TARGETED LOITERING LAWS

Andrew D. Leipold[*]

INTRODUCTION

One of the enduring tensions in law enforcement is between the need to keep public areas clear of annoying, unnerving, and potentially dangerous people and the right to gather, converse, and idle. Attempts to resolve this tension have often taken the form of "street sweeping" statutes—loitering and vagrancy laws that prohibit certain behavior that falls short of traditional criminal conduct. Although these statutes were and are common, attempts to enforce them occasionally founder, as courts are prone to find the most extreme of these laws unconstitutionally vague.[1]

Recently the City of Chicago thought it had struck a proper balance between being specific about the prohibited behavior while still giving the police enough discretion to handle the problem. In 1992 it passed an ordinance prohibiting "criminal street gang members" from "loitering" (defined as "remain[ing] in any one place for no apparent purpose") in public with each other or with non-gang members. If a police officer observed gang members loitering, she had the authority to order the group to disperse and the individuals

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[*] Professor, University of Illinois College of Law. This paper was presented as part of a symposium entitled Race, Crime, and the Constitution sponsored by the University of Pennsylvania Journal of Constitutional Law.

[1] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 359-61 (1983) (holding unconstitutionally vague a California statute requiring loiterers to present "credible and reliable" identification, as it provided inadequate notice to potential suspects and gave police officers too much discretion); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding a Jacksonville vagrancy ordinance unconstitutionally vague, as it was too general and inclusive, providing little notice to potential offenders); Coates v. City of Cincinnati, 402 U.S. 611, 614-15 (1971) (holding that a Cincinnati ordinance making it an offense to assemble in a group of three or more people and act in a manner annoying to passers-by was unconstitutional for vagueness and for infringing on the right to assemble); *see also* Broughton v. Brewer, 298 F. Supp. 260, 271 (S.D. Ala. 1969) (holding that an Alabama vagrancy statute that listed thirteen broad definitions for the term "vagrancy" was unconstitutionally overbroad and gave inadequate notice to potential offenders); E.L. v. State, 619 So. 2d 252, 253 (Fla. 1993) (holding unconstitutionally vague and overbroad a Sanford ordinance prohibiting loitering for the purpose of engaging in drug-related activity); People v. Bright, 520 N.E.2d 1355, 1361 (N.Y. 1988) (holding that a New York statute prohibiting a person from loitering in a transportation facility was unconstitutionally vague, as it failed to give adequate notice to potential offenders and afforded police officers too much discretion).

to remove themselves from the area.[2] Failure to follow the officer's command was an arrestable offense, for which the offender could be fined, imprisoned for up to six months, and required to perform community service.[3] In an effort to further narrow the ordinance's reach, the police department developed guidelines to limit officers' enforcement discretion. Under the guidelines, only police officers who specialized in gang activity could order the dispersal, and criteria were developed to help define what was meant by a "criminal street gang."[4] The ordinance also was to be enforced only in certain areas, where the presence of gangs had a demonstrated effect on the quality of the neighborhood.[5]

Chicago hoped that its ordinance would survive a constitutional test where others had failed because of two features. Among the problems with earlier loitering statutes was that the prohibited conduct was defined so broadly that the law could in theory be applied against virtually anyone who appeared in public. In addition, the police were free to arrest without warning, and that was simply too much discretion for courts to tolerate.[6] The Chicago ordinance, in contrast, focused on a subset of pedestrians—gang members—and required that anyone punished by the statute first engage in objectively identifiable conduct: refusal to comply with a dispersal order. Surely, the City argued when challenged in court, there was no unfair surprise to people in this situation, because the police would give actual notice and a chance to comply before the law was violated.

The gamble failed, of course, as the Supreme Court in *City of Chi-*

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[2] The text of the ordinance provided in part:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

The remaining text and background of the ordinance are set forth in City of Chicago v. Morales, 687 N.E.2d 53, 57-58 (Ill. 1997), *aff'd*, 527 U.S. 41 (1999).

[3] *Id.* at 58.

[4] The ordinance defined a "criminal street gang" as:

> 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 criminal acts enumerated in [other parts of the ordinance], and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Id. The Chicago Police Department then promulgated a "General Order," which "set[] forth standards for identifying criminal street gangs and specified criteria for establishing probable cause that an individual is a member of a criminal street gang." *Id.* at 59.

[5] For a description of the Chicago Police Department's General Order 92-4, see Brief for Petitioner at 5-6, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121).

[6] Perhaps the clearest example of this problem is found in *Coates v. City of Cincinnati*. There Cincinnati passed an ordinance that said: "[i]t shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings." *Coates*, 402 U.S. at 611 n.1. Under this statute there was no opportunity for those subject to the law to bring themselves into compliance.

cago v. Morales[7] invalidated the ordinance on vagueness grounds. This decision was widely praised by civil libertarians, who had argued that loitering statutes like this give too much power to the police to decide who is breaking the law, discretion that inevitably would be exercised more often against the poor and minority-race citizens. Given the impressive amount of data now available supporting the assertion that street-level contact between police and citizens does have a racially-disparate effect,[8] these fears, and the resulting sense of relief following *Morales*, were understandable.

But as Tracey Meares, Dan Kahan, and others have argued, cases like *Morales* are not an unqualified benefit to minority-race citizens;[9] indeed, they may not be a benefit at all. Pushing against the compelling need to prevent intrusive police practices is the need to protect law-abiding citizens from the intimidating public behavior of gang members and other (overwhelmingly) young men. Because so much of the housing in this country is segregated, one impact of a greater freedom to loiter is a diminished ability of other members of the same racial and ethnic groups to enjoy public areas. *Morales* may in general be a "meaningful victory for young men of color,"[10] but for other people of color who must walk past aggressive loiterers on the street, the victory may seem pyrrhic.

Not surprisingly, Chicago rewrote its gang loitering ordinance in February 2000 in an effort to cure the vagueness identified by the Court,[11] which means that more litigation is on the horizon.[12] The revised ordinance tries to limit police discretion even further by making the standard more objective: a gang member now is loitering if he "remain[s] 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

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[7] 527 U.S. 41 (1999).

[8] *See, e.g.*, OFFICE OF THE ATTORNEY GENERAL OF NEW YORK STATE, REPORT ON THE NEW YORK CITY POLICE DEPARTMENT'S "STOP & FRISK" PRACTICES 92-135 (1999), *available at* http://www.oag.state.ny.us/press/reports/stop_ frisk/stop_frisk.html.

[9] *See* Tracey L. Meares & Dan M. Kahan, *The Wages Of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 211-14 (criticizing Illinois Supreme Court decision for striking down anti-loitering statute as not in the best interest of defendants or society); *see also* Brief of Amici Curiae Chicago Neighborhood Organizations, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121) (brief joined by Professors Meares and Kahan).

[10] *See ACLU and the Public Defender Hail U.S. Supreme Court Decision Holding Chicago's 'Anti-Gang Loitering' Law Unconstitutional*, PR NEWSWIRE, June 10, 1999, LEXIS, News Library, PR Newswire File.

[11] *See* CHICAGO, ILL., MUNICIPAL CODE §§ 8-4-015 to -017 (2000) (added Feb. 16, 2000).

[12] At the time of passage, the American Civil Liberties Union promised to challenge the new ordinance in court. *See* Gary Washburn, *City OKs Gang Law, Expects Challenge*, CHI. TRIB., Feb. 17, 2000, § 2, at 1. As of August 2000, the police had issued thirty-nine dispersal orders and made four arrests under the new ordinance. The ACLU still said that it opposed the new law but had not yet taken legal action. *See* Pam Belluck, *Chicago Makes Another Effort to Disrupt Gangs*, CHI. TRIB., Aug. 30, 2000, § 1, at 22.

illegal activities."[13]

Perhaps the revised ordinance will survive a vagueness challenge; the revisions track a suggestion by Justice O'Connor in her concurring opinion in *Morales* on ways to sharpen the ordinance.[14] But even if the new ordinance survives legally, it is far from clear whether it will significantly reduce the problem of excessive discretion. After *Morales*, it also is uncertain how much more focused these statutes can be made while remaining adequate to the task. The hope of this essay is to recast the problem and to suggest a modified approach.

I. THE BACKDROP

A. The Problem

The problem of loitering is as old as the Republic, although its contours have changed over the years.[15] The poor asking for money and the homeless seeking a place to sleep have always troubled residents, particularly those living in the close quarters of a city.[16] Charitable and civil law efforts ease some of the problems, but for the aggressively idle or the overtly unpleasant, the usual response has been the criminal law.[17] Although loitering and vagrancy statutes typically specify at least some prohibited acts, usually the conduct is not itself harmful. Instead, the prohibited conduct is often described in a way that correlates to the behavior of the poor and the dispossessed, making much of their public behavior subject to police oversight.[18]

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[13] §§ 8-4-015(a), (d)(1) (emphasis added). The revised ordinance also attempts to resolve an unsettled claim of vagueness over the meaning of "dispersal." Some of those challenging the original ordinance claimed that the police officer's power to order gang members to "disperse and remove themselves from the area" was excessively vague (How far must a person remove himself from the area? How long must he stay away?). The revised ordinance provides that those subject to a dispersal order must not "engage in further gang loitering within sight or hearing of the place at which the order was issued during the next three hours." *Id.* at (a)(iii).

