

“THE SHERIFF KNOWS WHO THE TROUBLEMAKERS ARE.
JUST LET HIM ROUND THEM UP”¹: CHICAGO’S NEW GANG
LOITERING ORDINANCE

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This note examines Chicago’s Gang Congregation Ordinance. By enacting the ordinance, Chicago intended to allow its police force to reduce gang activity in designated “hot spots” by giving police the authority to command gang members to disperse whenever congregated on the streets for the purpose of establishing “control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.”

The author has two arguments. First, he argues that the ordinance is unconstitutionally vague because it does not place any limits on the police’s discretion in enforcing the ordinance. Second, even if the ordinance is not unconstitutionally vague, it violates public policy.

The note begins by detailing the history of loitering, noting that antiloitering laws and policies were traditionally used to discriminate against “society’s undesirables.” Next, the note changes its focus to the current trend of “order-maintenance policing,” a popular method of maintaining order to eliminate and reduce criminal activity. The author asserts that this policy is the underlying rationale for the ordinance. By not allowing gang members to congregate, the ordinance hopes to reduce instances of violence and other criminal activity. Part II of the note also includes an analysis of Chicago’s earlier gang loitering ordinances.

Part III examines and rebuts the arguments of supporters of the loitering ordinance. Finally, the author rebuts the proponents by finding that it allows the police to abuse their discretion by not requiring an overt act for its enforcement. The author also argues that the ordinance is ineffective in reducing gang activity. Instead, the author argues that the gang problem would be best addressed by encouraging communities to form partnerships with the police, investing money in youth programs, and aggressively enforcing current laws.

1. Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 244.

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I. INTRODUCTION

Jesus, a seventeen-year-old, is a known member of the Maniac Latin Disciples, one of Chicago's most notorious street gangs.² He lives in a residential area on Chicago's west side with his mother and three younger brothers. The boys are hanging around outside their apartment on a summer night when an officer on routine patrol recognizes Jesus. The officer instructs the boys to disperse and warns them that they are subject to arrest if they fail to obey the order. The boys immediately go up to their apartment to comply with the order. Forty-five minutes later, the three younger brothers, none of whom are members of a street gang, walk to the corner store to get some soda. At that moment, the same officer who gave the dispersal order drives through the area and arrests them on sight.

Mary lived one block north of where the aforementioned brothers were arrested. On that same night, Mary wanted to go to the corner store, but she looked outside her window and saw a group of ten Disciples selling drugs near her apartment, flashing gang signs, and intimidating passersby. Rather than take her chances trying to go through the mob, Mary reports this activity to the police. The same police officer that arrested Jesus's brothers responded to the call, but the Disciples had lookouts stationed on all corners and were able to warn the others to stop their criminal activity as the officer approached. The officer walked up to Mary's apartment and informed her that he could not make any arrests unless she is willing to testify against the gang. Fearing retaliation from the Disciples, Mary had no choice but to decline.

Is our society willing to tolerate either of these events? Innocent young boys are swept off the streets and branded as gang members in one instance while, one block away, the police are unable to order known troublemakers off the street. In my view, both of these scenarios are likely to occur under Chicago's "new and improved" Gang Congregation Ordinance.³

Chicago's City Council recently enacted the ordinance over the objections of several minority City Council members who deemed the measure as racist.⁴ The new ordinance allows an officer to order a group of gang members to disperse when, in the officer's view, the group is loitering for the purpose of establishing "control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities."⁵ Under the ordinance, the officer is permitted to arrest any group

2. The characters depicted in Part I are fictional and are used solely for the purpose of illustrating the problem. Any similarities with real persons are unintended.

3. See CHI., ILL., MUN. CODE § 8-4-015 (2000).

4. See Cate Plys, Editorial, *Truth Is Out There—on Street Corners*, CHI. SUN-TIMES, Feb. 18, 2000, at 37; Fran Spielman, *New Anti-Gang Law Passes; Black Aldermen Divided; 4 Rip Measure as Racist*, CHI. SUN-TIMES, Feb. 17, 2000, at 3.

5. CHI., ILL., MUN. CODE § 8-4-015(a), (d)(1).

member who “fail[s] to obey the order promptly or engage[s] in further gang loitering within sight or hearing of the place at which the order was issued during the next three hours.”⁶ However, the ordinance does not apply to all gang members loitering throughout the City; rather, the ordinance is only enforceable in an area designated by the Superintendent as a “hot spot.”⁷

This note will make two central arguments: (1) the Gang Congregation Ordinance is unconstitutionally vague in that it fails to effectively limit police discretion; and (2) even if the ordinance is specific enough to survive a vagueness challenge, it should be struck down as a matter of public policy. In support of these arguments, Part II will trace the evolution of loitering laws, focusing on how they have been used in the past to discriminate against society's undesirables.⁸ This part will then describe how a popular trend in policing, the “order-maintenance policing” movement, which purports to prevent future crime by eliminating signs of disorder, is the driving force behind the ordinance at issue.⁹ Part II concludes with a discussion of the history of Chicago's previous gang loitering ordinance, which was struck down in 1999 in *City of Chicago v. Morales (Morales III)*,¹⁰ and introduces the City's new gang loitering ordinance.¹¹

Part III illustrates the arguments in support of the new ordinance. First, proponents of the ordinance will argue that the ordinance satisfies all of the constitutional questions raised in *Morales III*.¹² Second, the proponents will point to the success of New York's “quality-of-life” initiative and argue that it supports the inference that order-maintenance policing strategies should be implemented to reduce crime.¹³ Third, the proponents will argue that Chicago's minority residents support the ordinance and that striking it down will actually thwart their attempts to protect themselves.¹⁴ Part III concludes with a discussion of some of the counterarguments likely to be raised by the opponents of the ordinance.¹⁵

Finally, Part IV will argue that, because the ordinance does not require an overt act, the new ordinance, like its predecessor, is unconstitutional in that it gives police too much discretion in deciding who is to be arrested.¹⁶ This note will then propose that police officers should be required to catch criminals in the act as a matter of public policy and that, as the above hypothetical scenarios illustrate, the ordinance is ineffective

6. *Id.* § 8-4-015(a)(iii).

7. *See id.* § 8-4-015(b).

8. *See discussion infra* Part II.A.

9. *See discussion infra* Part II.B.

10. 527 U.S. 41 (1999).

11. *See discussion infra* Parts II.C–D.

12. *See discussion infra* Part III.A.1.

13. *See discussion infra* Part III.A.2.

14. *See discussion infra* Part III.A.3.

15. *See discussion infra* Part III.B.

16. *See discussion infra* Part IV.A.

in curbing gang activity.¹⁷ I will then address the proponents' claim that courts should uphold the ordinance because a community's interests in peace and safety outweigh an individual's liberty interest. I will argue that this rationale presents a false dilemma and propose that the gang problem can be effectively reduced by aggressively enforcing the laws currently on the books, by encouraging communities to form partnerships with police, and by investing more money in youth development and after-school programs.¹⁸

II. BACKGROUND

To determine whether Chicago's gang loitering ordinance passes constitutional muster, it is necessary to examine the problems associated with loitering ordinances in general. In this section, I examine how, historically, legislators have designed loitering laws to disadvantage the poor and unpopular. I then discuss the recent order-maintenance policing movement and how the Chicago gang loitering ordinance was enacted under that movement's rationale. Finally, I conclude this section with a discussion of the history of Chicago's old gang loitering ordinance and introduce the new ordinance.

A. *The History of Loitering Laws*

1. *The Origins*

Merriam Webster's Collegiate Dictionary defines the term "loiter" as "to delay an activity with aimless idle stops and pauses; . . . to remain in an area for no obvious reason."¹⁹ A "vagrant" is defined as "[a] person able to work who spends his time in idleness or immorality, having no property to support him and without some visible and known means of fair, honest and reputable livelihood."²⁰ At first glance, these actions do not seem to require the imposition of stiff criminal penalties. Since their inception, however, vagrancy and loitering laws have been used to punish people for various reasons.²¹

Vagrancy laws initially served an economic purpose. They were created in England in 1349 to remedy a serious labor shortage created shortly after the Black Plague had wiped out nearly fifty percent of the population.²² Because English landowners lost most of their workforce,

17. See discussion *infra* Part IV.B.

18. See discussion *infra* Part IV.C.

19. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 686 (10th ed. 1995).

20. BLACK'S LAW DICTIONARY 1549 (6th ed. 1990).

21. See, e.g., Joel D. Berg, Note, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI.-KENT L. REV. 461, 462 (1993). As Berg points out, the two concepts are related. *Id.* at 463 n.15.

22. *Id.* at 462-63.

they had to raise their wages to attract workers.²³ Laborers then traveled the countryside in search of the highest bidder.²⁴ To prevent the destruction of the feudal system, Parliament enacted the Statute of Labourers, forcing workers to remain in one area and establishing fixed wages for these so-called wanderers.²⁵

After the feudal system's breakup around the fifteenth century, vagrancy and loitering statutes switched from an economic to a crime prevention rationale.²⁶ The crime prevention rationale is motivated by the theory that since unemployed persons do not earn wages, they must resort to crime to support themselves.²⁷ This theory presupposes that many future crimes would be prevented if persons were forced to work. As a result, Parliament enacted harsh laws that allowed persons to be sentenced to two years of slavery or banished from England if they "liveth idly and loiteringly, by the space of three days."²⁸

Vagrancy laws had the same malevolent goals once they reached the United States. For example, an Alabama post-Civil War vagrancy statute targeted "any runaway, stubborn servant or child" or any "laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause."²⁹ This statute had the effect of keeping "former slaves in a state of quasi slavery."³⁰ Discrimination in loitering statutes continued in the twentieth century with the creation of catch-all laws that allowed police to cast a net so large that it "enable[d] men to be caught who [were] vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."³¹ Predictably, these laws were overwhelmingly enforced against the poor and minorities.³²

2. Legal Challenges to Loitering Laws

a. *Papachristou v. City of Jacksonville*³³

A legal challenge to resolve the question of the constitutionality of loitering laws did not materialize prior to the 1960s because indigents

23. Peter W. Poulos, Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CAL. L. REV. 379, 385 (1995).

24. *Id.*

25. Berg, *supra* note 21, at 462–63. Later, in 1530, "able-bodied vagrants who did not offer themselves for work were subjected to such penalties as whipping 'till his body be bloody,' scourging, and bodily mutilation." Poulos, *supra* note 23, at 386.

