional police -- only increases my questions about this bill.

The vagueness objection I've talked about touches on a concern I've shared before -- that this law gives too much scope to overzealous or otherwise mistaken police to stop citizens.

Another major objection to this bill is that it smuggles "stop and identify" procedure into our county and state. At least the regrettable 2004 *Hiibel* ruling by the Rehnquist Court -- that a person could be compelled to identify themselves to a policeman -- was based on reasonable suspicion of involvement in a crime. But this law compels it for mere *concern* about *future* wrongdoing. Even under Henry VIII, Thomas More had the right to "stand on his silence"; it's strange and sad to give that up 600 years later because of isolated incidents.

An August story in the Post told of 15 young, mostly black men were stopped and searched in Silver Spring, and some had their tattoos photographed -- on nothing but a hunch. They turned out to be doing nothing wrong. It was an unjustified humiliation that just happened to be

reported; I think we can expect even more like it with this vague law encouraging stops for highly subjective reasons.

Americans expect our legislators to only craft unambiguous, absolutely necessary laws that don't infringe on our rights. So I hope you won't pass this one.

6

Testimony of Darian Unger
8204 Cedar St. Silver Spring MD 20910
darianunger@yahoo.com

I appreciate the chance to testify today, and urge the council to support an alternative better than the troubling and counterproductive curfew law.

I've testified here many times before – as chair of the Silver Spring Citizens Advisory Board, as chair of the Transportation and Pedestrian Safety Committee, and as a Silver Spring volunteer firefighter – but today I'm here in a different role: simply as a resident concerned about the rights and safety of my neighbors.

Let me begin with a story of what is happening in my Silver Spring neighborhood. As most of you probably know from the police reports, there has been a rash of daytime home burglaries...usually when people are at work. Several of my neighbors have had their homes broken into, and there is so much concern that last week, when I was walking my son to school, a neighbor told me that she felt compelled to lock her laptop computer in a safe rather than leaving it her own living room – because she was worried that her home could get broken into while she was walking her kids to Sligo Creek Elementary School.

Will the curfew legislation help with the daytime burglaries? No. Will it help police catch adult perpetrators casing their victims? No.

Instead of dealing with these real crime problems, the administration pitched a curfew as a knee-jerk reaction to an isolated fight in the middle of last summer. The proposed curfew immediately drew condemnation in Silver Spring as a blunt tool that missed the mark and wouldn't solve the problem.

The Silver Spring Citizens Advisory Board refused to support the curfew, despite being lobbied hard by the administration to endorse it. Municipalities, civil rights groups, police officers, and PTA followed suit, opposing the curfew for a variety of reasons. Some of those reasons are that:

- curfews are demonstrably ineffective at reducing crime.
- the curfews would be fundamentally un-American by selectively restricting the rights of innocent people to assemble peaceably.
- curfew enforcement would waste police time and resources that can be spent on more effective crime-reduction methods.
- the curfew is poorly-targeted because most crime does not occur during curfew hours and most perpetrators are not youth.
- curfews violate the rights of a class of citizens to even exist in public and violate the rights of parents to raise their children as they see fit.

The proposed curfew is giving our community a black eye instead of a helping hand. It is too limited to do any good, yet so broad that it affects the 99% of people who are law abiders.

I'm glad the council is exploring more thoughtful alternatives. This is a step in the right direction. Preventing crime in Montgomery County requires a smart approach: an approach that is based on effective and comprehensive strategies rather than reflexive, fear-based reactions. I appreciate the council's time in dealing carefully and constructively with the issue.

*Testimony to the Montgomery County Council's Public Safety Committee
Proposed Curfew Bill 25-11 and Loitering-Prowling Bill 35-11*

Fred S. Evans

November 15, 2011

Thank you for the opportunity to offer my perspective on the purposed curfew and loitering bills. I have been a resident of Montgomery County for over 41 years and have worked with our young people as a coach, mentor, teacher and school administrator during my career in the Montgomery County Public Schools. Based on those experiences, and the current feedback from my daughters, I believe that the proposed curfew bill is a "solution looking for a problem." As many young people have stated during their public testimony, and private conversations with me, the proposed bill punishes the great majority of under-18 residents who are behaving properly. I find it particularly interesting that the curfew regulations in Prince Georges County and Washington, DC have been used to justify a curfew bill in Montgomery County, since those residents come here to avoid their curfews. After listening to the testimony of officials from those jurisdictions, I do not believe that there is strong evidence that the curfew "works" in either neighborhood location.