[14] *See* Morales, 527 U.S. at 66 (O'Connor, J., concurring in part and concurring in the judgment) ("If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued."). Justice O'Connor's views on vagueness are critical here: she was joined in her opinion by Justice Breyer, and there were three dissenters who would have upheld the ordinance as originally drafted.

[15] Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public—Space Zoning*, 105 YALE L.J. 1165, 1210 (1996) ("English vagrancy statutes, initially enacted in the fourteenth century to control wages and prevent idleness, had evolved by the time of the American Revolution into a hodge-podge of controls on minor public offenses, including begging and sleeping in the open.").

[16] For "a brief history of street disorder and skid rows," see *id.* at 1202-19.

[17] For an insightful discussion of this subject, see Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997). *See also* Ellickson, *supra* note 15, at 1170.

[18] In case there was any doubt in the minds of the police that loitering statutes were to be enforced primarily against the poor, the drafters of some statutes were explicit. Consider the loitering ordinance in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 158 n.1 (1972), which

Ordinances like those in *Morales* have a much more focused target in mind: young males who are most likely to associate with gangs, whether as members or otherwise. Singling out this group is both predictable and rational, since its members commit a disproportionate amount of crime in general, and the street-level crimes of theft, drug possession and sale, assault, and robbery in particular.[19] It also comes as no surprise, however, that these young men are overwhelmingly poor and disproportionately members of racial and ethnic minorities. Poor education, the resulting lack of realistic career paths, ongoing effects of bias, and lack of parental and other role models mean that too many angry young men have too much time on their hands and too many friends who share their situation. The consequence is too often a group of "brazen, disorderly and visibly lawless persons on the public ways [who] intimidate[] residents, detract[] from property values, and ultimately destabilize[] communities."[20]

In most contexts the generalized threat of future criminality is not a basis for intervention; the police must either wait until a crime is at-

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made outlaws of certain members of the poor ("persons who go about begging") and the unemployed ("persons able to work but habitually living upon the earnings of their wives or minor children"). When it came time to describe the actual conduct that was bothersome, however, more care was required. Thus, not all gamblers, drunkards, street walkers, or those who frequented houses of ill fame were targeted: only "common" gamblers, "common" drunkards, and those who frequented prostitutes while "neglecting all lawful business" were subject to arrest. *Id.* at 156-58 & n.1 (setting forth text of ordinance).

Although the Jacksonville ordinance was invalidated, its terms are not unique. *See, e.g.*, 11 DEL. CODE ANN. tit. 11, § 132(6) (1974) (making it a violation for a person to "loiter[], congregate[] with others or prowl[] in a place at a time or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity, especially in light of the crime rate in the relevant area;" if practicable, peace officer must "afford the accused an opportunity to dispel any alarm which would otherwise be warranted" before making an arrest).

[19] Men make up nearly 80% of those arrested for all crimes, and over 75% of all street-level crime except larceny (65%) and prostitution/commercialized vice (40%). *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998 340 tbl.4.8 (1999) [hereinafter SOURCEBOOK 1998]. Roughly 45% of those arrested are under age 25. *Id.* at 339 tbl.4.7.

[20] *See* Brief for Petitioner at 9-10, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121). Recently the California Supreme Court recounted the vivid declarations made by the City of San Jose in its efforts to obtain an injunction against street gangs. The City described the problems in one of its neighborhoods:

> Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Racksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar .... Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti .... The people of this community are prisoners in their own homes.

People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 601 (Cal.), *cert. denied*, 521 U.S. 1121 (1997).

tempted or engage in costly monitoring or undercover work to intervene to prevent the crimes. Much of the crime engaged in by gang members, however, stubbornly defies these efforts. The opportunistic loiterer who is selling drugs, committing small thefts, spray-painting graffiti, or intimidating pedestrians is often in no hurry. He can wait until the police pass by and wait for another customer or another victim, making monitoring extremely expensive.[21] Undercover work is also difficult, in part because infiltration of groups is risky and in part because some of the crimes involve little advanced planning. Finally, waiting for the crimes to occur and then investigating is a frustrating and often fruitless enterprise. Victims are reluctant to testify against gang members for all of the obvious reasons.[22] More importantly, residents will often simply change their behavior—they will not walk in those city blocks, will not go out after dark, or in extreme cases, will move out of the neighborhood entirely.[23]

Given these difficulties, the power to disperse a troublesome group as contemplated by the Chicago ordinance is often the best option for addressing the residents' quality of life concerns. As an abstract matter, this is a workable, even desirable system. All have the right to enjoy the streets and the parks, but none has the right to interfere with the enjoyment of public areas by others. Dispersion is a relatively mild and inexpensive sanction but in many cases a highly effective one. Official authority to dispose groups of their turf helps squelch the notion that the groups "own" the area and often emboldens residents to cooperate with authorities to keep areas safe.[24]

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[21] As the Chicago City Council noted in the preamble to its revised anti-gang loitering ordinance:

> Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know police are present, while maintaining control over identifiable areas by continued loitering .... When police officers observe individuals engaging in loitering and other suspicious activity they are often unable to make an arrest, even though the persons engaged in that behavior will resume trafficking in narcotics and controlled substances as soon as the police depart.

Revised Anti-Gang Ordinance at 1-2 (copy on file with author).

[22] At the hearings on the Chicago ordinance, there was testimony that "community residents are often afraid to file formal complaints, serve as witnesses, or take other steps necessary to prosecute criminal activity because of concerns for their own safety or the safety of their family members or property." Brief for Petitioner at 3, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121). Even when cities take the less confrontational route of seeking injunctions against gang activity, citizens remain fearful of complaining. *See Gallo*, 929 P.2d at 602 (recounting city's findings in dealing with gang problems, including that "[v]erbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang's illegal activities"). As a result, when a city files a nuisance action against gangs, declarations by affected citizens are often filed under seal to prevent retaliation. *See infra* notes 40-47 and accompanying text (describing civil efforts at gang abatement).

[23] For a discussion of the law enforcement problems presented by gang loitering, see Brief of Amicus Curiae Los Angeles County District Attorney at 14-18, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121).

[24] The classic discussion of how "quality of life" laws, which are designed to control low-level, marginally criminal behavior, have a large influence on a community is found in James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. For an up-

What confounds this solution is that the discretion given to the police is inevitably quite broad. Identifying those who loiter in a threatening or unpleasant manner necessarily calls for a great deal of judgment, and the solution of dispersal (potentially followed by arrest) is a crude tool. The guilty, the near guilty, and the wholly innocent can get swept up in this remedy, disrupting legitimate activities as easily as illegitimate ones. Most police officers do not plan the intervention this way, but confronting and ordering a group to disperse can be dangerous, making it understandable that, when the police do intervene, they are looking for a complete, macro solution and not a debate on whether the current gathering is comprised in significant part of constitutionally-protected activity.

And of course, the sharp edge of excessive discretion is its tendency to be exercised in a racially unbalanced manner. It is increasingly common ground that young Black and Hispanic men are disproportionately targeted by police for discretionary arrests, traffic stops, *Terry* stops, and other forms of police intervention.[25] Some of this bias is deliberate, much of it is unconscious, but all of it can cause harm, particularly to the law-abiding people about whom unfair assumptions of criminality are made.[26]

So when a *Morales*-like ordinance comes along that rests nearly complete discretion in the hands of the police, courts are properly nervous. As scholars have noted, every statute gives police the ability to enforce the law in an arbitrary way, but statutes that rest too much subjectivity in the police virtually invite improper discrimination.[27] Police officers are probably no more free of conscious and unconscious racial bias than the community at large, and so when given un-

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dated discussion of the subject, see GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996). *See also* Livingston, *supra* note 17, at 578-85.

[25] For empirical evidence that supports this belief, see OFFICE OF THE ATTORNEY GENERAL OF NEW YORK STATE, *supra* note 8. *See also* George Kelling, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *"Broken Windows" and Police Discretion* 1 (1999) ("Many civil libertarians and advocates for the homeless, for example, oppose order maintenance because they believe it infringes on the liberties of selected populations .... Vagrancy and loitering laws, for example, have been used to deny minorities their rights and to abuse citizens, especially African-Americans.").

[26] *See* DAVID COLE, NO EQUAL JUSTICE 16-55 (1999); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999). For a particularly vivid description of the problem, see Paul Butler, *"Walking While Black": Encounters with the Police on My Street*, LEGAL TIMES, Nov. 10, 1997, at 23.