26. See Berg, *supra* note 21, at 463.

27. See *id.*

28. Poulos, *supra* note 23, at 386; see also Berg, *supra* note 21, at 462–63.

29. Morales III, 527 U.S. 41, 54 n.20 (1999) (citing T. WILSON, BLACK CODES OF THE SOUTH 76 (1965)).

30. *Id.*

31. Angela L. Clark, Note, *City of Chicago v. Morales: Sacrificing Individual Liberty Interests for Community Safety*, 31 LOY. U. CHI. L.J. 113, 116 (1999) (quoting Justice Felix Frankfurter).

32. *Id.*

33. 405 U.S. 156 (1972).

could not afford lawyers to argue the merits of their cases.³⁴ In 1963, however, the Supreme Court held that under the Sixth Amendment,³⁵ an indigent defendant is denied a fair trial unless he receives appointed counsel.³⁶ Shortly after this ruling, courts finally began to hear disputes over the constitutionality of vagrancy and loitering laws.³⁷

In the landmark case of *Papachristou v. City of Jacksonville*, eight defendants challenged Florida Ordinance Code § 26-57, which provided:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pick pockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction . . . shall be punished as provided for Class D offenses.³⁸

The pertinent facts of this case are as follows. After having dinner at a restaurant, Margaret Papachristou, her friend (another white female), and two African American males were driving toward a nightclub when they pulled over in front of a used car lot.³⁹ They were arrested immediately and charged with “prowling by auto” because the used car lot had been broken into in the past.⁴⁰

In a separate incident, Henry Edward Heath and another codefendant drove over to Heath’s girlfriend’s residence.⁴¹ As they pulled into

34. See Berg, *supra* note 21, at 464; Clark, *supra* note 31, at 117.

35. The Sixth Amendment provides in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI.

36. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The offense charged in *Gideon* was a felony under Florida law. *Id.* at 336.

37. See, e.g., *Coates v. City of Cincinnati*, 402 U.S. 611, 614–16 (1971) (invalidating an ordinance that makes it an offense for “three or more people [to] meet together on a sidewalk . . . [and] conduct themselves so as . . . to annoy any police officer or person . . . to passby” as a violation of the rights of free assembly and association.).

38. *Papachristou*, 405 U.S. at 156–57 n.1. The Court goes on to note that the original punishment was a \$500 fine or ninety days imprisonment, or both, but the penalty was reduced to \$450 and seventy-five days in 1971, in order to avoid having to appoint counsel to indigents. *Id.* The Fifth Circuit had previously held that a state must appoint counsel if the possible punishment is \$500 or ninety days in prison. *Id.*

39. *Id.* at 158–59.

40. *Id.* The lot had not been broken into on the night in question. *Id.* at 159. Additionally, Jimmy Lee Smith and another defendant were waiting in downtown Jacksonville for a friend to loan them a car. *Id.* They went inside a dry cleaners to avoid the cold, but the store owners told them to leave and also called the police. *Id.* Although a search of their possessions revealed no weapons, the two were arrested and charged as “vagabonds” because the arresting officers did not believe their story. *Id.*

41. *Id.* at 160.

the driveway, they noticed that the police were in close proximity making an arrest, so they attempted to back out of the driveway.⁴² The police ordered them to pull over and proceeded to search both the car and the defendants.⁴³ After finding no evidence of wrongdoing, the police arrested and charged Heath for being a 'common thief' because he had a reputation for being a thief.⁴⁴ The other defendant was arrested for "loitering" because he was standing in the driveway watching Heath's arrest.⁴⁵ The officer admitted he told him to stand there.⁴⁶

A unanimous Supreme Court reversed the convictions of the eight defendants and held the Jacksonville ordinance void-for-vagueness under the Fourteenth Amendment's Due Process Clause.⁴⁷ In doing so, the Court articulated the following two-pronged test: a criminal law is void-for-vagueness if (1) "it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,"⁴⁸ or (2) if "it encourages arbitrary and erratic arrests and convictions."⁴⁹

The Court was particularly troubled by the ease with which an officer could apply the ordinance to any person at any time.⁵⁰ The Court reasoned that the statute's ambiguity gave the police officer on the scene too much discretion in deciding when someone was violating the ordinance and would allow him to rid the streets of persons he deemed to be undesirable—in this case, Blacks.⁵¹ Thus, for the Court, the Jacksonville ordinance was tantamount to a legislative act that ordered police officers to go out and arrest all suspicious persons.⁵² The ordinance created "a regime in which the poor and the unpopular are permitted to 'stand on a public sidewalk . . . only at the whim of any police officer.'"⁵³

b. Other Loitering Laws

Papachristou is widely considered to be the most important case in loitering jurisprudence because it represented the first time the Court

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

48. *Papachristou*, 405 U.S. at 162 (citing *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

49. *Id.* at 170 (citing *Thornhill v. Alabama*, 310 U.S. 88, 97–98 (1940)).

50. *Id.* at 166 ("Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense." (quoting *Winters v. New York*, 333 U.S. 507, 540 (1948))).

51. "Prowling by auto is not even listed in the ordinance as a crime." The officer was able to charge the four defendants under the ordinance by extending the meaning of "persons wandering from place to place without any lawful purpose or object" to include "travel by automobile." *Id.* at 168 n.11.

52. *Id.* at 169.

53. *Id.* at 170 (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)).

suggested that an ordinance that criminalizes mere loitering is unconstitutional.⁵⁴ As a consequence, subsequent loitering laws were required to be drafted in a way that ensured that they no longer criminalized mere loitering.⁵⁵

Loitering laws have been upheld against a vagueness challenge when, in addition to loitering, the law requires an overt act or sets forth clear and definite criteria for citizens as well as police. For example, the following ordinances have withstood vagueness challenges: an ordinance that criminalizes loitering in a manner and under circumstances which demonstrate an intent to engage in drug-related activity;⁵⁶ an ordinance prohibiting stopping or interfering with passersby for the purpose of prostitution;⁵⁷ and an ordinance prohibiting possession of a concealed weapon while loitering.⁵⁸ What makes these ordinances different from mere loitering statutes is that they all require some conduct that the police can readily observe.

Conversely, loitering laws that tend to reach innocent activity, fail to provide fair warning to the public, or fail to require overt conduct have been held invalid under the vagueness doctrine. For example, in *Kolender v. Lawson*,⁵⁹ the Court held that a statute that required persons loitering on the streets to provide "credible and reliable" identification and to account for their presence when asked by a police officer was unconstitutionally vague for failing to clarify what is "credible and reliable" identification.⁶⁰ Thus, according to the Court, the particular officer on the scene had unfettered discretion to determine who had satisfied the statute and who should be arrested.⁶¹

Other ordinances that have not survived vagueness challenges include: an ordinance that criminalized loitering in unusual times or places, subject to the opportunity to explain identity and conduct to a police officer;⁶² an ordinance prohibiting loitering in or about any place for no apparent reason and under circumstances justifying suspicion that the

54. Before *Papachristou*, the Court in *Shuttlesworth* upheld a loitering law that made it a crime "for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on." *Shuttlesworth*, 382 U.S. at 88. The Court noted that the ordinance if read literally would be unconstitutional, but accepted the limiting construction given to it by the Alabama Court of Appeals, which held that in order to violate the ordinance, a person had to both disobey an order to move on and obstruct the free passage of others. *Id.* at 90-91.

55. See, e.g., *Lambert v. City of Atlanta*, 250 S.E.2d 456 (Ga. 1978) (discussing loitering for the purpose of prostitution); *State ex rel. Williams v. City Court of Tucson*, 520 P.2d 1166 (Ariz. Ct. App. Div. 2 1974) (discussing public loitering for the purpose of begging); *State v. Kimball*, 503 P.2d 176 (Haw. 1972) (discussing loitering on school grounds); *People v. Pagnotta*, 253 N.E.2d 202 (N.Y. 1969) (discussing loitering to use or possess drugs).

56. See, e.g., *City of Akron v. Holley*, 557 N.E.2d 861 (Ohio Mun. Ct. 1989).

57. See, e.g., *People v. Smith*, 378 N.E.2d 1032 (N.Y. 1978).

58. See, e.g., *Yuen v. Mun. Court*, 125 Cal. Rptr. 87 (Cal. Ct. App. 1st Dist. 1975).

59. 461 U.S. 352 (1983).

60. *Id.* at 358-61.

61. *Id.* at 358.

62. E.g., *State v. Bitt*, 798 P.2d 43 (Idaho 1990).

person is engaging or about to engage in a crime;⁶³ and an ordinance making it a crime for “any habitual drunkard, any person known to be a prostitute, or any person who aids or abets prostitution, or for any person previously convicted of a felony, of prostitution, or of aiding and abetting prostitution, to assemble or congregate with other persons of any of the foregoing classes.”⁶⁴

B. The Movement Toward Order-Maintenance Policing

Policing strategies have also recently shifted their focus toward a crime prevention rationale. The police profession has typically dealt with crime using the following strategies: (1) police vehicles patrolling different city areas; (2) quick response to calls for help; and (3) ex post facto investigation of previous crimes.⁶⁵ Although these techniques have led to the successful prosecutions of many criminals, many still criticize these techniques for being reactive as opposed to proactive and for failing to actually prevent crime.⁶⁶ In response to these criticisms, criminologists have recently sparked what is known as the order-maintenance policing movement.