Rather than implement the proposed curfew, I offer the following recommendations:

- Examine the proposed Loitering/Prowling bill to determine if effective prevention and intervention strategies can be utilized in areas of concern, such as Downtown Silver Spring
- Convene a representative group of minors to learn what they believe will be effective strategies to maintain safe communities, especially on weekends.
- Meet with law enforcement officials to learn what they believe are effective strategies, based on their training and experiences, to maintain safe communities.
- Survey parents and caregivers about what limits they impose on their minor children to ensure safe behavior.

I learned from a tremendous professional mentor that we often make bad decisions in the heat of the moment. Those moments are frightening, but our responses should be measured and effective. We do have safety and security issues in our county, but the proposed curfew bill will not resolve those problems and future problems. Prevention and effective intervention programs should be our primary focus. I am willing to assist the county council and county executive, in every way possible, to enhance and to maintain the safety and security of Montgomery County.

Montgomery County Council
Bill 35-11, Offenses - Loitering or Prowling - Established
Public Hearing on November 15, 201

Testimony of Paul M. Bessel

My name is Paul M. Bessel. I live in Leisure World in Silver Spring, Maryland and I am a lawyer, an active member of the Bar of Maryland.

I am testifying in support of Bill 35-11, the loitering bill, as a substitute for Bill 25-11, the proposed youth curfew. The Council has heard from many younger citizens who are opposed to the youth curfew bill. I am over 60 and thought the Council might want to hear from people in my age bracket who feel the same way about this issue as the younger residents of our County.

The loitering bill is viewed by many people as a substitute for the youth curfew bill. The curfew bill would state the general policy that, "a minor must not remain in any public place or establishment within the County during curfew hours," while the loitering bill would state the general policy that, "a person must not loiter or prowl in any public place or establishment within the County."

There are exceptions and important definitions in both bills but these statements of general policy highlight the key differences between the curfew and the loitering bills. The curfew bill would only apply to minors while the loitering bill would apply to all persons, and the curfew bill would only apply to certain hours of certain days of the week, while the loitering bill would apply

(continued on next page)

at all times. Most importantly, the loitering bill would allow the police to act on the basis of behavior, which is much fairer and more comforting to law-abiding citizens than the curfew bill's emphasis on age and time of day.

These are the key reasons why I and many others support the loitering bill as a better alternative than the curfew bill. If specific persons rather than all people are to be targeted in legislation, and if specific hours rather than all times are to be stated, there should be reasons for those distinctions. I am not aware of sufficient reasons for those distinctions having been made to justify adoption of the youth curfew bill as county law.

The curfew bill has generated a great deal of controversy, and thus might not be effective even if it is adopted. Those who are said to be protected by that proposal are its most vocal critics and not likely to be cooperative if a youth curfew is put into effect.

More importantly, a comparison of the two proposals shows which would make me and my neighbors more secure. Assume that it is 10:30pm and police see two groups of people who, based on their training and experience, appear to be threatening to the peace and security of our community. One of the groups consists of people who appear to be under 18 but the other group appears to be considerably over that age. Under the curfew proposal, the

(continued on next page)

police could not take action against either group because it is too early in the evening. Even if it were later, under the curfew proposal the police could only take action against the younger group, but the older group might be much more threatening yet the curfew bill would not give the police any authority to act against them.

On the other hand, if the loitering and prowling bill is adopted, in that situation the police could take action against people who meet the definition of loitering or prowling — meaning they are in a public place or establishment at a time or in a manner not usual for law-abiding persons under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity. That is the type of action I and my neighbors want the police to be authorized to take.

The proposed curfew bill appears to me to be the wrong tool at this time. The loitering and prowling bill is a much more effective and useful tool, able to be used regardless of the age of offenders and regardless of the day of the week or time of the day. That law, Bill 35-11, is the one the County Council should adopt in place of the curfew bill.

Testimony of Edward A. Clarke to the Montgomery County Council

On Bill 35-11, Offenses – Loitering or Prowling

November 15, 2011

Bill 35-11 is being offered as a tool to address potential criminal activity that may occur throughout the County resulting from an individual(s) who may be engaged in suspicious behavior and or activity.

As a former Montgomery County Police Officer and District Commander, it is my opinion this bill could provide an additional tool and resource for police officers to utilize in addressing potential criminal activity that impacts the safety and security of community residents as well as property and business owners.