The harm to law-abiding citizens caused by police stereotyping is hard to measure. One indicator of its effects, however, is the fear of being falsely arrested. According to one survey, African-Americans are more than two and one-half times as likely to fear a false arrest as whites. SOURCEBOOK 1998, *supra* note 19, at 111 tbl.2.29 (43% of blacks and 16% of whites over the age of eighteen are "sometimes afraid that the police will stop and arrest [them] when [they] are completely innocent").

[27] *See, e.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212-19 (1985); *see also* Livingston, *supra* note 17, at 608-18.

fettered choices about which groups to disperse and arrest, we would expect a certain percentage of those actions to reflect those biases.[28]

We are left, then, with police who are severely hampered in their ability to prevent troublesome, threatening group activity unless they can intervene and disrupt a group before a crime occurs. A statute that allows this type of random intervention is problematic, however, because it leaves the police free to operationalize their biases, conscious or unconscious, by unfairly targeting, dispersing, and arresting racial minorities and other disfavored groups. What is needed is a different legal structure, one that is faithful to *Morales*, that would allow the former while minimizing the opportunity for the latter.

B. The Limits of Morales

There is much to like about the Supreme Court's opinion that invalidated the Chicago ordinance. Most importantly, it shows the Court taking seriously the concern of discriminatory enforcement of the criminal law. Missing from the majority and plurality opinions were the expected statements about the interests of effective law enforcement,[29] and the often unstated assumption that police are presumed to act properly. There have now been several cases where the Court has struck down loitering or vagrancy-like statutes, each time being explicit that the fear of discriminatory police enforcement is the primary problem with vague laws, even more so than the fear of unfair surprise.[30] More specifically, in each of these cases the Court has shown a sensitivity to the risk that the poor and racial minorities will be unfairly targeted by these laws.

The Court's heightened concern in these cases is welcome, but puzzling. *Morales* was a close case with compelling arguments on each side, and for the Court to uphold the interests of the gang members and reject those of the people who must live with the street disorder (to put the case in slanted terms) was mildly surprising.[31]

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[28] *See* Roberts, *supra* note 26, at 806 ("Police officers are particularly notorious for using race as a proxy for criminal propensity.").

[29] *See, e.g.*, California v. Acevedo, 500 U.S. 565, 574 (1991); New York v. Quarles, 467 U.S. 649, 655 (1984).

[30] *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (explaining that vagueness doctrine is designed both to prevent unfair surprise to those subject to the law and to prevent discriminatory enforcement by police, with "the more important aspect [being] 'the requirement that a legislature establish minimal guidelines to govern law enforcement'" (citation omitted)).

[31] Fears of discriminatory enforcement were not the only problem with the *Morales* ordinance. There was obviously some vagueness in the ordinance, and a chance (relatively remote) that otherwise innocent people would be unfairly surprised by the manner in which the law was enforced. In particular, the Court was troubled by the lack of precision in the term "loiter." The ordinance defined it as "to remain in any one place with no apparent purpose," and many Justices thought this standard created too great a risk that people of ordinary intelligence would have to guess at when their purpose was "apparent." But there is little doubt that the heart of the *Morales* holding was the fear that the police would use sweeping discretion in ways that would harm disfavored groups.

There have been many criminal procedure cases over the last thirty years where there have been even greater risks of discriminatory police conduct, yet the Court has often seemed indifferent to the potential impact.[32] Within the last few terms, cases like *Whren*, *Armstrong*, and *Wardlow*[33] have put tremendous discretion in the hands of police or prosecutors, yet the Court was unmoved by direct arguments about the racial effect of the decisions that were ultimately made.

There are many possible explanations for the Court's sensitivity in loitering law cases, some charitable—the Court just finds these types of laws unusually ripe for abuse—others less so. Perhaps the best explanation for the Court's behavior, however, reflects more administrative concerns than racial ones. It may be that *Whren*, *Armstrong*, *Wardlow*, and now *Morales* can be viewed as a piece, with the unifying theme that the Court does not want routine disputes over potentially race-based motivations to play themselves out in court. Trying to untangle the motivations of individual decision-makers may be too frequent, too complex, too imprecise, and too ugly to make the case-by-case method a palatable solution. Under this view, judicial aversion to the issues sometimes results in setting impossibly high standards (*Armstrong*), other times in making tests objective so that evidence of motive becomes irrelevant (*Whren*). And maybe, when there is no other way to avoid potential for huge numbers of recurring claims based on race—recall there were 45,000 arrests under the original Chicago ordinance[34]—it means getting rid of a statute entirely.[35]

This explanation is not completely satisfying, since the power to invalidate an entire statute is a blunt and drastic measure. But to the extent the idea has explanatory power, it offers an insight into the future of loitering laws. Legislatures will continue to refine and narrow these ordinances,[36] but current reform efforts seem directed only at sliding the balance between the need for police discretion and the fear of police bias. But perhaps *Morales* is sending a different message. If the courts are trying to bring the discretion of loitering laws

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[32] For a diverse discussion on this point, see Conference, *Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567 (1996). *See also* Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?* 62 IND. L.J. 273 (1987).

[33] Whren v. United States, 517 U.S. 806 (1996) (holding that for Fourth Amendment purposes, police officer's motivation for making traffic stop is irrelevant); United States v. Armstrong, 517 U.S. 456 (1996) (holding that claim of racial bias in prosecution decision requires proof of discriminatory intent; defendant must make significant threshold showing of bias to obtain discovery); Illinois v. Wardlow, 528 U.S. 119 (2000) (holding that flight from police in high crime area can support finding of reasonable suspicion to justify a *Terry* stop). *Whren* and *Armstrong* are discussed below in Part III.B.

[34] *See* Brief for Petitioner at 16, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121) ("[W]e estimate that some 45,000 orders to disperse were issued under the ordinance and obeyed, and nearly the same number of arrests were made of those who failed to move on after being ordered to do so.").

[35] My thanks to Sharon Beckman at Boston College Law School for suggesting this line of analysis.

[36] *See supra* note 13 and accompanying text (discussing revised ordinance).

within judicially manageable limits, perhaps the law should focus more on the *identity* of those who should be dispersed, rather than on the amorphous conduct that causes us concern. Singling out gang members for special treatment was a halting step in this direction, but perhaps there is room for refinement, one that would involve the courts themselves in the targeting process.

II. A PROPOSAL

In designing a system that would channel discretion while still allowing early police intervention, the hardest part is making valid distinctions among the range of people who are now targets of street-sweeping laws. Some of the young men who spend time on the street will commit crimes, most will not. Erring on the side of caution (or less charitably, on the side of flexing their muscles) the police, we fear, will sweep too broadly, disbanding or arresting the inchoate criminal and the non-criminal alike, often using race as a proxy for this distinction.

A second problem is that in the absence of evidence that a crime is imminent, the prospective criminal has precisely the same right to be free of police intrusion as any other citizen, meaning that the officer's authority to act against loitering is at its lowest constitutional level. To justify intervention at this stage, the police must either spend huge amounts of time monitoring behavior, or else be armed with a broad statute that provides a facially legitimate way to disrupt incipient crime.

A final problem is that we trust the police less than we trust other parts of the criminal process, namely prosecutors and judges. There are too many police officers to ensure quality control in decisionmaking, the police necessarily make quick and fact-specific decisions that are hard to reconstruct later, and they are by training and perhaps temperament more prone to strike the balance in favor of crime control and against personal freedom. There are reasons, often good ones, for these qualities, and judges and prosecutors are not pristine in their own decisionmaking. But in constructing a better loitering law, we would prefer at the threshold to have someone other than the police make some of the discretionary decisions.

This combination of problems suggests a solution. When possible, we should leave to the courts the task of identifying those who may not loiter, and we should limit those identifying opportunities to cases where the targets' rights are at their lowest and the authority to intervene is at its highest. Stated differently, we should target for intervention those who already have broken the law, are already under the court's supervision, and who already have the fewest rights of any non-incarcerated citizen.

The proposal would work like this. After a conviction for any group or gang-related crime, the court should impose as a condition

of the sentence that while the defendant is not incarcerated, he must for a certain time avoid specified places, certain people, or both. Failure to do so would constitute a violation of the sentence, which could result in any incarceration that was deferred in the conditional sentence for the original crime. When the police see the person on conditional release in a place where he should not be, or with people with whom he should not associate, the officer would have the ability to cause the person to disperse or be subject to arrest. In short, the police should be given the authority that was (and is) extended in the Chicago ordinance, but the law should *only* reach those who have been previously labeled by the court as someone whose presence in certain places and with certain people creates an unacceptable risk.[37]

The feasibility of the plan depends on several assumptions. The first is that limiting the police's street-sweeping powers to "targeted" individuals (those who have been ordered by a court not to loiter) would be nearly as effective as the broader, Chicago-style statutes. It is hard to know how valid this belief is, but it is intuitively appealing. A large percentage of the people who loiter in ways that cause public disruption have been through the criminal system before, and thus have been or are at the time subject to restraints on their liberty.[38] Judges would thus have the opportunity to select those who seem particularly likely to repeat that behavior, and just as importantly, to induce others to behave in a similar way. Every group has leaders and followers, and while the banishment of some leaders from the group could result in others filling the leadership vacuum, in many cases the removal of the head will cripple the body. Prosecutors recognize this feature when targeting the heads of organized crime families, just

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[37] This authority already exists in the federal courts and in some states. *See, e.g.*, 18 U.S.C. § 3563(b) (Supp. 1998); ME. REV. STAT. ANN. tit. 17-A, § 1204(2-A)(F) (West Supp. 1999). Other states have extremely broad probation requirements that could be construed to cover the restrictions proposed here. *See, e.g.*, FLA. STAT. ANN. § 948.03 (West 1996); IOWA CODE ANN. § 907.6 (West Supp. 2000) ("Probationers are subject to the conditions established by the judicial district department of correctional services subject to the approval of the court, and any additional reasonable conditions which the court or district department may impose to promote rehabilitation of the defendant or protection of the community.").