Because of its complexity, any effort to summarize order-maintenance policing is a hazardous undertaking. In short, it is a “law-enforcement strategy that seeks to create public order by aggressively enforcing laws against public drunkenness, loitering, vandalism, littering, public urination, panhandling, prostitution, and other minor misdemeanors.”⁶⁷ It is motivated by a desire to prevent future criminal behavior by merging theories from economics and sociology.⁶⁸ To understand how this policing strategy works, it is necessary to explore its origins—the broken windows theory.⁶⁹

The broken windows theory was first articulated in 1982 by criminologists James Q. Wilson and George L. Kelling, who argued that “disorder and crime are inextricably linked, in a kind of developmental sequence.”⁷⁰ The argument was developed as follows:

Social psychologists and police officers tend to agree that if a window in a building is broken and left unrepaired, all the rest of the

63. *E.g.*, *People v. Berck*, 300 N.E.2d 411, 412 n.1 (N.Y. 1973).

64. *E.g.*, *Farber v. Rochford*, 407 F. Supp. 529, 530 (N.D. Ill. 1975) (evaluating a Chicago ordinance).

65. *See* MARK H. MOORE ET AL., *Crime and Policing*, 2 PERSPECTIVES ON POLICING 1, 1 (1988).

66. *Id.*

67. Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 301 (1998).

68. *See id.* at 295. From economics, we get the notion that humans are rational and will always seek to maximize their utility. *Id.* From sociology, we get the notion that individuals are a reflection of their environment and thus, much of their conduct is shaped by social forces. *Id.*

69. *See id.* at 302.

70. *Id.* (quoting James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29).

windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing. . . . Untended property becomes fair game for people out for fun or plunder. . . . We suggest that 'untended' behavior also leads to the breakdown of community controls.⁷¹

Similarly, under the theory, if there are two cars parked on the street and one has a broken window, the car with the broken window is more likely to be stripped and/or stolen.⁷² Thus, for Wilson and Kelling, eliminating the visible signs of community disorder can prevent crimes.⁷³

Soon thereafter, criminologist Wesley G. Skogan conducted a series of experiments to test the broken windows theory.⁷⁴ Skogan analyzed data compiled from forty different neighborhoods in the following cities: Atlanta, Chicago, Houston, Newark, Philadelphia, and San Francisco.⁷⁵ Skogan then compared the relationship between robbery rates and disorder.⁷⁶ After controlling for such variables as poverty, race, and neighborhood instability, Skogan concluded that there is a strong link between crime and disorder and suggested that police should direct their attention toward eliminating disorder.⁷⁷

Many American cities, most notably New York, have since adopted this method of law enforcement and have achieved great success in reducing crime rates.⁷⁸ In 1993, under Mayor Rudolph Giuliani, New York initiated its version of order-maintenance policing and gave it the moniker, "the quality-of-life initiative."⁷⁹ The city drastically increased its law enforcement budget, hired a slew of new police officers, and began to aggressively enforce minor misdemeanors such as turnstile jumping and

71. Dorothy E. Roberts, Foreword, *Race, Vagueness, and the Social Meaning of Order Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 791 (1999) (quoting Wilson & Kelling, *supra* note 70, at 29).

72. See Interview with Adam D. Schwartz, Staff Counsel, The Roger Baldwin Foundation of ACLU, Inc., in Chicago, Ill. (Nov. 14, 2000) (on file with the author).

73. Roberts, *supra* note 71, at 791.

74. See generally WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990) (discussing various experiments testing the relationship between disorder and crime).

75. *Id.* at 187-90. The data was obtained through random telephone and personal interviews from 1977 to 1983. *Id.* at 187, 190.

76. *Id.* at 73.

77. *Id.* at 73-75. Skogan selected "disorder" as an independent variable and divided it into "social disorder" and "physical disorder." Harcourt, *supra* note 67, at 317. Under "social disorder," Skogan included loitering, drug use and sale, vandalism, gang activity, and public drinking. *Id.* at 317 n.107. Under "physical disorder," he included noise, abandoned buildings or vehicles, litter, and trash in vacant lots. *Id.* at 317 n.108. To test the relationship between disorder and common crime, Skogan compared the relationship between robbery rates and disorder and found that "levels of crime were strongly related (+.80) to levels of disorder." SKOGAN, *supra* note 74, at 73. To ensure that the relationship between crime and disorder was not a spurious one, Skogan then analyzed the same data taking poverty, race, and neighborhood instability into account. *Id.* Ultimately, he found that there still is a strong link (+.54) between crime and disorder even when controlling for these three other variables and suggested that police should direct their attention toward eliminating disorder. *Id.* at 73-75.

78. Harcourt, *supra* note 67, at 302.

79. *Id.* at 292.

public drinking.⁸⁰ In the two years immediately following the implementation of the quality-of-life initiative, New York's murder rate dropped forty percent, robberies declined more than thirty percent, burglaries around twenty-five percent, and since 1990, subway felonies dropped sixty-four percent.⁸¹ Criminologists further note that the drops in crime rates "are more than double the national average" and suggest that the only possible explanation for the decline is the quality-of-life initiative.⁸²

C. City of Chicago v. Morales

1. *The Chicago Ordinance of 1992*

Not too long after Skogan's experiments, Chicago enacted its own version of order-maintenance policing. After growing tired of gangs in its neighborhood, the Northwest Neighborhood Federation, a predominantly white community group operating out of Chicago's northwest side, spearheaded a campaign to curb gang loitering.⁸³ The group conducted extensive research and, with the help of four Aldermen, submitted proposals to Mayor Richard Daley and the City Council.⁸⁴ In 1992, the City Council's Committee on Police and Fire held extensive hearings to determine the extent of the problem posed by loitering gang members.⁸⁵ After "one of the most heated and emotional council debates in recent memory," Chicago passed the Gang Congregation Ordinance by a thirty-one to eleven margin.⁸⁶ The preamble of the ordinance lists the City Council's findings as follows:

WHEREAS, The City of Chicago . . . has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and

. . . the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and

. . . [i]n many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and

80. *Id.* at 332–33 (noting that, after the decade ending in 1994, New York's law enforcement budget increased by seventy-four percent).

81. Dan M. Kahan, *Defending the Gang-Loitering Law*, CHI. TRIB., Dec. 31, 1995, at 19.

82. Harcourt, *supra* note 67, at 332.

83. Alschuler & Schulhofer, *supra* note 1, at 217.

84. *Id.* at 218. The Aldermen, Michael Wojcik (white), William Banks (white), Carol Bialczak (white), and Lemuel Austin (Black), were Daley supporters and, with the exception of Austin, were all from predominantly white wards. *Id.*

85. See Morales III, 527 U.S. 41, 46 (1999).

86. Alschuler & Schulhofer, *supra* note 1, at 220. "African American Aldermen opposed to the ordinance said . . . that under the ordinance '(y)ou're guilty until proven innocent.'" *Id.* at 219 (quoting Fran Spielman, *Loitering Ban Passes: Aldermen Bitterly Split on Anti-Gang Measure*, CHI. SUN-TIMES, June 18, 1992, at 1 (remarks of Alderman Dorothy Tillman)). "Another . . . argued that the ordinance would 'restrict the movement of young blacks in a manner similar to the pass laws of South Africa.'" *Id.* (remarks of Alderman Virgil Jones).

... [o]ne of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and

... [m]embers of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and

... loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and

...
... [a]ggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear ...⁸⁷

The ordinance required a police officer, upon observing a person whom he "reasonably believes to be a gang member loitering in any public place with one or more persons," to "order all such persons to disperse and remove themselves from the area."⁸⁸ The ordinance further defined the term "loiter" as "to remain in any one place with no apparent purpose."⁸⁹ "'Public place' means the public way and any other location open to the public, whether publicly or privately owned."⁹⁰ The ordinance made failure to obey the dispersal order a violation punishable by a fine of up to \$500, up to six months in prison, and a requirement to perform up to 120 hours of community service.⁹¹ The Chicago Police Department then enacted General Order 92-4, which purported to limit the police officers' discretion by providing guidelines on how to determine whether a person is a gang member and also restricted the enforcement of the ordinance to areas designated by the district commanders.⁹² The city did not divulge the location of these designated areas.⁹³

2. *Legal Challenges to the Gang Loitering Ordinance*

During the three years the ordinance was enforced, the Chicago Police Department issued 89,000 dispersal orders and made nearly 43,000 arrests.⁹⁴ Predictably, the police enforced the ordinance primarily against

87. CHI., ILL., MUN. CODE § 8-4-015 (1992).

88. *Id.* § 8-4-015(a).

89. *Id.* § 8-4-015(c)(1).

90. *Id.* § 8-4-015(c)(5).

91. *Id.* § 8-4-015(d).

92. *Morales III*, 527 U.S. 41, 48 (1999); *see also* *City of Chicago v. Youkhana (Morales I)*, 660 N.E.2d 34, 37 (Ill. App. Ct. 1995) (citing CHI., ILL., POLICE GENERAL ORDER No. 92-4, at 2 (1992)) ("Probable Cause to establish membership is substantiated by the officers' experience and knowledge of the alleged offenders and reliable information such as admission of membership, uses of gang symbols, or identification of reliable informants.").

93. *Morales III*, 527 U.S. at 48-49.

94. *Clark, supra* note 31, at 113.

Blacks and Latinos.⁹⁵ In fact, almost ninety-one percent of the defendants in *Morales III* were either Black or Latino.⁹⁶ As of the 1990 Census, there were 88,053 Black males living in Chicago between the ages of fifteen and twenty-four.⁹⁷ Thus, a high percentage of young, Black males were processed through the criminal justice system based on this ordinance.