Much attention has been drawn to an incident that occurred over the July 4th weekend in the Silver Spring Central Business District where approximately 70 young people, including suspected gang members gathered and fought each other. The incident resulted in a serious stabbing of one of the participants. Despite an immediate and large number of police responders the incident was initially difficult to control. Had the Loitering or Prowling law been in an effect this could have provided police officers with a tool and resource to more effectively address that incident.

Various loitering laws across the country have been deemed by Courts to be vague or overbreadth and as such they did not pass constitutional muster. It is imperative that this Bill be crafted and modified if needed to address those legal challenges while at the same time providing our law enforcement officers with a practical and effective tool to address and combat crime within the County.

Montgomery County Police officers are well trained to recognize and address suspicious activity that may indicate that crime is a foot. Officers must be able to demonstrate they have reasonable and articulable suspicion that a crime has been committed, a crime is being committed, or a crime is about to be committed in order to lawfully detain and question an individual.

Some concern has also been raised that this Bill could result in the unintended consequences of racial profiling. The Montgomery County Police Department is an extremely professional organization that has earned a national reputation for excellence. The Department does not and never has engaged in a pattern and practice of racial profiling. Each Montgomery County Police Officer takes an oath of office to perform their duties and obey the law and to enforce the law without any consideration of class, creed, color, or condition.

This is an oath that is not taken lightly by those who have served and are currently serving their community. There are measures and procedures in place for community members to bring any concerns as to allegations of racial profiling to the attention of the police department. Any allegation will be reviewed and investigated in a timely manner to ensure officers acted properly and professionally in carrying out their duties.

In my opinion Bill 35-11 should be looked at in the context of will the proposed law provide an effective and practical tool and resource for police officers to use in addressing potential acts of crime and criminal activity that adversely impacts the safety and security of the community as well as property and business owners.

In order to determine if this Bill meets the needs of the community and will pass constitutional muster there should be on-going dialogue with key stakeholders based on the comments presented during the public hearing. This allows for the development of good public policy.

It is also important to address any legal, policy, and procedural issues or concerns raised by Chief Manger and his executive team as to this Bill as well as issues related to the application of enforcement in future Council work sessions.

If future work sessions address the issues and concerns raised during the public hearing on Bill 35-11 this will have a positive outcome in making any needed modifications to the bill so that a vote can go forward. As a community, we need to provide the police department with the proper tools, resources, and appropriate funding to ensure Montgomery County remains a safe community.

Thank you for the opportunity to provide input on this community safety issue and I am available to respond to any questions you may have.



Serving the Public Interest Since 1925

Monday, November 21, 2011

Dear Council President Ervin and Councilmembers:

At its November general meeting, the MCCF members voted to **support Council Bill 35-11**, "Offenses-Loitering or Prowling-Established" as a means of addressing concerns about street crime problems occurring in the County. It provides an approach that applies uniformly to all segments of the population at all times of the day and has a reasonable legal basis for enforcement.

At this same November meeting, the MCCF membership voted to **oppose Bill 25-11**, "Offenses-Curfew-Established" for the following reasons:

1. According to the Sept. 13th letter from the County Executive, the proposed curfew law's penalties have been reduced to a Class B civil fine which eliminated any authority for police to arrest violators.
2. The ability to require community service and parent training for curfew violators and their families have also been removed which stripes the rehabilitative objectives from the legislation.
3. The longstanding body of empirical research shows that curfews alone have little effect on reducing crime, and supporting measures employed by other jurisdictions such as curfew centers were not planned in conjunction with the adoption of the County's curfew law.
4. Concerns about the inability of the curfew to restrict potential criminal activities committed by individuals 18 years or older during non-curfew hours.
5. The ability of youths who simply declare themselves as being 18 years old to be exempted from further police questioning if there is no further cause for stopping them, and
6. The legal uncertainty to which officers would be subject in determining a youth's eligibility for the many curfew exemptions while questioning him or her on the street.

Given the totality of these concerns, the curfew law appears to be an ineffective solution to the public safety concerns that generated its proposal.