The requirement that the prior offense be group or gang-related would not be strictly necessary; judges typically have a great deal of discretion in fashioning sentencing conditions to fit the offender, rather than just the offense. *See* NEIL P. COHEN & JAMES J. GOBERT, THE LAW OF PROBATION AND PAROLE 188 (1983) (noting broad discretion in trial courts and parole boards to impose conditions); *see also* Burns v. United States, 287 U.S. 216, 220 (1932) (in making probation decision, "[i]t is necessary to individualize each case, to give that careful, humane, and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion."). But as discussed below, banishing a defendant from a certain area raises constitutional concerns, making it prudent to limit the court's power to cases where there is a link between the restriction and the crime of conviction. *See* Part III.A below.

[38] *See Hearing on Gang Activity Before the Senate Comm. on the Judiciary*, 105th Cong. 13 (1997) [hereinafter *Hearing*] (statement of Stephen K. Wiley, Chief, Violent Crimes and Major Offenders Section, FBI) ("Consistently, more than half of all gang members tend to be repeat offenders.").

as prison officials recognize this when they transfer gang leaders to other facilities.[39]

A second assumption is a practical one: that those who are targeted by the court will be identifiable by the police once they are back on the street. At first blush this problem looms large, but on reflection there are several reasons to think it would not be fatal. Several jurisdictions are already experimenting with targeted legal restraints, and their experience is instructive.[40]

Consider, for example, the ongoing efforts to use civil injunctions to restrict gang activity. Several California cities [41] have brought civil nuisance actions against identified gang members, seeking both geographic and associational restrictions on specific individuals.[42] If the injunction is imposed, the police have the power to arrest those who are found in the prohibited area or associating with other identifiable individuals. Violators can then be prosecuted for statutory criminal contempt, a misdemeanor.[43]

As with the current proposal, identification of those who are under civil restraint has been an issue. In injunction cases, the problem is addressed in several ways. First, there is a belief that the officers who regularly patrol an area come to know those who should not be in the prohibited zone.[44] Second, since the injunctive remedy is tied

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[39] *See* U.S. DEPT. OF JUSTICE, PRISON GANGS, THEIR EXTENT, NATURE AND IMPACT ON PRISONS 64-65 (1985) (discussing frequent use of power to transfer and isolate gang leaders as strategy to disrupt prison gang activity); *see also infra* note 99.

[40] For an overview of various efforts to use civil remedies to combat gang problems, see Gregory S. Walston, *Taking the Constitution at Its Word: A Defense of the Use of Anti-Gang Injunctions*, 54 U. MIAMI L. REV. 47 (1999); Christopher S. Yoo, Comment, *The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances*, 89 NW. U. L. REV. 212, 217 (1994) (discussing use of injunctions in anti-gang efforts in seven California cities).

[41] *See* Yoo, *supra* note 40, at 217-25 (describing injunctions); *see also* People *ex rel.* Gallo v. Acuna, 40 Cal. Rptr. 2d 589, 592 n.1 (Ct. App. 1995), *review granted, depublished by* 899 P.2d 66 (1995), *superseded by* 929 P.2d 596 (1997) (setting forth injunction issued in San Jose, California); Livingston, *supra* note 17, at 553-55 (describing Norwalk, California, experience with civil injunctions against gangs).

[42] A San Jose injunction provided in part that certain named gang members were prohibited from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known 'VST' (Varrio Sureno Town or Varrio Sureno Treces) or 'VSL' (Varrio Sureno Locos) member." *See Gallo*, 40 Cal. Rptr. 2d at 592 n.1. Other injunctions preclude certain identified gang members from appearing in a several block area that was particularly plagued with undesirable street activity. Telephone Interview with Carol Overton, San Jose City Attorney's Office (Mar. 16, 2000) [hereinafter Overton Interview] (notes on file with author). My thanks to Ms. Overton for her valuable assistance. For an extended discussion of the California experience, see Walston, *supra* note 40.

[43] Overton Interview, *supra* note 42; Walston, *supra* note 40, at 57-58. The use of civil remedies to solve problems traditionally managed through the criminal law is itself controversial, in part because injunctions and similar actions are "unencumbered by the rigorous constitutional protections associated with criminal trials, such as proof beyond a reasonable doubt, trial by jury, and appointment of counsel." *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS. L.J. 1325, 1329 (1991); *see also* Livingston, *supra* note 17, at 640-45 (discussing implications of using civil injunctions).

[44] Overton Interview, *supra* note 42. In San Jose, according to Ms. Overton, between thirty-

almost exclusively to gang activity, there are often special police gang units whose members would be in a better position to know and monitor individual gang members.[45] (Chicago had adopted such a scheme in enforcing its original anti-gang loitering ordinance.)[46] Finally, the city of San Jose, and perhaps others, list the civil restrictions found in the injunctions in the same place as they do outstanding arrest warrants; if a police officer has questions or doubts about whether a person is violating the injunction, she can check by radio to see if a person is under a legal restriction, just as she would check to see if there were outstanding wants or warrants.[47]

These procedures should be sufficient to help police enforce the targeted loitering law proposed here. Note, however, that greater police training would not be the only alternative; courts could also decide to label offenders in a more literal sense. Similar to what is now done with those subject to home arrest,[48] those offenders who are subject to geographic and associational limits could be required to wear a wrist or ankle bracelet, not to permit their whereabouts to be continuously tracked, but to identify them as a person under geographic and associational restrictions. Although this type of public labeling is controversial,[49] there does not appear to be any insurmountable legal barrier to its use.[50]

Once a person is subject to this kind of restriction, the police should then have the ability to require the person to leave the group, leave the neighborhood, or face arrest. Police would have discretion in making this decision, of course, and might abuse it. The goal here is not to eliminate discretion, however (an impossible and probably

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eight and fifty gang members have been subject to injunctions. Prohibited areas have been four square blocks in two instances, and nine square blocks in another. *Id.*

[45] *Id.*

[46] In regulations passed to guide enforcement of the now-invalid Chicago gang ordinance, the city restricted the enforcement of the ordinance to members of the police gang crime section and other designated personnel. *See* Brief for Petitioner at 6, Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121).

[47] Overton interview, *supra* note 42.

[48] *See* 18 U.S.C. § 3563(b)(19) (Supp. 1998) (permitting courts to require probationers to wear an electronic signaling device).

[49] Requiring someone to publicly identify himself as a person under sentence or court supervision gives rise to concerns about "shaming," a topic that has generated a lively and sophisticated legal discussion. For a sample of the legal literature on this subject, see Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); Eric Rasmusen, *Stigma And Self-Fulfilling Expectations Of Criminality*, 39 J.L. & ECON. 519 (1996); James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998).

[50] Although some appellate courts have reversed the imposition of shaming conditions on probationers, they often do so because the trial judges lack the statutory authority to impose such conditions. For a discussion of the relatively sparse case law on this topic, see Aaron S. Book, Note, *Shame On You: An Analysis Of Modern Shame Punishment As An Alternative To Incarceration*, 40 WM. & MARY L. REV. 653, 660-70 (1999). *See also* Phaedra Athena O'Hara Kelly, Comment, *The Ideology Of Shame: An Analysis Of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 787-803 (1999).

undesirable task),[51] but rather to restrict it to cases where the person has already shown a propensity toward criminality and has already been so adjudged by someone other than the officer on the street.

III. ADVANTAGES, QUESTIONS, AND COSTS

There would be at a least two advantages to this proposal over traditional loitering laws. The first is that there would no longer be a need to define "loitering." Police would have the power to disperse and ultimately arrest certain individuals who are likely to cause street-level disruption, not because they are loitering (a tricky concept, even if we know it when we see it),[52] but because they have no business being in the area to begin with. This not only helps remove the arbitrariness from an officer's decision to move someone along, but also helps protect those who are *not* living under similar restrictions. Police anti-loitering powers would be limited to controlling those whose movements are already regulated by court order.[53]

A second advantage is that the proposal provides an intermediate step between releasing defendants and incarcerating them. One frustration in dealing with young offenders is that the sanctions for low-level criminality often seem trivial to them at first, then suddenly become extremely harsh.[54] More generally, the problem of over-

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[51] *Cf.* Livingston, *supra* note 17, at 637 ("The problematic character of police discretion in order maintenance does not disappear, however, merely because conduct prohibitions are reasonably specific.").