The ordinance was first held invalid at the trial court level by eleven of the thirteen judges who heard enforcement proceedings.⁹⁸ The City promptly appealed and in *City of Chicago v. Youkhana (Morales I)*,⁹⁹ the Illinois Court of Appeals struck down the ordinance on four fronts: (1) the ordinance was unconstitutionally overbroad in that it infringed on freedoms of association, assembly and expression;¹⁰⁰ (2) the ordinance was unconstitutionally vague;¹⁰¹ (3) the ordinance unconstitutionally criminalized the mere status of being a gang member;¹⁰² and (4) the ordinance improperly permitted officers to arrest gang members without probable cause in violation of the Fourth Amendment.¹⁰³

The Illinois Supreme Court affirmed the decision in *City of Chicago v. Morales (Morales II)*,¹⁰⁴ holding that “the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and

95. See *id.*; Roberts, *supra* note 71, at 775.

96. See Roberts, *supra* note 71, at 776 n.2.

97. Alschuler & Schulhofer, *supra* note 1, at 234. The authors further note that these statistics do not represent the percentage of Black men in Chicago who were arrested under the ordinance because some of them may have been arrested on more than one occasion. *Id.* at 244 n.105.

98. *Morales III*, 527 U.S. at 49. “One of the trial courts that invalidated the ordinance gave the following illustration: ‘[s]uppose a group of gang members were playing basketball in the park, while waiting for a drug delivery. Their apparent purpose is that they are in the park to play ball. The actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the ‘basketball players’ awaiting a drug delivery would be left alone.’” *Id.* at 57 n.24 (quoting *City of Chicago v. Youkhana*, Nos. 93 MCI 293363 et al. (Ill. Cir. Ct., Cook Cty., Sept. 29, 1993), *reprinted in* App. to Pet. for Cert. 45a). Another judge said the ordinance “may apply to situations such as a social worker talking to a gang member or two people stargazing.” *City of Chicago v. Youkhana (Morales I)*, 660 N.E.2d 34, 38 (Ill. App. Ct. 1995).

99. 660 N.E.2d 34 (Ill. App. Ct. 1995). This case was later consolidated with several other cases under the name *Morales*. See *City of Chicago v. Morales (Morales II)*, 687 N.E.2d 53, 53 (Ill. 1997).

100. 660 N.E.2d at 37–39. The court further stated that “[s]tanding in one place with no apparent purpose cannot be made a crime.” *Id.* at 38. The ordinance was also held unconstitutional based on an independent state ground. *Id.* at 39. Article I, section 5 of the Illinois constitution provides: “The people have the right to assemble in a peaceable manner, to consult for the common good, to make known their opinions to their representatives and to apply for redress of grievances.” ILL. CONST. art. 1, § 5.

101. *Morales I*, 660 N.E.2d at 39–41. The court further opined that the ordinance does not give officers guidance on whether someone has an “apparent purpose” nor does it tell the officer how to determine if a person has complied with his dispersal order. *Id.* at 41.

102. *Id.* at 41–42. The court noted that “the ordinance can only be triggered when a gang member is found loitering. In other words, the Chicago ordinance prohibits gang members from loitering because they are gang members, not because they are loitering. Non-gang members and those not associating with gang members are not prohibited from loitering.” *Id.* at 42.

103. *Id.* at 42–43 (“Gang membership itself is not a crime, and standing in a public place with no apparent purpose is not a crime. Adding these actions together does not make them any more criminal.”).

104. 687 N.E.2d 53 (Ill. 1997).

an arbitrary restriction on personal liberties.”¹⁰⁵ The Court reasoned that a person waiting for a taxi, a jogger taking a break, or a person seeking shelter under a doorway to avoid the rain all have legitimate purposes, but that purpose might not be immediately apparent to an observing police officer.¹⁰⁶ The Illinois Supreme Court did not rule on whether the ordinance was overbroad, unfairly criminalized status, or allowed officers to avoid the probable cause requirement.¹⁰⁷

In 1998, the United States Supreme Court granted certiorari.¹⁰⁸ Writing for the plurality in *Morales III*, Justice Stevens concluded that the Gang Congregation Ordinance was unconstitutionally vague in failing to provide minimal guidelines for police.¹⁰⁹ Justice Stevens also concluded that the ordinance failed to give adequate notice because the definition of “loitering” fails to distinguish between innocent and threatening conduct, but only Justices Souter and Ginsburg joined in this part of the opinion.¹¹⁰ Thus, the gang loitering ordinance in question was found void-for-vagueness under only the minimum guidelines prong.¹¹¹

For Justice Stevens, the ordinance’s major infirmity was that it gave police unfettered discretion in determining whether a person was “loitering.”¹¹² The ordinance’s inapplicability to persons who are moving or who have an apparent purpose does not remedy the situation; the officer still has complete discretion when deciding which stationary person to order to disperse.¹¹³ Nor is the fact that an arrest can only follow after an unheeded dispersal order a sufficient limitation on police discretion.¹¹⁴

105. *Id.* at 59.

106. *See id.* at 60–61.

107. *See id.* at 59.

108. *City of Chicago v. Morales*, 523 U.S. 1071 (1998).

109. *Morales III*, 527 U.S. 41, 56–64 (1999) (Justice Stevens garnered five other votes for this part of the opinion).

110. *Id.* at 57. Justice Stevens stated that it would be difficult for a person of ordinary intelligence to know if he or she had an “apparent purpose.” *Id.* The dispersal order made matters worse. Persons trying to comply with the order have no idea how long they have to stay out of the area and do not know how far they have to go to “remove themselves from the area.” *Id.* at 59. Because the dispersal order can only come after the prohibited loitering has already occurred, a loitering gang member has no idea how he can conform his conduct to the law. *Id.*

111. *See Vagueness—Chicago’s Anti-Gang Loitering Ordinance*, 113 HARV. L. REV. 276, 276 (1999). *But cf.* Michael C. Steel, *Constitutional Law—The Vagueness Doctrine: Two-Part Test or Two Conflicting Tests?* *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999), 35 LAND & WATER L. REV. 255, 257 (2000) (arguing that the Vagueness Doctrine is really composed of two, separate conflicting tests: the “overly broad” test and the “hard-core violator” test).

112. *Morales III*, 527 U.S. at 60 (“It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may . . . order them to disperse.”). In his concurring opinion, Justice Breyer argued that “[s]ince one always has some apparent purpose, the so-called limitation invites, in fact requires, the policeman to interpret the words ‘no apparent purpose’ as meaning ‘no apparent purpose except for’” *Id.* at 70 (Breyer, J., concurring in part and concurring in the judgment). It is when officers attempt to fill in the blank that the ordinance allows bias and prejudice to enter into the picture. *Id.*

113. *Id.* at 61–62.

114. *Id.* at 62.

The ordinance provides no guidance as to when a dispersal order is to be issued.¹¹⁵ In addition, the requirement that the officer reasonably believe that one of the loiterers is a member of a street gang places only a minor limit on the police officer's discretion because the ordinance does not require a scienter element.¹¹⁶ The ordinance further allows the arrest of "[f]riends, relatives, teachers, counselors, or even total strangers" if "they happen to engage in idle conversation with a gang member."¹¹⁷ Finally, Justice Stevens stated that applying the plain meaning of the definition of "loitering" in the ordinance would lead to absurd results.¹¹⁸ Because an observing police officer must believe that a person is remaining in an area "with no apparent purpose," the ordinance would not apply to gang members who have the apparent purpose of trying to intimidate others or to conceal illegal activity.¹¹⁹

D. Chicago's New Gang Loitering Ordinance

Justice O'Connor wrote a concurring opinion detailing how Chicago's City Council could have drafted the ordinance to withstand constitutional scrutiny.¹²⁰ Chicago Mayor, Richard M. Daley, seized the moment and instructed the city's lawyers to draft the new ordinance following the "remarkably detailed map that the Supreme Court provided."¹²¹

The new gang ordinance provides:

(a) Whenever a police officer observes a member of a criminal street gang engaged in gang loitering with one or more other persons in any public place designated for the enforcement of this section . . . the police officer shall . . . (i) inform all such persons that they are engaged in gang loitering within an area in which loitering by groups containing criminal street gang members is prohibited; (ii) order all such persons to disperse and remove themselves from within sight and hearing of the place at which the order was issued; and (iii) inform those persons that they will be subject to arrest if they fail to obey the order promptly or engage in further gang loitering within sight or hearing of the place at which the order was issued during the next three hours.

(b) The superintendent of police shall by written directive designate areas of the City in which the superintendent has determined

115. *Id.*

116. *Id.* at 62–63.

117. *Id.*

118. *Id.* at 63. Justice Stevens further articulated that because the "Illinois Supreme Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent." *Id.*

119. *Id.*

120. *Id.* at 64–69 (O'Connor, J., concurring in part and concurring in the judgment).

121. Gregory Washburn & Eric Ferkenhoff, *City Targets 86 Hot Spots for Gangs, Keeps List Secret*, CHI. TRIB., Aug. 23, 2000, at 1. After a heated debate reminiscent of the debate to enact the first ordinance, the City Council passed the ordinance by a whopping forty-four-to-five margin. *Id.*

that enforcement of this section is necessary because gang loitering has enabled criminal street gangs to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.

....

(d) As used in this section:

(1) "Gang loitering" means remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.

....