However, laws such as this do have the potential for misuse and abuse by law enforcement officers and could threaten basic citizens' rights if applied in a discriminatory, harsh or oppressive manner. We would strongly recommend that the County Council take a proactive

approach in this regard by establishing an annual reporting requirement that would document how these laws, if either or both are adopted, are being applied by the County's law enforcement personnel. Such a report should include the following data items:

- number of incidents involving curfew violation/loitering/prowling charges
- a frequency count of arrests made per incident for these charges
- day of week/time of day frequency counts for incidents involving these charges
- number of arrestees by appropriate age groups, e.g., <18, 18 to 25, 26 to 65, and >65 years of age
- number of arrestees by race/ethnicity
- number of incidents by location type, i.e., commercial, residential, industrial, public facilities/parks, or other places
- incidents displayed on a County map in order to determine their geographic distribution

This would enable the County Council and Executive to assess the effect and application of these laws for future decisions regarding their continuation or possible modification.

If the application of these laws is primarily intended for periodic crackdowns by the police in particular areas of the County, the cautions raised by the Center for Problem-Oriented Policing for such actions should be heeded.

Poorly planned, ill-conceived, and improperly managed crackdowns, intended merely as a show of police force and resolve, can create more problems than they solve. But carefully planned crackdowns, well supported by prior problem analysis, implemented with other responses to ensure longer-term gains, and conducted in a way that maintains public support and safeguards civil rights, can be an important and effective part of police strategies regarding a range of crime and disorder problems.

- excerpted from *The Benefits and Consequences of Police Crackdowns*,
www.popcenter.org/responses/police_crackdowns/1

We would hope that these measures would achieve the objective of promoting public safety while also protecting citizen's rights to freedom of movement and to meet and congregate without interference from government.

Thank you for this opportunity to offer our opinion on this matter.

Sincerely,

Peggy Dennis, President
Montgomery County Civic Federation



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

TO: Phil Andrews, Chair
Public Safety Committee

FROM: Marc P. Hansen *Marc Hansen*
County Attorney

Edward B. Lattner *Edward B. Lattner*
Chief, Division of Human Resources & Appeals

DATE: November 28, 2011

RE: **Bill 35-11, Offenses—Loitering or Prowling—Established**

At the November 17, 2011, worksession on Bill 35-11, you asked our office to opine on the legality of Bill 35-11 with the criminal penalty deleted, making the Bill enforceable as a civil infraction only.

Amending Bill 35-11 to make the offense of loitering and prowling enforceable as a civil infraction only would remove the void for vagueness and Fourth Amendment concerns identified in our November 14, 2011, memorandum. Nonetheless, we believe that it is more likely than not that the Bill continues to be unconstitutional because the Bill imposes, in an overly broad manner, an infringement on an individual's right to travel. An individual's right to travel is a fundamental liberty interest in the words of the Supreme Court "may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values," *Aptheker v. Secretary of State*, 378 U.S. 500, 505-06 (1964).

We acknowledge that our conclusion is open to reasonable debate.

Vagueness.

All the courts striking down loitering and prowling laws did so under the void for vagueness doctrine (as discussed below, some also found that the law violated the Fourth Amendment). But all of those laws were subject to criminal penalties. Although Maryland courts have applied the void for vagueness doctrine to civil penalties, where a statute imposes criminal

penalties, the standard is certainly higher than the standard applicable to statutes imposing only civil penalties. *Neutron Products, Inc. v. Dep't of the Environment*, 166 Md. App. 549, 609 (2006). The Maryland Court of Appeals has noted that void for vagueness doctrine is applicable only to criminal statutes "except in rare instances." *Maryland-National Capital Park and Planning Commission v. Mayor and Council of Rockville*, 272 Md. 550, 559 (1974). The Court went on to note:

In one of the rare cases, if not the only one, in which a vagueness attack on a non-criminal statute has succeeded in the Supreme Court, the latter emphasized that what had been imposed there was "... the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." *Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925).

Id.

That is not to say that a civil statute cannot be unconstitutionally vague. In *City of Bellevue v. Miller*, 536 P.2d 603 (Wash. 1975), the Washington Supreme Court struck down the criminal loitering and prowling law at issue as unconstitutionally vague, noting that Section 250.6 of the Model Penal Code, upon which the law (and Bill 35-11) were based, only provided for a civil penalty. But, even as to the civil penalty provided under the Model Penal Code, the court wrote, "it would seem that vagueness problems inhere despite the relatively inconsequential penalty contemplated under the [Model Penal] Code." *Id.* at 606 n. 4.

Nonetheless, given the "no rule or standard at all" void for vagueness test applicable to statutes enforceable by civil penalties alone, we believe that a Maryland court would likely conclude that a "civil version" of Bill 35-11 is not void for vagueness.