[52] There is an odd passage in the *Morales* plurality opinion on this point. Justice Stevens acknowledges the Illinois Supreme Court's conclusion that the term "loiter," standing alone, "may have a common and accepted meaning," but concludes that the term as defined by the Chicago ordinance does not. City of Chicago v. Morales, 527 U.S. 41, 56 (1999). The implication is that if the City had left the term undefined it might have survived the vagueness challenge, a counter-intuitive notion. In any event, the City apparently decided not to test the suggestion—in its revised ordinance, it defines "loitering" in greater detail than in the invalidated version. *See supra* note 13.

[53] The proposal obviously would not limit police powers over otherwise illegal or high-risk conduct, including loitering with intent to commit an offense or loitering in a prohibited area. Many states have passed these more-focused laws, which in general have been less vulnerable to vagueness attacks. *See, e.g.*, N.J. STAT. ANN. § 2C:33-2.1 (West 1995) (loitering for purpose of illegally using, possessing, or selling controlled substance); N.Y. GEN. BUS. LAW § 396-w (McKinney 1996) (loitering for the purpose of soliciting passengers for transportation); R.I. GEN. LAWS § 11-34-8, 1956 (Michie 1994) (loitering for indecent purposes); S.C. CODE ANN. § 24-1-270, 1976 (Law. Co-op. 1989) (loitering on correctional facility property); W. VA. CODE ANN. § 61-6-14a (Bender 2000) (loitering on school property). *Compare* E.L. v. State, 619 So. 2d 252, 252-53 n.2 (Fla. 1993) (invalidating for vagueness and overbreadth an ordinance making it a crime "to loiter in or near any public street, right of way, or place open to the public . . . in a manner and under circumstances manifesting the purpose to engage in drug related activities") *with* City of Tacoma v. Luvene, 827 P.2d 1374 (Wash. 1992) (en banc) (sustaining constitutionality of similar ordinance). This proposal addresses only the most troublesome type of loitering statute, that which makes loitering simpliciter grounds for police intervention.

[54] *See* Nick Jackson, Comment, *Internal Exile: A Proposal For A Federal System*, 1990 DET. C.L. REV. 1085, 1105 ("One reason that intuitively explains why youthful offenders do not have high expectations of punishment is the fact of their youth itself. These offenders generally do not

incarceration, especially of young men of color, is well documented and troublesome.[55] Providing an intermediate step—banishing a defendant from his neighborhood and prohibiting him from associating with his gang—may provide some of the incapacitative benefits of prison without some of the malignant side effects.

There would be other benefits,[56] but a discussion of the costs seems more pressing. Two questions suggest themselves: is the proposal constitutional, and even if it is constitutional, do the benefits outweigh the harms?

A. The Constitutionality

Limiting a person's ability to travel to certain areas or associate with certain people would undoubtedly raise constitutional challenges. Ultimately, however, the most instinctive sources of concern—the First and Fourteenth Amendments—should be no barrier. The more serious concern is the similarity between the proposal and the practice of banishing those convicted of crimes.

Ordering a person to stay out of a certain area is a facial restriction on the right to travel. "[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution,"[57] and a court order prohibiting a person from being present in a certain block or certain part of a city plainly limits that mobility.[58]

But this right is not nearly so broad as its title suggests. Courts have long had the authority to impose geographic limits on convicted defendants as a condition of probation, as have executive agencies in setting parole conditions. The federal probation statute, for example, provides that as a condition of release, courts may order that a

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have sufficient hard-time experience to fear the criminal justice system.").

[55] In 1996 roughly 774,000 African-Americans, about seven percent of the black population, were held in prisons or jails in this country. *See* SOURCEBOOK 1998, *supra* note 19, at 480 tbl.6.24. In contrast, there were roughly 822,000 whites held in prison or jails that same year, slightly more than one percent of the white population. *Id.* Different rates of crime commission probably explain some, but not all, of the disparity. For a discussion of how drug laws, sentencing schemes, and prosecutorial decision making influence these numbers, see COLE, *supra* note 26, at 141-53.

[56] Actually, other benefits would come from *any* proposal that split the difference between having a *Morales*-type ordinance and no loitering law at all. Allowing some police intervention would improve the quality of life in many neighborhoods, while limiting the law's reach to those convicted defendants targeted by the courts would reduce the costs of misused police discretion. Whether this middle ground strikes an appropriate balance (a more difficult question) is discussed below.

[57] Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); United States v. Guest, 383 U.S. 745, 758 (1966); *see also* Edwards v. California, 314 U.S. 160, 173-74 (1941).

[58] *See, e.g., In re* White, 158 Cal. Rptr. 562 (Cal. App. 3d 1979) (finding unreasonable a probation condition forbidding probationer from being in specified "map areas" at "any time, night or day"); *see also* People v. Beach, 195 Cal. Rptr. 381, 385-87 (Cal. App. 3d 1983) (finding probation condition that required defendant to relocate from her home overbroad and an unreasonable interference with the right to travel).

defendant "refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons," that he "reside in a specified place or area, or refrain from residing in a specified place or area," and that he "remain at his place of residence during nonworking hours."[59] Defendants who challenge these conditions have had mixed results, but the prevailing judicial view is that as long as the prohibited area is relatively small and specific, the condition will be upheld. Thus, for example, sentencing conditions that bar a defendant from being present near schools,[60] near a naval base,[61] in places where liquor is sold,[62] or in a specific store[63] have been affirmed.

In contrast, efforts to expand the prohibited zone beyond discrete areas are usually (but not always) invalidated, particularly when the reviewing court suspects that the sentencing judge was simply trying to move the defendant on to some other jurisdiction. Thus, conditions that a defendant leave the country,[64] state,[65] county,[66] city,[67] or

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[59] 18 U.S.C. § 3563(b)(6), (13), (19) (Supp. 1998); *see also* 28 C.F.R. § 2.40(a) (3), (10) (1998) (mandatory conditions of parole that defendant not leave geographic area fixed by his parole and not associate with people with criminal records without permission from parole officer); *id.* § 2.40(e) (can require as conditions of parole that parolee remain at residence during nonworking hours and wear electronic monitoring device); *id.* § 2.41 (requiring that person on parole obtain permission from commission for foreign travel); *cf.* 18 U.S.C. §3142(c)(1)(B)(iv) (1994) (ability of courts to restrict movement and association during pretrial release).

[60] *See In re* Dunn, 488 P.2d 902, 902-03 (Mont. 1971) (per curiam) (upholding sentence condition that defendant not be found near certain elementary, junior high, and high schools, and that he not be found in the company of any person under the age of 18).

[61] *See* United States v. Lowe, 654 F.2d 562, 567-68 (9th Cir. 1981) (affirming probation condition prohibiting probationer from going within 250 feet of a naval base where she had previously protested).

[62] *See* State v. Harrington, 336 S.E.2d 852, 857 (N.C. Ct. App. 1985) (upholding probation condition that defendant "[n]ot go upon the premises of any business or private club licensed by the State of North Carolina for the sale or on the premises [for the] consumption of alcoholic beverages between 8:00 p.m. and 6:00 a.m. the following day").

[63] *See* Dukes v. State, 423 So. 2d 329, 331 (Ala. Crim. App. 1982) (upholding six-month probation condition that defendant stay out of the store where she shoplifted).

[64] *See* United States v. Abushaar, 761 F.2d 954, 958-61 (3d Cir. 1985) (holding that a probation condition that probation time be served outside of the country is impermissible); *In re* Babak S., 22 Cal. Rptr. 2d 893, 897-98 (Cal. Ct. App. 1993) (holding that a probation condition that juvenile live with relatives in Iran is invalid).

[65] *See* Henry v. State, 280 S.E.2d 536, 536 (S.C. 1981) (invalidating probation condition that would have banished defendant from the state in the event of a violation); State v. Doughtie, 74 S.E.2d 922, 924 (N.C. 1953) (suspending sentence on the condition that defendant leave the state for two years is effectively banishment and therefore void); People v. Baum, 231 N.W. 95, 96 (Mich. 1930) (holding banishment from state for five years an improper condition of sentence).

[66] *See* Johnson v. State, 672 S.W.2d 621, 623 (Tex. Ct. App. 1984) (holding a probation condition that banished defendant from county invalid as not reasonably related to rehabilitation and unduly restrictive of liberty); People v. O, 321 N.Y.S.2d 518, 519 (N.Y. App. Div. 1971) (holding judge abused his discretion by revoking probation where condition violated was reentering county without permission); People v. Blakeman, 339 P.2d 202, 202-03 (Cal. Dist. Ct. App. 1959) (holding court had no authority to banish defendant from county as condition of probation).