(5) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.¹²²

General Order 00-02 further attempts to constrain police discretion by requiring an officer, after issuing a dispersal order, to "communicate with the Office of Emergency Communication (O.E.C.) dispatcher and request an O.E.C. event number be assigned to the gang loitering dispersal order, citing the designated area number, the exact location the order was issued and the number of persons the order was issued to."¹²³ The Chicago Police Department designated eighty-six "hot spots" as large as two square blocks each around the city where gang activity is prevalent and began enforcing the new ordinance on August 17, 2000.¹²⁴ Similar to the previous ordinance, to stay one step ahead of the gangs, the city has

122. CHI., ILL., MUN. CODE § 8-4-015 (2000). The ordinance further provides:

(2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the initial acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

(3) "Criminal gang activity" means the commission, attempted commission or solicitation of the following offenses, provided that the offenses are committed by two or more persons, or by an individual at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further or assist in any criminal conduct by gang members:

The following sections of the Criminal Code of 1961: 9-1 (murder), 9-3.3 (drug-induced homicide), 10-1 (kidnapping), 10-4 (forcible detention), subsection (a)(13) of Section 12-2 (aggravated assault-discharging firearm), 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), . . . 12-6 (intimidation), 12-6.1 (compelling organization membership of persons), 12-11 (home invasion), 12-14 (aggravated criminal sexual assault), 18-1 (robbery), 18-2 (armed robbery), 19-1 (burglary), 19-3 (residential burglary), 19-5 (criminal fortification of a residence or building), 20-1 (arson), 20-1.1 (aggravated arson), 20-2 (possession of explosives or explosive or incendiary devices), . . . 24-1 (unlawful use of weapons), 24-1.1 (unlawful use or possession of weapons by felons or persons in the custody of the department of corrections facilities), 24-1.2 (aggravated discharge of a firearm), . . . 25-1 (mob action-violence) . . .

Id. § 8-4-015(d).

The penalty for failing to comply with the new ordinance is the same as under the old ordinance.

See § 8-4-015(e); § 8-4-015(d) (1992).

123. CHI., ILL., POLICE GENERAL ORDER No. 00-02 add. 4, at 3 (2000).

124. *See* Washburn & Ferkenhoff, *supra* note 121.

not revealed the locations of these areas designated as “hot spots.”¹²⁵ The Superintendent has remarked that the ordinance is “‘constitutionally correct, constitutionally sensitive,’ but he acknowledged that a legal challenge was a virtual certainty.”¹²⁶

The Superintendent was indeed correct. On February 26, 2002, the first people arrested for violating the new ordinance challenged the law’s constitutionality before a Cook County judge.¹²⁷ The judge is expected to issue a written ruling on March 19, 2002.¹²⁸

III. ANALYSIS

To decide whether the ordinance is constitutional, it is helpful to examine some of the revised arguments that are likely to be raised by the parties on either side.¹²⁹ The arguments in favor of the ordinance are threefold. First, the drafters of the new ordinance were meticulous in analyzing the Court’s opinion in *Morales III* and have drafted a constitutional ordinance. Second, the proponents will raise policy arguments in favor of the ordinance and argue that order-maintenance policing is the best way to eliminate the gang problem. Finally, although the ordinance has been primarily enforced against minorities, the ordinance is not discriminatory because the Black and Latino communities have expressed a willingness to trade minor infringements on their individual liberties for safer neighborhoods. This part will conclude with an examination of the counterarguments to the aforementioned claims.

A. *The Arguments for Upholding the Ordinance*

1. *The New Ordinance Is Constitutional Under Morales III*

Proponents of the ordinance will undoubtedly argue that the drafters of the new ordinance addressed every concern raised by the Court in *Morales III*.¹³⁰ They will also argue that, unlike the Court in *Morales III*, any future litigation over the ordinance’s constitutionality should include

125. See *id.* Lawrence Rosenthal, deputy corporation counsel remarked: “[W]e don’t want gangs to know where they can sell drugs. What we want them to do is move on when ordered. Gangs will have a much more difficult time establishing markets.” *Id.*

126. *Id.* (remarks of police superintendent, Terry Hillard).

127. Frank Main, *Loitering Law Keeps 22,410 Off Corners; City Cites Statistics in Attempt to Defend Anti-Gang Ordinance*, CHI. SUN-TIMES, Feb. 27, 2002, at 10.

128. *Id.*

129. A First Amendment argument has also been raised. Lawyers for the suspected gang members have recently argued that gang signs are a form of protected speech. *Id.* This issue is beyond the scope of this note.

130. Matt Wawrzyn, Note, *Chicago v. Morales: Constitutional Principles at Loggerheads with Community Action*, 50 DEPAUL L. REV. 371, 414 (2000) (“The City’s new ordinance clears up the problems that were specifically identified in *Morales III*]. Thus, challengers of the new ordinance will not have the benefit of old arguments because the City’s conscientious effort has rendered them moot.”).

an analysis of Chicago Police Department General Order No. 00-02,¹³¹ promulgated to establish police procedures for enforcing the new ordinance.¹³² With this in mind, this section includes a discussion of General Order 00-02.

a. The Ordinance Limits Police Discretion by Adding a Scienter Element

Justice Stevens, writing for the plurality in *Morales III*, noted that under the previous ordinance, an officer's discretion was limited by the requirement that he/she reasonably believe that at least one of the loiterers is a member of a street gang.¹³³ Justice Stevens further stated that this "limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect."¹³⁴ For the plurality, the "no apparent purpose" language of the previous ordinance is said to criminalize mere loitering because "it is a criminal law that contains no *mens rea* requirement."¹³⁵ Thus, if a person is loitering for innocent purposes, and a police officer can arbitrarily order him off the street, then the Chicago ordinance allows persons to stand on the streets "only at the whim of any police officer."¹³⁶

The City responded by changing the definition of "gang loitering" to mean "remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities."¹³⁷ Thus, instead of criminalizing mere loitering, the ordinance requires a police officer to leave gang members alone unless they are engaging in behavior that the City Council seeks to prevent.¹³⁸

The new general order restricts police discretion even further. In addition to requiring a harmful purpose, the new law describes how officers should determine whether a loiterer is a gang member¹³⁹ and restricts the enforcement of this ordinance to officers who have undergone at least four hours of specific training.¹⁴⁰

131. CHI., ILL., POLICE GENERAL ORDER No. 00-02 (2000).

132. Wawrzyn, *supra* note 130, at 373 ("the Court should have given explicit recognition to the usefulness of administrative regulations like General Order 92-4 that can effectively constrain the discretion of the police.").

133. *Morales III*, 527 U.S. 41, 62 (1999).

134. *Id.*

135. *Id.* at 55.

136. *Id.* at 59 n.29 (1999) (quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965)).

137. CHI., ILL., MUN. CODE § 8-4-015(d)(1) (2000).

138. See *supra* note 87 and accompanying text.

139. CHI., ILL., POLICE GENERAL ORDER No. 00-02 add. 4, at 1-2 (2000).

140. See Washburn & Ferkenhoff, *supra* note 121.

b. The Dispersal Order Itself Is Clear

The Court found two major problems with the dispersal order under the previous ordinance: (1) it was not clear when the dispersal order should be issued;¹⁴¹ and (2) after the order had been issued, it was unclear whether a person had complied with it.¹⁴² If the officer knows neither when to issue the order nor when it has been obeyed, the law gives him absolute discretion in deciding who to arrest.

In response, the City now requires the police officer, upon observing gang loitering, to: (1) inform all persons that they are engaging in gang loitering, (2) order all persons to “remove themselves from within sight and hearing” of the place where the order was given, and (3) inform these persons that they will be arrested if (a) they do not disperse immediately, or (b) if they engage in gang loitering within sight or hearing of the location for the next three hours.¹⁴³ In addition, General Order 00-02 imposes on officers an affirmative duty to figure out if there is some innocent explanation for the loitering before giving the dispersal order.¹⁴⁴ After giving the dispersal order, the Order requires an officer to radio the O.E.C. and request a number assigned to the dispersal order including the location of the order and the number of persons involved.¹⁴⁵ The addition of the scienter element and the clarification of the dispersal order, the proponents will argue, provides adequate guidelines for the police and cures the original ordinance’s constitutional deficiencies.

2. *Order-Maintenance Policing Is the Best Way to Curb Gang Crimes*

Proponents of the ordinance argue that order-maintenance policing initiatives, like the one at issue, help communities in two ways: (1) they allow law-abiding citizens to walk the streets without fear; and (2) they prevent future crimes by gang members.¹⁴⁶ Relying primarily on the broken windows theory, they insist that keeping gangs from loitering is essential to reducing crime because the presence of gangs is a visible sign of disorder.¹⁴⁷ As one commentator stated, “[w]hen law abiding citizens see gang members congregating on the streets, they infer that cooperating with law enforcement officials is futile and dangerous. And their reluctance to report lawbreaking predictably leads to more of it.”¹⁴⁸

141. *Morales III*, 527 U.S. at 62 (“[The] ordinance . . . does not provide any guidance to the officer deciding whether such an order should issue. The ‘no apparent purpose’ standard for making that decision is inherently subjective.”).

142. *Id.* at 59 (“After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again?”).

143. CHI., ILL., MUN. CODE § 8-4-015(a) (2000).

144. See CHI., ILL., POLICE GENERAL ORDER NO. 00-02 add. 4, at 2 (2000).

145. *Id.* at 3.

146. Roberts, *supra* note 71, at 790.

147. Kahan, *supra* note 81.

148. *Id.*

In addition, this ordinance is effective because it outlaws the behavior that allows gangs to maintain control of their neighborhoods and perpetuate their illegal activities. In *Morales III*, the City cited statistics indicating that during the last year the ordinance was enforced, there was a twenty-six percent drop in gang-related homicides.¹⁴⁹ The year after the ordinance was held to be invalid, gang-related deaths increased by eleven percent.¹⁵⁰ These impressive statistics, coupled with those gathered in New York under their quality-of-life initiative, lend strong support to the proposition that order-maintenance policing does in fact work.

Proponents also believe that striking the gang loitering ordinance will lead to more people being swept off the streets and thrown in jail.¹⁵¹ With the ordinance in place, police have to give a dispersal order before making an arrest; without it, the argument goes, police will simply arrest gang members to control their behavior. "The kids whom the police can't order off the streets today are the same ones they'll be sending to jail tomorrow."¹⁵²

3. *The Black and Latino Communities Are in Favor of This Law*

I have never had the terror that I feel everyday when I walk down the streets of Chicago. . . . I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, well, do I go out today. Do I put my ax in my briefcase. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that.¹⁵³

It is difficult to argue in favor of the gang loitering ordinance when one considers that the burden of putting up with the increased police discretion is placed almost entirely on the Black and Latino communities. There is no need to articulate the vice of a law that criminalizes only minorities. There is some evidence, however, that the residents of minority communities are growing tired of street gangs terrorizing their neighborhoods and support the ordinance.¹⁵⁴ If this is true, supporters of the law

149. *Morales III*, 527 U.S. 41, 49 n.7 (1999).