Fourth Amendment.

Some of the courts striking down loitering and prowling laws did so because the laws also violated the Fourth Amendment. *See Sate v. Bitt*, 798 P.2d 43 (Idaho 1990). Specifically, these courts reasoned that the laws criminalized behavior which amounted to nothing more than the type of suspicious conduct which would only justify a *Terry* stop. Once the criminal penalty is removed from Bill 35-11, this concern disappears.

Constitutional Right to Travel.

Vagueness and Fourth Amendment concerns aside, all loitering laws implicate the right to free movement (also referred to as the right to travel) recognized as part of the liberty interest protected by the United States Constitution. When reviewing Chicago's anti-gang loitering law, the Supreme Court wrote:

The freedom to loiter for innocent purposes is part of the liberty protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this right to remove from one place to another according to inclination as an attribute of personal liberty protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage.

City of Chicago v. Morales, 527 U.S. 41, 53-54 (1999) (internal citations and quotations omitted). In *Morales*, the Court struck down Chicago's anti-gang loitering law on vagueness grounds and therefore expressly reserved judgment as to whether the law violated the right to travel. *Id.* at 55. See also *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (striking down a California stop and identify law as unconstitutionally vague, but noting that the law also "implicates consideration of the constitutional right to freedom of movement").

The Supreme Court has identified in various cases different provisions of the federal constitution as encompassing the right to travel and, thus, has left the lower courts in search of the appropriate textual reference point and applicable standard of review in adjudicating constitutional challenges to statutes that impinge on the right to travel.

At least one court concluded that the right to travel is protected by "substantive due process" and applied an intermediate scrutiny standard to the challenged law, determining that it constituted a reasonable time, place, and manner restriction. *Lutz v. City of York*, 899 F.2d 255 (3rd Cir. 1990). In *Lutz*, the Court upheld a city law that prohibited continual cruising around a several square blocks in downtown York during certain evening hours. The factual predicate behind enactment of the law indicated that it could take 20 minutes to go only a few blocks during prime cruising time, and the emergency vehicles were significantly impeded by the heavy bumper to bumper traffic. The *Lutz* court noted that the City ordinance would not be constitutionally sustainable if the Court had applied a strict scrutiny test—i.e. the ordinance used the least restrictive means of meeting a compelling government interest.

Another court agreed that the right to travel is protected by substantive due process, but concluded that the strict scrutiny test applied. *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002) (court struck down ordinance which excluded individuals convicted of certain drug offenses from drug-exclusion zones as not narrowly tailored to survive strict scrutiny).

For its part, the Fourth Circuit seems to have concluded that a strict scrutiny test applies. In *Schleifer v. City of Charlottesville*, 159 F.3d 843 (4th Cir. 1998), the court applied an intermediate standard of scrutiny, rather than a strict scrutiny standard, in reviewing a curfew ordinance only because the effect of that ordinance was limited to minors. *Id.* at 846-47. The

dissenting judge criticized the majority's choice of applicable standard:

The Charlottesville curfew ordinance does implicate fundamental rights. *Cf. Kolender v. Lawson*, 461 U.S. 352, 358, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983) (loitering statute implicates First Amendment liberties and "constitutional right to freedom of movement") . . . Normally, this would require the City to demonstrate that the ordinance satisfies strict scrutiny. However, because this case involves the fundamental rights of minors, and not those of adults, the majority concludes that equal protection requires only intermediate scrutiny. *See ante* at 7. I disagree. Like the Fifth and Ninth Circuits, I would hold that the Equal Protection Clause subjects to strict scrutiny all governmental classifications that impact fundamental constitutional rights.

Schleifer, 159 F.3d at 859-60.

Bill 35-11 would likely fail if subjected to strict scrutiny, as is the result with most laws subjected to this rigorous standard of review. *Lutz v. City of York*, 310 F.3d 484. Assuming that Bill 35-11 is intended to achieve a compelling government interest—preventing crime against persons and property, it seems unlikely that a court would find that the Bill has adopted the least restrictive means of accomplishing that goal.

Instead of identifying a specific list of behaviors that would constitute the offense of loitering and prowling, the Bill adopts a relatively sweeping approach that makes it an offense to remain in a public place "at a time or in a manner not usual for law-abiding persons under circumstances that warrant a justifiable and reasonable alarm . . . for the safety of persons or property in the vicinity." A person may receive a civil citation if an officer "reasonably believes that the person's conduct justifies alarm . . ." We think a court would find it problematic that the Bill could lead to the issuance of a citation for activity that involves a fundamental liberty interest that, while unusual, is nonetheless innocent.