[67] *See* State *ex. rel.* Baldwin v. Alsbury, 223 So. 2d 546, 547 (Fla. 1969) (holding improper the

certain parts of the city[68] have regularly been struck down. A few courts, however, have been more willing to export their problem citizens. Thus, a Georgia court upheld an order that banished the defendant from every county in the state except one, an area described by defendant's lawyer as a "remote, sparsely populated area" in the south-central part of the state.[69] Federal courts have also upheld as conditions of parole that the person remain outside the state for many years.[70]

This cautious exercise in line-drawing emerges from a fear of imposing a sentence of "banishment" or "exile" on the defendant. There is a long historical tradition of expelling those who violate the norms of the community,[71] but banishment has never been popular in this country as a state-imposed sanction for crimes.[72] Some states have abolished the practice in their constitutions,[73] and even when

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indefinite suspension of a sixty day jail sentence in return for defendant's agreement to leave town); State v. Jacobs, 692 P.2d 1387, 1389 (Or. Ct. App. 1984) (holding probation requirement that defendant move out of city was impermissibly broad).

[68] *See* Jones v. State, 727 P.2d 6, 8 (Alaska Ct. App. 1986) (invalidating probation condition that required person to stay out of forty-five block "high crime district" for one year); *In re* White, 158 Cal. Rptr. 562, 566 (Cal. Ct. App. 1979) (invalidating prohibition on person being in certain part of city); Almond v. State, 350 So. 2d 810, 810-11 (Fla. Dist. Ct. App. 1977) (per curiam) (invalidating requirement that person leave "Central Florida" because the condition was impermissibly vague).

[69] State v. Collett, 208 S.E.2d 472, 474 (Ga. 1974); Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 455 (1998); *see also* Flick v. State, 285 S.E.2d 58, 58 (Ga. Ct. App. 1981) (upholding probation condition of banishment from judicial district).

There are other reasons for rejecting the application of the general "right to travel" doctrine in this context. Not every geographic limit will interfere with the right to *inter*state travel, the right described in the Supreme Court's case law. *See* Shapiro v. Thompson, 394 U.S. 618, 630-31 (discussing right to travel among states); United States v. Guest, 383 U.S. 745, 758-59 (same). *But see White*, 158 Cal. Rptr. at 567 ("We conclude that the right to intrastate travel (which includes intramunicipal travel) is a basic human right protected by the United States and California Constitutions as a whole."). As described below in Part III.B., the current proposal would be limited to banishment from an area that is smaller than the political jurisdiction, and thus should not interfere with any right to interstate travel.

[70] *See, e.g.*, Bagley v. Harvey, 718 F.2d 921, 924 (9th Cir. 1983) (upholding parole condition banishing person from state, subject to a few exceptions); *cf.* Carchedi v. Rhodes, 560 F. Supp. 1010, 1013-19 (S.D. Ohio 1982). In *Carchedi*, the court upheld a parole condition that the defendant not return to Ohio for forty years, the balance of his permissible sentence. Although the court was plainly worried about the constitutionality of the banishment, it found that defendant had originally suggested this condition on his parole, had obtained his release in exchange for agreeing to leave the state, and thus would not be permitted to object. *Id.* at 1018-19.

[71] "The ancient civilizations of Babylon, Greece, and Rome employed banishment, and England made extensive use of it for centuries. By the mid-nineteenth century, however, the English lost interest in banishing citizens." Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. REV. 758, 759 (1963) (footnotes omitted).

[72] *See* Snider, *supra* note 69, 464-65 (discussing the history of banishment in Russia). Note also that a large number of settlers in the United States came because they had been banished from England. *Id.* at 462 (noting that "nearly 50,000 people were banished to America from the British Isles") (citing A. ROGER EKIRCH, BOUND FOR AMERICA 27 (1987)).

[73] *See, e.g.*, ALA. CONST. art. I, § 30 ("no citizen shall be exiled"); ARK. CONST. art. 2, § 21

states permit it,[74] the practice does not appear to be widespread.[75]

Characterizing the current proposal as "banishment" is an exaggeration; most judicial orders that would limit the defendant's choice of areas and comrades would be far more modest than an "exile" in the classic sense.[76] Many street gangs have limited areas of influence, and thus a restricted area of even several blocks will often be enough to serve the purpose.[77] But separating people from their communities shares enough worrisome qualities with banishment that a comparison is appropriate.

There have been several justifications offered for the periodic rejection of this form of sanction. Some courts have reasoned that exile is improper because it is unrelated to the purposes of punishment and thus is simply the arbitrary infliction of harm.[78] This analysis may

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("nor shall any person, under any circumstances, be exiled from the State"); GA. CONST. art. 1, § 1, ¶ 21 ("Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime"); *see also* Snider, *supra* note 69, at 465 ("Currently, there are at least fifteen states that have provisions in their constitutions explicitly forbidding the banishment of individuals from their state." (footnote omitted)).

[74] *See, e.g.*, MASS. CONST. pt. 1, art. 12 ("no subject shall be arrested, imprisoned . . . exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land"); N.H. CONST. pt. I, art. 15 (same); *see also* COHEN & GOBERT, *supra* note 37 at 261-65 (1983 & 1998 Supp.).

[75] The Supreme Court has not passed on the validity of banishment directly, although one of its early cases elliptically raised the issue. In *Cooper v. Telfair*, 4 U.S. 14 (1800), the Georgia legislature banished one of its citizens and confiscated his property for committing treason by siding with the British during the American revolution. In upholding the legislative action, the Court did not consider the exile question, but two of the four Justices who heard the case assumed that the power to banish existed. *See id.* at 19 (Paterson, J.) ("[T]he power of confiscation and banishment does not belong to the judicial authority [under the facts of this case] and yet, it is a power that grows out of the very nature of the social compact, which must reside somewhere," and thus resides in the legislature); *id.* at 19 (Cushing, J.) ("The right to confiscate and banish, in the case of an offending citizen, must belong to every government."). *Cf.* Olim v. Wakinekona, 461 U.S. 238, 252-53 n.1 (1983) (Marshall, J., dissenting) ("Whether it is called banishment, exile, deportation, relegation, or transportation, compelling a person 'to quit a city, place, or country, for a specified period of time, or for life,' has long been considered a unique and severe deprivation, and was specifically outlawed by '[t]he twelfth section of the English Habeas Corpus Act, 31 Car. II, one of the three great muniments of English liberty.'" (quoting United States v. Ju Toy, 198 U.S. 253, 269-70 (1905) (Brewer, J., dissenting))).

[76] Historically, banishment was an extremely harsh form of punishment, because removing the defendant from his land and his community often deprived him of any means of protecting himself from hostile members of other tribes or communities. *See generally* Snider, *supra* note 69, at 459-63 (discussing historical uses of banishment and transportation). As discussed below, the current proposal contemplates a much more modest (although still potentially burdensome) exclusion.

[77] This will not always be true; some gangs are extremely large, and have chapters in cities across the country. *See Hearing*, *supra* note 38, at 2 (statement of Sen. Orrin Hatch) (noting that Bloods and Crips gangs had syndicated in 118 cities, while another gang, the Gangsta Disciples, had expanded throughout the Midwest).

[78] *See* State *ex rel.* Halverson v. Young, 154 N.W.2d 699, 702 (Minn. 1967) (banishment from state as a condition of probation is "unauthorized by statute, is contrary to public policy, and is repugnant to the underlying policy of the probation law, which is to rehabilitate offenders without compromising the public safety"); Johnson v. State, 672 S.W.2d 621, 623 (Tex. Ct. App. 1984) ("banishing defendant from the county, particularly when he is broke and unemployed is not reasonably related to his rehabilitation").

be true in some cases, but in the loitering context it probably is not. Selectively removing people who have engaged in group criminality from their group and from their home turf should at a minimum remove some of the temptations and opportunities for further crime, which serves both the rehabilitative and, indirectly, incapacitative goals of the criminal law.[79] Removing the defendant from his community carries some punitive aspects as well, making it, within the limits set by the underlying crime, a legitimate penological end.[80]

A second, and related, argument is that banishment violates the Eighth Amendment prohibition on cruel and unusual punishment.[81] It appears that banishment in any meaningful sense is relatively uncommon, so as a condition of parole or probation, it is "unusual" in the sense of being rare.[82] It also is possible to imagine a court order that was so severe in its impact—one that prevented a defendant from holding any job or ever seeing his family—that it would be completely out of proportion to the harm caused by the crime of conviction.

On balance, however, this argument is unpersuasive as a matter of both logic and law. Banishment could have serious consequences for a defendant, but it is surely less cruel than the alternative sanction of incarceration. While imposing this type of restriction on a defendant is now relatively uncommon, challenges to the death penalty have shown that infrequency of application does not itself make punishment "unusual" in an Eighth Amendment sense. The Supreme Court's case law in this area, while jumbled, also makes it clear that for non-capital sentences, the legislature's discretion over the disposition of convicted defendants is extremely broad.[83] Finally, an Eighth

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[79] *See* Bagley v. Harvey, 718 F.2d 921, 925 (9th Cir. 1983) (holding that banishment from state was not arbitrary and capricious: "[o]n this record, the Commission could have reasonably concluded that a new community would be less hostile to Bagley's return to society, and that a new start in Iowa where his parents reside would contribute to Bagley's rehabilitation.").