150. *Id.*

151. Kahan, *supra* note 81.

152. *Id.*

153. *Morales III*, 527 U.S. at 101 (Thomas, J., dissenting) (quoting Transcript of Proceedings before the City Council of Chicago, COMM. ON POLICE AND FIRE 124-25 (May 15, 1997)).

154. See, e.g., Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach to Crime Control: Should One Make Us More Comfortable with the Others?*, 34 GA. L. REV. 1253, 1253 (2000) ("We used to have a nice neighborhood. We don't have it anymore. . . . I am scared to go out in the daytime. . . . [Y]ou can't pass because they are standing. I am afraid to go to the store. I don't go to the store because I am afraid."); Frank Main, *Pilsen Applauds Gang Arrests*, CHI. SUN-TIMES, Aug. 23, 2000, at 8 (citing several citizens of the Pilsen neighborhood who were relieved that the city began to enforce the new ordinance.); Editorial, *Tolerate No More of Gangs' Violence*, CHI. SUN-TIMES, July 21, 2000, at 39 ("Neighborhoods that are hot spots for criminal activities must be identified immediately and the law must be enforced quickly and strenuously.").

are armed with perhaps their most powerful argument: judicial scrutiny of laws like the gang loitering ordinance actually prevents minority groups from protecting themselves from gang violence.¹⁵⁵

The vague loitering and vagrancy laws of the past, such as the one at issue in *Papachristou*, were passed primarily to oppress minorities and other unpopular groups.¹⁵⁶ These laws were passed without much input from minority groups, who were at the time still disenfranchised.¹⁵⁷ The Court in *Papachristou* recognized this and struck down those laws that criminalized mere loitering because they gave police carte blanche to sweep up minorities.¹⁵⁸

With the passage of the Voting Rights Act of 1965,¹⁵⁹ however, Blacks and Latinos now have representation in all sectors of government and are involved in community organizations.¹⁶⁰ Unlike the 1960s, law enforcement officials are now accountable to minority politicians and cannot abuse their power to harass minorities with impunity.¹⁶¹ Some leaders of minority groups are fed up with the problems created by gangs and have given their blessing to the passing of laws like the Chicago ordinance, even though it might infringe upon their own liberty.¹⁶²

In *Morales III*, Justice Scalia quipped, “[t]he minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them . . . a small price to pay for liberation of their streets.”¹⁶³

As the previous quote indicates, some members of the Court are beginning to accept this argument. Whereas antiloitering laws used to discriminate against minorities, the police are now enforcing these laws at their behest.¹⁶⁴ Judicial scrutiny of vague laws used to protect minorities from abuse by police; now, it actually thwarts their efforts to protect their citizens. Thus, for proponents of the ordinance, if a community is willing to internalize the “burden that a particular law imposes on individual freedom, . . . court[s] should presume that the law does not violate individual rights.”¹⁶⁵

155. See Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1172–73 (1998) [hereinafter Kahan & Meares, *Coming Crisis*].

156. See *supra* notes 33–52 and accompanying text.

157. This was true despite the passage of the Fifteenth Amendment, which provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

158. See *supra* text accompanying notes 49–52.

159. 42 U.S.C. § 1973 (1994).

160. See Kahan & Meares, *Coming Crisis*, *supra* note 155, at 1161–63.

161. *Id.* at 1159.

162. *Id.* at 1160.

163. *Morales III*, 527 U.S. 41, 74 (1999) (Scalia, J., dissenting).

164. *Id.*; Kahan & Meares, *Coming Crisis*, *supra* note 155, at 1160.

165. Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 209 [hereinafter Meares & Kahan, *Procedural Thinking*].

B. The Arguments to Strike Down the Ordinance

1. The Law Is Still Unconstitutionally Vague

Although the City followed Justice O'Connor's suggestions for reconstructing the ordinance almost verbatim, the law is not unassailable. Because Justice O'Connor's concurrence received only one other vote, it is certainly not a foregone conclusion that the new ordinance will pass constitutional muster with the other Justices.¹⁶⁶

- a. The Officer Continues to Have Too Much Discretion in Determining Whether One Is Engaging in Gang Loitering
- i. The Officer Must Speculate on the Loiterer's Purpose

The mere addition of a scienter element is not enough to limit a police officer's discretion.¹⁶⁷ Although the ordinance now prohibits loitering for the purpose of securing territory, intimidating others, and concealing illegal activity, whether one is actually engaging in that behavior continues "to depend on [one's] external appearance [as viewed by the police], rather than the loiterer's state of mind."¹⁶⁸ Because there is no requirement of an overt act, a law that forces police officers to "ascertain whether a group of loiterers have [a purpose to secure territory, intimidate others, or conceal illegal activity] would require them to exercise *more* discretion, not less."¹⁶⁹

An illustration is helpful here. In enforcing an ordinance prohibiting stopping or interfering with passersby for the purpose of prostitution, an officer is not given unlimited discretion. At a minimum, an officer must witness the predicate and overt act of stopping or interfering with passersby. Additionally, the officer must witness some other acts that, in light of the officer's knowledge and experience in dealing with prostitution, would lead the officer to conclude that the person is soliciting prostitution. Such a law would not be unconstitutional.¹⁷⁰

Conversely, laws that fail to require overt conduct have been held unconstitutional.¹⁷¹ Unlike the law prohibiting interfering with others for the purpose of prostitution, there is no predicate act required in the loitering ordinance. Thus, under the ordinance, an officer is forced to conclude that a group of loiterers who are not *actually and presently* intimi-

166. *Morales III*, 527 U.S. at 64 (O'Connor, J., with whom Justice Breyer joins, concurring in part and concurring in the judgment).

167. *Id.* at 110-11 (Thomas, J., dissenting); see also BLACK'S LAW DICTIONARY 1345 (6th ed. 1990) (stating that the term "scienter" is "frequently used to signify the defendant's guilty knowledge.").

168. *Morales III*, 527 U.S. at 111 (Thomas, J., dissenting).

169. *Id.*

170. See discussion *supra* Part II.A.2.b.

171. *Id.*

dating others from entering their neighborhood or concealing illegal activity nevertheless have a purpose to do so. This power gives police officers too much discretion.

ii. Police Training Materials Do Not Clarify When an Arrest Is Warranted

General Order 00-02 provides that before an officer gives a dispersal order, the officer “will also attempt to establish if circumstances are present which provide some innocent explanation for the individuals’ conduct.”¹⁷² The Order further provides that in order to make an arrest, one of the following two conditions must be present: (1) a person refused to disperse when ordered, *or* (2) a person did disperse when ordered, but returned to within sight or sound of the order within three hours *and engaged in further gang loitering*.¹⁷³ Only officers who undergo a mandatory four hours of training conducted by Chicago Police Department officials and city lawyers are allowed to enforce the ordinance.¹⁷⁴

However, a training handout distributed during this four-hour class describes the following hypothetical situation:

Jill Banger, a self admitted Latin Queen is hanging out with an unknown woman in a play lot within an area designated for enforcement of the gang and narcotics loitering ordinance. This is a known drug area. They are approached by 2 known Latin Kings and engage in loud boisterous conversation and laughter. Whenever someone approaches the play lot, one of the four gets up from where they are sitting and engages in a brief conversation with that person. Other than the conversations, you do not observe any exchanges between them but you see that all the people walk towards the same building which is a known drug house. After observing this behavior for approximately ten minutes, you investigate. The four individuals can offer you no innocent explanation for their conduct so you give a dispersal order. After ordered to disperse, all four get up and walk to the bus stop which is within sight and sound of the play lot.¹⁷⁵

The exercise concludes with the officer arresting the four persons for violating the dispersal order under both the gang and narcotics loitering ordinances.¹⁷⁶ In this example, clearly neither prerequisite to an arrest was present. A reasonable officer would not conclude that the group failed to heed the dispersal order by walking to a nearby bus stop. There are a

172. CHI., ILL., POLICE GENERAL ORDER NO. 00-02 add. 4, at 2 (2000).

173. *Id.* at 3 (emphasis added).

174. Washburn & Ferkenhoff, *supra* note 121.

175. Chi. Police Dep’t, Training Materials Exercise #3 (on file with the author).

176. Chi. Police Dep’t, Sample Arrest Report for Jill Banger (on file with the author); CHI., ILL., MUN. CODE § 8-4-017 (2000).

number of innocent explanations for this conduct. For example, the group could be waiting for a bus to take them home. Alternatively, there is no evidence to suggest that the group *resumed their gang loitering*. The General Order makes it clear that simply returning to the area is not enough.¹⁷⁷ Thus, neither the Order nor the four hours of training are effective in teaching officers when to make an arrest under the ordinance.

b. The Ordinance Still Applies to Non-gang Members

The *Morales III* plurality was troubled by the way the previous ordinance applied to gang members and non-gang members alike.¹⁷⁸ The same calamity afflicts the new ordinance. Under the plain language of the ordinance and General Order 00-02, it is clear that the officer only needs to identify one of the group members as a gang member.¹⁷⁹ As a result, the law still reaches “[f]riends, relatives, teachers, counselors, or even total strangers” if an officer is convinced that a group is engaging in gang loitering.¹⁸⁰

2. *The Empirical Support for the Broken Windows Theory Is Flawed*

Proponents of order-maintenance policing routinely cite Skogan’s empirical studies and New York’s quality-of-life initiative to support their position. It is hard to dispute such compelling evidence, so most politicians, criminologists, and sociologists have hopped on the broken windows bandwagon and are convinced that the theory works.¹⁸¹ In fact, until a recent article by Bernard E. Harcourt, it was impossible to find a single article that questioned the validity of the broken windows theory or the quality-of-life initiative.¹⁸²

In his article, Harcourt replicated Skogan’s study and reached a completely different conclusion.¹⁸³ After discussing several problems with Skogan’s methodology,¹⁸⁴ Harcourt found that certain crimes like

177. CHI., ILL., POLICE GENERAL ORDER NO. 00-02 add. 4, at 3 (2000).

178. *Morales III*, 527 U.S. 41, 62–63 (1999).