This least restrictive means test is closely related to the overbreadth doctrine.

Overbreadth

The overbreadth doctrine permits the facial invalidation of a law that inhibits the exercise of First Amendment rights if the impermissible application of that law is substantial when judged in relation to the statute's plainly legitimate sweep. *City of Chicago v. Morales*, 527 U.S. at 77-78. Because "freedom of travel is a constitutional liberty closely related to [the First Amendment] rights of free speech and association," the Supreme Court has extended the overbreadth doctrine to laws limiting freedom of travel. *Aptheker v. Secretary of State*, 378 U.S. at 515-17. In *Aptheker*, the Supreme Court noted, "Travel abroad, like travel within the country . .

Phil Andrews
November 28, 2011
Page 5

. may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Id.* at 505-06.¹

Bill 35-11 would not likely survive an overbreadth challenge, because it gives so much discretion to the police officer that it leaves open the distinct possibility that the officer could impinge on the protected right to travel. As we noted in our November 14th discussion of Bill 35-11 in the context of the void for vagueness doctrine, the Bill offers no clear standards for a police officer to follow in determining whether a suspect has dispelled the officer's alarm. We believe that the Maryland Court of Appeal's concern over the broad discretion granted a police officer under Bill 35-11 will be heightened by the impingement this law places on the otherwise constitutionally protected right to move about in a public place. *See City of Chicago v. Morales*, 527 U.S. 41.²

If you have any concerns or questions concerning this memorandum please let us know.

eb1

Cc: Thomas Manger, Chief of Police
Kathleen Boucher, Assistant Chief Administrative Officer
Bob Drummer, Senior Legislative Attorney

A11-01677
M:\Cycrom\Wpdocs\0206\0013-00228029.doc

¹ But see *Lutz v. City of York*, 899 F.2d 255, 271 (3rd Cir. 1990) (overbreadth doctrine inapplicable to right to travel cases).

² But we note that the Idaho Supreme Court in *State v. Bitt*, 798 P.2d 43, 48 concluded that the criminal loitering law was unconstitutionally vague, but not overbroad ("even if the ordinance does regulate the right to free movement, we hold that the ordinance does not regulate a significant amount of such conduct").

STAFF AMENDMENT REQUESTED BY THE COMMITTEE

Amend lines 8-12 as follows:

[[Loitering or prowling]] Loiter or prowl means to remain in a public place or establishment at a time or in a manner not usual for law-abiding persons [[under circumstances that warrant a justifiable and reasonable alarm or immediate concern for]] that threatens the safety of persons or property in the vicinity.

Amend lines 21-28 of the Bill as follows:

(b) Prohibitions.

- (1) A person must not loiter or prowl in any public place or establishment in the County.
- (2) In determining whether a person is violating this Section by threatening the safety of persons or property in the area, a police officer may consider if the person:

 - (A) takes flight after the appearance of the officer;
 - (B) refuses to identify himself or herself; or
 - (C) attempts to conceal himself or herself or any object.



OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Jennifer A. Hughes
Director

MEMORANDUM

November 18, 2011

TO: Valerie Ervin, President, County Council
FROM: Jennifer A. Hughes, Director
SUBJECT: **Bill 35-11: Offenses – Loitering or Prowling - Established**

Attached please find the fiscal and economic impact statements for the above referenced legislation.

JAH:ep

c: Kathleen Boucher, Assistant Chief Administrative Officer
Lisa Austin, Offices of the County Executive
Joy Nurmi, Special Assistant to the County Executive
J. Thomas Manger, Chief of Police
Wayne Jerman, Assistant Chief of Police
Joseph F. Beach, Director, Department of Finance
Michael Coveyou, Department of Finance
John Cuff, Office of Management and Budget
Amy Wilson, Office of Management and Budget
Alex Espinosa, Office of Management and Budget
Patrick Lacefield, Director, Office of Public Information
Ed Piesen, Office of Management and Budget

Office of the Director

101 Monroe Street, 14th Floor • Rockville, Maryland 20850 • 240-777-2800
www.montgomerycountymd.gov

montgomerycountymd.gov/311



240-773-3556 TTY

Fiscal Impact Statement
Council Bill 35-11: Offenses-Loitering or Prowling-Established