[80] *See* Cobb v. Mississippi, 437 So. 2d 1218, 1221 (Miss. 1983) (upholding probation condition that required defendant to stay more than 125 miles away from home county, even though it meant he had to live apart from his family; "Some amount of punitive aspects of probation serve the public interest as well as the probationer's interest.").

[81] *See* Dear Wing Jung v. United States, 312 F.2d 73, 76 (9th Cir. 1962) (holding that banishment from a country as a condition of a suspended sentence is either cruel and unusual punishment or a denial of due process); *cf.* Carchedi v. Rhodes, 560 F. Supp. 1010, 1015 (S.D. Ohio 1982) (finding that banishment from state has been viewed as cruel and unusual punishment under some circumstances, but upholding parole condition on procedural grounds). For a dated but still interesting discussion of this point, see Armstrong, *supra* note 71.

[82] *Cf.* Weems v. United States, 217 U.S. 349 (1910) (finding cadena temporal cruel and unusual); *see also* Snider, *supra* note 69, at 491 ("[S]ince banishment has been used as a condition of a parole or pardon almost continuously since the founding of the Republic, a defendant cannot successfully argue that the mode of punishment is so barbaric as to shock the modern day conscience." (footnote omitted)).

[83] *See* Harmelin v. Michigan, 501 U.S. 957 (1991). Although large pieces of the opinions in *Harmelin* are plurality rather than majority views, there were five votes for the position that, except for in the most extreme cases, legislatures have free reign in setting the punishment for crimes. *See id.* at 985-88 (Scalia, J.); *id.* at 998-1000 (Kennedy, J., concurring in part and concurring in the judgment). Interestingly, it is Justice Scalia's opinion, joined only by Chief Jus-

Amendment challenge would have to overcome some strong Ninth Circuit reasoning, which found that banishment from Washington state during probation was not cruel and unusual.[84] The appeals court there correctly reasoned that because incarcerated people can be sent to other states to serve their jail terms,[85] it is less punitive, and thus within Eighth Amendment bounds, to require that parole be served outside the state.[86]

There is one other constitutional argument that causes concern. Preventing people from associating with others or congregating in certain places may rub the First Amendment the wrong way.[87] A conditional sentence ordering a defendant not to keep company with certain people implicates the rights of free speech and association; the exiled person may be prevented from gathering with friends to socialize or may have diminished ability to work with others to engage in political activity to bring about social change.[88] As one commentator explains:

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tice Rehnquist, that may provide the better basis for challenging an order banning defendants from particular areas. *See id.* at 976 (Eighth Amendment "disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed"). It seems unlikely, however, that many members of the Court would view the type of banishment imposed here as being "cruel" in a constitutional sense.

[84] *Bagley*, 718 F.2d at 925.

[85] *See* Olim v. Wakinekona, 461 U.S. 238, 248-50 (1983). In *Olim*, the Court rejected an argument that a prison transfer between Hawaii and the mainland was analogous to banishment. It concluded that "respondent in no sense has been banished; his conviction, not the transfer, deprived him of his right freely to inhabit the State .... Moreover, respondent has not been exiled; he remains within the United States." *Id.* at 248 n.9.

[86] *Bagley*, 718 F.2d at 925. *But cf.* Ray v. McCoy, 321 S.E.2d 90, 92 (W. Va. 1984) (holding that incarceration of state inmates beyond state borders violates West Virginia Constitution's ban on forced "transportation" of inmates).

[87] *See, e.g., In re* Babak S., 22 Cal. Rptr. 2d 893, 897 (Cal. App. 1993) ("Conditions of banishment affect the probationer's basic constitutional rights of freedom of travel, association and assembly.").

[88] In *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984), the Court described two related interests protected by the First Amendment freedom of association: the right to "enter into and maintain certain intimate human relationships" and the right to "associate for the purpose of engaging in those activities protected by the First Amendment," such as group political activity. *See also* City of Dallas v. Stanglin, 490 U.S. 19, 24-25 (1989) (applying *Roberts*). The Court in *Morales* was dismissive of the associational interests of the gang members. *See* 527 U.S. 41, 52-53 (1999) (plurality) (holding anti-gang ordinance "does not have a sufficiently substantial impact on conduct protected by the First Amendment to render it unconstitutional .... Its impact on the social contact between gang members and others does not impair the First Amendment 'right of association' that our cases have recognized." (citing *Stanglin*)). However, the issue may be closer than the Court suggests. While it is true that many gangs are large organizations with a loose structure and little selectivity in membership, other gangs, or subsets of gangs, may be precisely the place where disenfranchised young men form their closest associational bonds. *See, e.g.*, James Diego Vigil & John M. Long, *Emic and Etic Perspectives on Gang Culture: The Chicano Case*, *in* GANGS IN AMERICA 55, 60-66 (C. Ronald Huff ed., 1990) (discussing the importance of gangs in their members' lives). Thus, it may be that certain *types* of associations among gang members, if disrupted by law, would present a tougher First Amendment case.

> When one is banished, one is separated not only from the citizens that would most benefit from his voice, but also from the politicians that would most likely have an interest in seeing that his voice is heard. One of the inherent problems with banishment, however, is that many times it is the local politicians who are least receptive to the voice of the banished . . . .[89]

In addition, the argument continues, the rights of those in the group from which the defendant is excluded are also infringed. Just as the families of prisoners have a constitutional interest in maintaining contact with their incarcerated relative,[90] the associates of a banished person may have a constitutional interest in being able to effectively communicate with those who have been expelled.

This concern argues against sweeping exile orders, but not against the proposal *per se.* Even assuming that gang activity of the type disrupted by a dispersal order is covered by the First Amendment,[91] once again the parallel is not between a banished person and a free citizen, but rather between a banished person and an incarcerated one. The government obviously has the ability to severely limit a convicted person's familial, associational, and political rights, provided that the limits are not imposed arbitrarily and are incident to the compelling government interest in punishing those who commit crimes.[92] While it is always risky to rely on "the greater power includes the lesser" argument, here the power to incarcerate, and thus restrict or control all communications, must surely include the more limited power of preventing that person from directly communicating with at least some

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[89] Snider, *supra* note 69, at 495-96. *See generally* Terence R. Boga, Note, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space,* 29 HARV. C.R.-C.L. L. REV. 477, 494 (1994) (discussing anti-gang injunctions' impact on constitutional right to free association).

[90] *Cf.* Procunier v. Martinez, 416 U.S. 396, 409 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989) ("The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him.").

[91] First Amendment protection is not a foregone conclusion here. Compare Judge Mosk's dissent in *Gallo v. Acuna,* 929 P.2d 596, 630 n.9 (Cal. 1997) (suggesting that "[t]he right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all . . . is rooted in the First Amendment's protection of freedom of expression and association" (quoting Waters v. Barry, 711 F. Supp. 1125, 1134 (D.D.C. 1989))) with Walston, *supra* note 40, at 61-70 (arguing that street gangs are not protected associations under the First Amendment). *See also supra* note 88.

[92] *See, e.g.,* U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(c)(9) (1999) (recommending as a "standard" condition of probation that the defendant "not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer"); *see also* Pennsylvania Board of Probation and Parole v. Scott, 524 U.S. 357, 359-60, 364 (1998) (exclusionary rule does not apply to warrantless searches of parolee's residence; noting, without deciding, the state's ability to obtain waiver of the warrant requirement from an inmate as a condition of parole); Morrissey v. Brewer, 408 U.S. 471, 480 (noting that a parolee is not entitled to "the full panoply" of due process rights to which a criminal defendant is entitled); Griffin v. Wisconsin, 483 U.S. 868, 872-76 (1987) (permitting a warrantless search of probationer's home where officers only had reasonable suspicion of probation violation).

others.[93]

More pointedly, the proposal in its narrowest form contemplates only one type of communication: face to face, and in public. A defendant would not as a matter of course be restricted from talking with friends on the telephone, or from meeting with them in a non-public place, or from meeting with them outside the prohibited area.[94] A carefully drawn sentencing condition should create no more First Amendment concern than any other type of restriction now imposed.[95]

In short, the proposal is not advocating the extension of any power that does not already exist. It does advocate a more aggressive, more targeted use of the power to restrict those who have violated the law, and to do so in the context of public, gang-related behavior. Judges should be encouraged, by legislation if necessary, to impose geographic and associational limits on those who seem particularly likely to cause problems if they are allowed to return to their pre-conviction practices. Police in turn should be encouraged to develop methods for identifying and monitoring those who are under these restrictions. While great care would be required both in the courtroom and on the street to avoid constitutional pitfalls, this is no more of a requirement than should be demanded in the normal course of judicial or police work.