179. See CHI., ILL., MUN. CODE § 8-4-015(a) (2000); CHI., ILL., POLICE GENERAL ORDER NO. 00-02 add. 4, at 2 (Apr. 15, 2000).

180. *Morales III*, 527 U.S. at 62–63.

181. See Harcourt, *supra* note 67, at 292–95.

182. See *id.* at 293.

183. See *id.* at 315.

184. First, Harcourt found that there are substantial amounts of missing values for much of the data constituting the variable “disorder.” *Id.* at 315–16. Missing values occur when survey respondents fail to rank a particular variable. If 10,000 people took the survey, one would expect 10,000 values or ranks for every variable in the survey. For example, under the variable “noise,” a typical set of responses might be: (1) noisy all the time; (2) sometimes noisy; and (3) almost always quiet. A missing value means that the respondent did not choose any of the responses, thereby leaving the researcher with the difficult task of determining what to do with the missing value. The following represents the percentage of missing values under the variable “disorder:” “noise,” 50%; “abandon,” 0%; “litter,” 60%; “trash,” 40%; “loitering,” 20%; “drugs,” 15%; “vandalism,” 60%; “gangs,” 60%; “public drinking,” 60%; and “insults,” 25%. *Id.* at 316 tbl.2. As a result, the data Skogan has available for

sexual assault, purse snatching, and pocket-picking are not related to disorder.¹⁸⁵ Additionally, he found that crimes like physical assault and burglary have no relationship to disorder once factors such as poverty, stability, and race are accounted for.¹⁸⁶ Thus, for Harcourt, Skogan's research fails to support the broken windows theory.¹⁸⁷

Harcourt then turns his attention to New York's quality-of-life initiative. Harcourt argues that proponents of this aggressive form of law enforcement ignore a number of alternative explanations for the dramatic decrease in crime rates in New York since 1990.¹⁸⁸ Some of these factors include a large increase in the number of police personnel, a healthy economy, a change in drug usage from crack to the less destructive heroin, technological advances that increase police response times, a drop in the population of eighteen to twenty-four-year-old males, an increase in the prison population (which decreases the number of criminals on the streets), the successful convictions of several of New York's major drug suppliers and a change in the attitudes and behaviors of minors.¹⁸⁹ Other experts agree that crime in New York would have dropped even without the implementation of order-maintenance policing.¹⁹⁰ In fact, crime has been decreasing nationwide throughout the same time period.¹⁹¹ Harcourt concludes that "[o]ur present understanding of the causes of the decline is too tentative—and contested—to suggest that the quality-of-life initiative accounts for the difference in New York City's rates."¹⁹²

The broken windows theory does have some merit. Disorder becomes a problem and correlates to some crime when an entire neighborhood is designated as a broken window. For instance, if a neighborhood is full of scattered garbage, has graffiti all over the walls of run-down buildings, is full of potholes, and does not have working streetlights, it might make criminals feel like they can do whatever they want. However, this situation is not the same as designating people as broken windows. As ACLU attorney Adam Schwartz opines:

once we say that four fourteen-year-olds hanging out in front of a candy store, doing nothing wrong, are a broken window . . . and therefore, to fix the broken window we've got to sweep these inno-

analysis is not an accurate representation of the neighborhoods it purportedly measures and may produce bias. *Id.* at 316. Next, Harcourt critiques Skogan's independent variable, "disorder," for having elements of the dependent variable, "crime." *Id.* at 317–18. For example, "some of these disorderly activities—like drug trafficking or certain gang activities—would be considered by respondents to be major crimes in themselves and are likely to trigger responses that assess the level of crime in the neighborhood." *Id.* at 318.

185. *Id.* at 320.

186. *Id.* at 320–21.

187. *Id.* at 329.

188. *Id.* at 332.

189. *Id.*

190. *Id.* at 339.

191. *Id.* at 296 n.24.

192. *Id.* at 339.

cent fourteen-year-olds off the corner, I think we've taken [the broken windows] theory way too far. People are not broken windows; broken windows are broken windows.¹⁹³

3. *The Black and Latino Community Do Not Want This Law*

It seems there are two laws. . . . There's one for this kind of area, and there's another for everyone else. . . . We're Mexican and we're bald. . . . The police . . . pick us up for nothing. . . . We can't do nothing. . . . We don't want to be in the house all day. It feels like we're in Cuba. We ain't got not no freedom. This is supposed to be America, right?¹⁹⁴

The argument that the Black and Latino communities favor this law is certainly subject to dispute. For every story one hears about the horrors of gang loitering, there is an equally compelling story about police abuse of innocent persons and racial profiling.¹⁹⁵ Proponents of the law have not pointed to any credible statistical study that shows that most Blacks and Latinos support the law.¹⁹⁶ In fact, many minority organizations like the NAACP and the Chicago Alliance for Neighborhood Safety openly oppose the ordinance.¹⁹⁷

In addition, while it is true that minorities now have some representation in the political sphere, this ordinance was not passed or influenced by a minority political body, but rather by a mostly white City Council.¹⁹⁸ The City Council members will not bear the burden of the law's restrictions on freedom. While it is true that times have changed from the days of *Papachristou*, Blacks and Latinos still do not have the political clout that Whites have. "It is therefore highly presumptuous to claim that [simply because this law was passed through the democratic process,] inner-city residents have voluntarily relinquished their civil liberties in exchange for safer streets."¹⁹⁹

IV. RESOLUTION

The rewritten ordinance is still unconstitutional. Unlike other crimes that target intent—like conspiracy—the ordinance does not require an overt act and thus grants police too much discretion. Alterna-

193. Interview with Adam D. Schwartz, Staff Counsel, *supra* note 72.

194. Washburn & Ferkenhoff, *supra* note 121 (quoting Chicago residents opposed to the ordinance).

195. See, e.g., *id.* ("Sometimes it almost turns your stomach the way they can ride through here, swoop people up and lock them up for eight hours and let them out.") (quoting Chicago resident Solomon Netwon); Spielman, *supra* note 4 ("I can't support something that legalizes racial profiling and redlining." (quoting Chicago City Council member Leslie Hairston)).

196. Dorothy Roberts, *It's All About Race: Vague Anti-Loitering Laws Target Minorities*, CHI. TRIB., June 18, 1999, at 31.

197. *Id.*

198. *Id.*

199. *Id.*

tively, even if the ordinance passes constitutional muster, it is bad policy to allow police officers to make arrests without evidence of criminal acts. In addition, the argument that we need an ordinance like this to ensure safer streets presents a false dilemma. The loitering law has many alternatives that legislators should explore. I will conclude this section by proposing that the City should aggressively enforce laws currently on the books, encourage troubled communities to form partnerships with police and invest more money for youth development.

A. The Ordinance Is Unconstitutionally Vague

For the reasons articulated in Part III.B.1, the ordinance is unconstitutionally vague under *Morales III*.²⁰⁰ By proscribing loitering under circumstances that would warrant a reasonable person to believe that the loiterer is attempting to secure gang territory, intimidate others, or conceal illegal activities, the law targets a person's intent without requiring a completed act. Because the ordinance is not meaningfully precise, it gives officers too much discretion to determine who is engaging in gang loitering.

Comparing the ordinance with another law that targets "intent" is useful. The typical conspiracy statute "makes it an offense to conspire to commit any offense . . . where one or more of the conspirators does 'any act to effect the object of the conspiracy.'"²⁰¹ Thus, conspiracy punishes an agreement to commit a crime.²⁰² Most jurisdictions, however, require an overt act toward the commission of an offense.²⁰³ In contrast, the Chicago ordinance merely requires that an officer reasonably believe that a loiterer intends to commit a criminal act. In fact, the Chicago ordinance is almost identical to the stricken New York law that prohibited loitering in or about any place for no apparent reason and under circumstances justifying suspicion that the person is engaging or about to engage in a crime.²⁰⁴ Thus, without requirement of an overt act, an officer is vested with too much discretion.

200. It is important to note that the discussion in Part III.B.1 is not binding on what the Illinois courts do with this ordinance under the Illinois Constitution. *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983) (stating that the U.S. Supreme Court has no authority to review a state court decision that is predicated on independent and adequate state grounds.). Thus, the Illinois courts are still free to strike down the new ordinance so long as it does not rely solely on federal law.

201. G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding, Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1430 (1996).

202. *Id.* at 1436.

203. *Id.* For example, under Illinois law, "no person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator." 720 ILL. COMP. STAT. 5/8-2(a) (1993).

204. See discussion *supra* Part II.A.2.b.

B. The Ordinance Is Based on Suspect Policies

1. We Should Require Conduct Before Allowing an Officer to Make an Arrest

Even if the ordinance survives a vagueness challenge, it should be struck down as a matter of policy. Although the ordinance's crime prevention rationale is compelling, we should force the police to catch people in the act before they make an arrest. This is the better view even if it means that some people will be able to evade arrest by ceasing their illegal behavior when the police arrive.