1. Legislative Summary.

An Act to:

- (1) prohibit certain loitering or prowling
- (2) provide for certain defenses
- (3) establish enforcement procedures and penalties;
- (4) generally amend County law relating to offenses.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

It is not possible to quantify a fiscal impact because the Department of Police cannot predict the number of arrests or citations issued as a result of this legislation. It is possible there might be a fiscal impact if the number of arrests or citations is significant but determining the fiscal impact depends on prior law enforcement experience, the resultant action in responding to this type of law enforcement incident, and an accepted predictive methodology by the law enforcement community. The Office of the State's Attorney and the Department of Correction and Rehabilitation have indicated that the fiscal impact of this Bill cannot be determined for similar reasons.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

Not applicable

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

Not applicable

5. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Not applicable

6. An estimate of the staff time needed to implement the bill.

This is too speculative to estimate. See response to #2.

7. An explanation of how the addition of new staff responsibilities would affect other duties.

See response to #2.

8. An estimate of costs when an additional appropriation is needed.

Not applicable

9. A description of any variable that could affect revenue and cost estimates.

The number of arrests and citations would affect revenue and cost estimates.

10. Ranges of revenue or expenditures that are uncertain or difficult to project.

This is too speculative to estimate. See response to #2.

11. If a bill is likely to have no fiscal impact, why that is the case.

The Department of Police indicated that the determination of whether there will be a fiscal impact is purely speculative. The Police Department cannot predict the number of arrests that would be made if this bill is approved. Without knowing the number of potential arrests, the fiscal impact of the legislation cannot be quantified.

12. Other fiscal impacts or comments.

OMB concluded that Bill 25-11, as modified by the Executive's proposed amendments, would not have a fiscal impact on the County. This was based on the understanding that violation of the proposed curfew law would be a civil offense only. The elements related to enforcement under Bill 25-11 are very specific in nature:

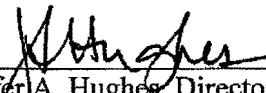
- 1) the suspected violator is under 18 years of age,
- 2) who are out in public or in a place not subject to the exemptions, and
- 3) who do not go home after requested to do so by a police officer.

According to the Department of Police, Bill 35-11 is vague and has been written to reflect that violations can be considered a Class B civil violation or a criminal violation. As noted in response to #2, the fiscal impact of the legislation cannot be quantified without knowing the number of potential arrests.

Based on the County Attorney's recent opinion relating to Bill 35-11, there may also be a fiscal impact to the County resulting from lawsuits challenging the Bill's constitutionality. Estimating the fiscal impact that may result from these lawsuits, however, cannot be quantified.

13. The following contributed to and concurred with this analysis.

Assistant Police Chief Wayne Jerman; Lisa Russo, Office of the State's Attorney; Craig Dowd, Department of Correction and Rehabilitation; and Ed Piesen, Office of Management and Budget.



Jennifer A. Hughes, Director
Office of Management and Budget

11/18/11
Date

Economic Impact Statement: Council Bill 35-11
Offenses Loitering or Prowling Established

Economic Impact Statement:

Since Council Bill 35-11 provides enforcement procedures to address "loitering and prowling"¹ it is not anticipated that this legislation would have a measurable economic impact. To the extent that the legislation would create a more inviting or attractive environment for public places and private businesses it could support enhanced economic activity. However, the linkage to this legislation is sufficiently unclear to not make it possible to quantify the impact on employment, saving, spending, investment, incomes or property values.

1. The sources of information, assumptions, and methodologies used.

Not Applicable

2. A description of any variable that could affect economic impact estimates.

Not Applicable

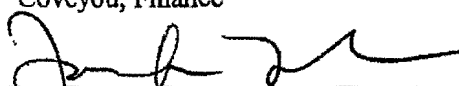
3. The bill's positive or negative effect, if any, on employment, spending, saving, investment, incomes, and property values in the County.

Not Applicable

4. If a bill is likely to have no economic impact, why that is the case.

This Bill addresses procedural issues for law enforcement and defenses only, and therefore there is no quantifiable economic impact.

5. The following contributed to and concurred with this analysis: David Platt, Finance; Mike Coveyou, Finance



Joseph F. Beach, Director
Department of Finance

11/14/11
Date

¹ As defined in the bill, loitering and prowling is to remain in a public place or establishment at a time or in a manner not usual for law-abiding persons under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.