Under the current ordinance, an officer is permitted to infer that a group is engaging in gang loitering without having witnessed an overt act. This discretion will invite abuse as officers are likely to focus on race or on the fact that a person is a known gang member to make this determination. The unusually high number of arrests under the previous ordinance indicates that there must have been some abuse of police discretion. After all, 43,000 people (ninety-one percent Black or Latino) were arrested over a three-year span even though police officers were unable to arrest a loiterer unless he violated a dispersal order.²⁰⁵ "One wonders whether tens of thousands of Chicago youth proved so defiant of police authority, so fond of the food at the Cook County Jail, or so dedicated to civil liberties that, rather than obey an order to disperse, they stood their ground and submitted to arrest."²⁰⁶

In addition, under the previous ordinance, the vast majority of those arrested had their cases dismissed by the prosecutor.²⁰⁷ Escaped prosecution, however, does not denote a lack of harm. The arrest, the search incident to arrest, and the time spent in jail is punishment itself and is too high a burden for someone to bear when they have not been caught violating a criminal law.²⁰⁸ Mere suspicion that you are a criminal, or an inference that you will commit a crime because you are a gang member, is not sufficient to justify an arrest.

2. The Ordinance Does Not Prevent What It Purports to Prevent

The ordinance can only be enforced in areas designated as "hot spots."²⁰⁹ There is little doubt that a gang member who is in the business of selling drugs has an interest in keeping vigilant on police activities. As a result, a gang member ordered off of the corner of Belden and Central

205. Clark, *supra* note 31, at 113; Roberts, *supra* note 71, at 776 n.2.

206. Alschuler & Schulhofer, *supra* note 1, at 220.

207. *Id.* at 221–22. As of February 26, 2002, there have been 22,410 dispersal orders resulting in 171 arrests under the new ordinance. Eric Ferkenhoff, *Newly Written Anti-Loitering Code Faces Test; 1st Law Targeting Gangs Struck Down by Supreme Court*, CHI. TRIB., Feb. 27, 2002, at 1. In over 100 of those arrests, charges were either dismissed or dropped. *Id.*

208. Alschuler & Schulhofer, *supra* note 1, at 221–22.

209. See CHI., ILL., MUN. CODE § 8-4-015(b) (2000).

Park will eventually move his drug enterprise to a safer location. Thus, the ordinance does not really prevent gang members from terrorizing people and doing other illegal activities; it simply forces them to do it elsewhere.

In contrast, law-abiding teens are probably not keeping close track of police activities and are not interested in whether their corner has been designated as a “hot spot.” If these teens continue to congregate on these corners, and the officer on the scene mistakenly determines that they are gang members, the ordinance will have the perverse effect of criminalizing the law-abiding kids while shielding the troublemakers.²¹⁰ The previous scenarios are entirely possible simply because the city does not publish the locations of the “hot spots.” The City’s attempt to deceive its citizens by not telling them where they can or cannot loiter will inevitably ensnare many law-abiding citizens. It is difficult to imagine “a law more arbitrary and discriminatory, where you can do one thing on one block and it’s OK. When you do it on the next block, it’s not, and we’re (the city) not going to tell you where that imaginary line is.”²¹¹ In my view, the wrong people will figure out where that line is.

C. Resolving the False Dilemma: Alternatives to the Gang Loitering Ordinance

Chicago does not need a gang loitering ordinance to curb gang activity. As stated earlier, the argument that this ordinance is necessary to prevent gangs from terrorizing the City presents a false dilemma. ACLU attorney Adam Schwartz articulates the false dilemma as follows:

[W]e do not need to throw the Constitution . . . and our civil liberties and civil rights out the window in order to live in a safe society. There is a false choice between safety and freedom that we are being faced with here. . . . Essentially, . . . Mayor [Daley] is saying to the residents of our poorest communities, you can have no law enforcement and live in the law of the jungle, or you can have lousy, second-rate law enforcement in the form of round-them-up, dragnet sweeps.²¹²

There are several alternatives to the gang loitering ordinance that do not infringe on one’s personal liberties. I now propose a few solutions to the gang problem.

210. In fact, as of November 14, 2000, the ACLU had received calls detailing incidents where innocent people have been swept up under the ordinance. Interview with Adam D. Schwartz, *supra* note 72. Mr. Schwartz was unable to elaborate further due to client confidentiality concerns.

211. Ferkenhoff, *supra* note 207, at 1.

212. *Id.*

1. *The Police Should Enforce the Laws Currently on the Books*

As a first step, the City should increase its commitment to enforcing the laws currently on the books. Such a measure renders the loitering ordinance unnecessary because existing laws already prohibit the very acts the loitering ordinance seeks to prevent. By aggressively enforcing laws prohibiting mob action,²¹³ gang recruitment,²¹⁴ disorderly conduct,²¹⁵ intimidation,²¹⁶ aggravated intimidation,²¹⁷ and drug selling²¹⁸ the police will be able to effectively thwart criminal street gangs.

For example, "mob action" prohibits "[t]he use of force or violence disturbing the public peace by 2 or more persons acting together."²¹⁹ The "intimidation" statute prohibits the situation where a person, "with intent to cause another to perform or to omit the performance of any act, . . . communicates . . . a threat to . . . (1) [i]nfllict physical harm on the person threatened . . . or (3) [c]ommit any criminal offense."²²⁰ The crime of "aggravated intimidation" is committed when one "commits the offense of intimidation . . . in furtherance of the activities of an organized gang."²²¹ In addition, a person can be charged with conspiracy to commit any of the aforementioned crimes so long as the officer witnesses an act in furtherance of the conspiracy.²²² Aggressively enforcing these laws would keep the gangs under control without unduly burdening innocent persons.

2. *Forming a Partnership with Police*

The second step to eradicating the gang problem is, as the Chicago Alliance for Neighborhood Safety (CANS) suggests, encouraging troubled communities to form partnerships with the police.²²³ First, the residents of gang-infested neighborhoods should report all illegal activities to the police.²²⁴ If residents reported a group of troublemakers when

213. 720 ILL. COMP. STAT. 5/25-1 (1993).

214. *Id.* § 5/12-6.1.

215. *Id.* § 5/26-1.

216. *Id.* § 5/12-6.

217. *Id.* § 5/12-6.2.

218. Illinois Controlled Substances Act, 720 ILL. COMP. STAT. 570/1 (2000). There is also an ordinance that prohibits narcotics-related loitering. CHI., ILL., MUN. CODE § 8-4-017 (2000).

219. 720 ILL. COMP. STAT. 5/25-1(a)(1) (2000). The statute further provides: "Any participant in a mob action who does not withdraw on being commanded to do so by any peace officer commits a Class A misdemeanor." *Id.* § 5/25-1(e).

220. *Id.* § 5/12-6(a).

221. *Id.* § 5/12-6.2(a).

222. *Id.* § 5/8-2.

223. See CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY, CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY IS AGAINST THE ANTI-GANG LOITERING LAW 5 (1998) (on file with the author). For a discussion of previous examples of successful and unsuccessful partnerships between police and citizens, see WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 172-84 (1997).

224. CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY, *supra* note 223, at 5.

they spot them committing illegal acts, police officers could monitor the group and make sure they did not get out of hand. Second, the police department should assign an undercover officer to an area if the residents request one.²²⁵ The undercover officer would be more effective in catching gang members engaging in illegal activities than the typical marked squad car. A third strategy requires the neighborhood to set up positive loitering in the area normally occupied by the gang members.²²⁶ The positive loitering could help residents reclaim their streets by encouraging the gang to move elsewhere.²²⁷

3. *Investing Money in the Community*

The third step to eliminating the gang problem is a familiar refrain, but one worth repeating. The City should spend more resources on creating jobs in impoverished areas and creating after-school programs for youths.²²⁸ A frustrated Woodlawn resident gave the following illustration:

I can't see staying down here because it's a dead end. . . . It's a dead end because you can't find no jobs down here; you have to go outside of the neighborhood to find a job. You look up and down 63rd street and most of the stores . . . are boarded up or gone or burned up. . . . There's no job opportunities for young people. . . . You ought to see them, its all they do is get high, play basketball, walk around doing nothing.²²⁹

Between 1970 and 1985, over 250,000 manufacturing jobs vanished in Chicago.²³⁰ The City has replaced those jobs with service-sector jobs, for which inner city residents are typically underqualified to compete.²³¹ In addition, the City reduced its summer job program from 15,500 jobs in 2000 to a mere 2000 positions in 2001.²³² These numbers are completely unacceptable when one considers that the City is spending less than one percent of its \$4.3 billion budget on youth development and employment.²³³ "A community that can guarantee every teenager a jail cell but can't provide a summer job is asking for trouble."²³⁴

225. *Id.*

226. *Id.*

227. *Id.* In 1994, a group of sixty residents in the Rogers Park neighborhood began Operation Beat Feet. SKOGAN & HARTNETT, *supra* note 223, at 173. The group conducted "positive loitering" in the form of marches through the neighborhood for one to three hours each night. *Id.* In the span of six months, the neighborhood experienced a thirty-three percent reduction in crime rates for five key crimes. *Id.*

228. CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY, *supra* note 223, at 5.

229. SKOGAN, *supra* note 74, at 175.

230. *Id.* at 174. This number represented half of Chicago's industrial-sector jobs. *See id.*

231. *Id.*

232. Adele Simmons, *Summer Jobs: The Best Anti-Loitering Program*, CHI. TRIB., June 1, 2000, at 17.

233. Quintana Woodridge, Editorial, *Invest in Better Kids*, CHI. SUN-TIMES, Aug. 18, 2000, at 44.

234. Simmons, *supra* note 232, at 17.

V. CONCLUSION

The new ordinance is still unconstitutionally vague for giving police officers too much discretion. In light of the dubious history of loitering laws, and the questionable legitimacy of order-maintenance policing in general, the Illinois courts should, once again, strike down the gang loitering ordinance. Even if the ordinance survives a vagueness challenge, it should be discarded because it allows arrests without an overt act. In addition, we do not need to sacrifice liberty to ensure safety. Referring back to the hypothetical situations set out in Part I, we do not have to send Jesus's brothers to jail in order to let Mary go to the store in peace. If the City enforced the laws currently on the books, encouraged communities to form partnerships with police, and invested more money on neighborhood programs, there would be no need for a loitering ordinance such as the one at issue.