To say that the idea is constitutional, of course, is not to say that it is wise. The next section considers some prudential concerns.

B. The Wisdom

The proposal raises at least two related worries. First, banishing people from one area may simply shift the problem to some other

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[93] *See generally Griffin*, 483 U.S. at 874 ("To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special restrictions.'" (citation and bracketed material omitted)); Carchedi v. Rhodes, 560 F. Supp. 1010, 1015 (S.D. Ohio 1982) ("Once released on parole, a convict may not be entitled to the full range of rights accorded other citizens, and the government may impose upon the parolee certain conditions of liberty which would be unconstitutional if applied to ordinary individuals.").

[94] There may be limits on a person's ability to meet or speak with some people (convicted felons, for example) *at all* under other terms of probation or parole. *See supra* note 59 and accompanying text. This proposal is only concerned about the public loitering part of defendant's behavior, although admittedly it could add to other sentencing conditions imposed by the court or to release conditions imposed by a parole board.

[95] Case law largely supports this conclusion. *See, e.g.*, United States v. Albanese, 554 F.2d 543, 546-47 (2nd Cir. 1977) (upholding a condition that probationer associate only with law abiding citizens); United States v. Adderly, 529 F.2d 1182, 1183 (5th Cir. 1976) (upholding a probation revocation because probationer violated requirement that he associate only with law-abiding persons); Malone v. United States, 502 F.2d 554, 556-57 (9th Cir. 1974) (upholding a probation condition precluding probationer from participating in the American Irish Republican movement).

neighborhood, resulting in no net societal benefit. Second, there is a risk that the police and courts would use their power to banish for more than just disrupting gangs; they may instead use it as a crude form of social engineering, moving aggressively to drive "undesirables" from their jurisdiction and thereby bringing back in the discriminatory practices that the proposal hoped to avoid.[96]

1. *Moving the Problem*

Courts that invalidate banishment orders sometimes do so on the ground that these orders violate public policy.[97] Although often unarticulated, the reasoning behind invalidation seems to be that banning criminals from one area does not solve any crime problem but only relocates it, and that notions of comity discourage one jurisdiction from exporting its problems to another.[98]

Dumping convicted criminals on other jurisdictions is unappealing, but the concerns are probably exaggerated as there are at least two offsetting benefits. First, it seems unlikely that displaced people in general will engage in crime to the same degree as they would by remaining in their home environment. Much of the harm that is

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[96] These are not the only concerns. Targeting people as unworthy of being seen in public or in the company of others raises concerns about stigmatizing the offender, a problem that is compounded when some type of physical marking is used. *See, e.g.*, KAREN L. KINNEAR, GANGS 7-8 (1996) (discussing "labeling theory" and risk of creating self-fullfilling prophecy in identifying sources of potential anti-social behavior). There is also the concern that by labeling people to a greater degree than is now done, the proposal will be antithetical to rehabilitation. One obvious reason for anti-social conduct is the person's lack of connection with the community, and formalizing the disconnect may intensify those feelings. Removing a person from an area will prevent contacts with good influences as well as bad, and indiscriminate use of banishment could leave the person rootless, perhaps leading him to have even less concern about social rules and norms.

Nonetheless, the question is not whether the labeling is good or bad in the abstract, but whether the proposed distinction is better than the status quo. Minority race citizens need not be reminded that many people already generalize on the basis of skin color and that because a disproportionate number of young minority men commit crimes, people often become fearful and biased against *all* men in those groups, including the much larger group of law-abiding members. Labeling people—with bracelets, distinctive clothes, or otherwise—could help redraw those lines and encourage people to limit their fears to people already found to be lawbreakers, rather than to racial or ethnic groups. Nonetheless, the risks of physically labeling people make this the weakest part of the proposal, one that would require further study if the police were unable to otherwise identify those subject to court restrictions.

[97] *See* People v. Blakeman, 339 P.2d 202, 203 (Cal. App. 1959); State *ex rel.* Halverson v. Young, 154 N.W.2d 699, 702 (Minn. 1967); *cf.* State v. Doughtie, 74 S.E.2d 922, 924 (N.C. 1953) (invalidating a "road sentence" as effectively a banishment and therefore against public policy).

[98] *See* Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) ("To permit one state to dump its convict[ed] criminals into another is not in the interests of safety and welfare; therefore, the punishment by banishment to another state is prohibited by public policy." (citations omitted)); Johnson v. State, 672 S.W.2d 621, 623 (Tex. Ct. App. 1984) (noting with disapproval that "[t]he State of Georgia apparently does permit one political subdivision to dump persons it considers undesirable upon another" (citation omitted)); *cf.* Yadyaser v. State, 430 So. 2d 884, 888 (Ala. Crim. App. 1983) (affirming a probation condition requiring an Iranian national defendant to purchase a one-way ticket to Iran).

meant to be prevented by street-sweeping statutes depends on group behavior, and groups take time and some measure of trust to develop. It is unrealistic to believe that a gang member who is prevented from associating with his group or from congregating on his turf will promptly enter into the same kind of relationship and engage in the same conduct somewhere else, at least in the short term.[99]

Second, moving the problem to another part of the city or state (to the extent that it occurs) should help spread the costs of law enforcement more equitably. Randall Kennedy and others have written about the need to spread the "tax" of more rigorous police practices evenly among groups.[100] One explanation that has been offered for the majority's willingness to press for increasingly more intrusive law enforcement is that the impact of these practices is imposed disproportionately on minority groups. Moving high risk individuals to other areas, however, may lead to a wider dispersion of policing efforts, which may in turn check the enthusiasm people feel for increasingly rigorous policing methods.[101] While this would admittedly impose a cost on the outlying areas, that cost might be more than offset by the increased benefit to the law-abiding citizens of the neighborhood from which the person was banished.

Nonetheless, the fear of dumping is legitimate, and the proposal should be modified accordingly. In imposing a geographic restriction on a defendant, a judge should not have the power to exclude the person in a way that would force him outside the political division where the court resides. Thus a judge would not be able to bar a defendant from appearing anywhere in the city, county, or district under the court's supervision, thereby ensuring political accountability by forcing the sentencing area to internalize the costs associated with the defendant's dislocation. Stated differently, there should be no incentive for the court, prosecutor, and police to push the limits on

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[99] Thus, authorities often use their powers to transfer or otherwise isolate gang member inmates in dealing with gang problems in prison. *See* U.S. DEPT. OF JUSTICE, *supra* note 39, at 64-65. Although this "bus therapy" risks spreading the gang problem to other institutions, *id.* at 22, administrators apparently believe that overall the strategy is useful. *Id.* at 65. *See also supra* note 79 and accompanying text.

It also is worth noting that, in the opinion of the San Jose City Attorney's Office, the dispersal of gangs through injunctive geographic restrictions as described above has not resulted in gangs reconstituting just outside the prohibited zone. Overton Interview, *supra* note 42 and accompanying text; *see also* Walston, *supra* note 40, at 50 n.34 (noting that after gang ordinance was put in place, "crime did not shift to surrounding areas as some critics predicted").

[100] *See* Randall Kennedy, *Suspect Policy*, THE NEW REPUBLIC, Sept. 13 & 20, 1999, at 30.

[101] David Cole makes this point in a slightly different context:

> If well-to-do white people were routinely stopped, questioned, and searched, there would likely be more community pressure on the police to regulate themselves. We would likely find more sympathy within the legislative, executive, and judicial branches for protecting those subjected to such tactics. Restrictions on police behavior would soon develop. If those restrictions turned out to impede law enforcement too greatly, we would be forced as a community to reach a consensus on where the appropriate line should be drawn—*for everyone*—between crime control and privacy interests.

COLE, *supra* note 26, at 54.

the excluded zone in a way that simply exports the problem defendant to another political entity.

2. *Forced Relocation*

There is a related risk created by the aggressive displacement of gang members. History shows a troubling tendency of societies to target and drive away those who are different by moving them from the center to the fringes of the community, and eventually out of it entirely.[102] A tool that would allow the geographic or associational dislocation of disfavored group members could pave the way for those in power to use it offensively in redefining the community according to their own tastes, rather than defensively as means of combating crime.[103]

The superficial response is that the proposal contains a safeguard: that before a person can be dislocated he must commit a crime, a path no one is compelled to choose. There are obviously greater social, economic, and peer pressures on some people than others to break the law, but the existence of large numbers of people who resist those temptations belies a wholly-fatalist vision of behavior. Thus, the argument continues, even if police and prosecutors were interested in driving out certain groups, they could only do so after members of the group had been shown in court to have exhibited antisocial behavior.[104]

There is much truth in this response, but the risk remains. The danger that dislocation would become an offensive tool is relatively small under a law enforcement model of passive response to commit-

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[102] Consider that:

> many blacks migrated north in the early 1900s because of their resentment of the law-enforcement tactics in southern counties where officials were paid a bounty for every man arrested. "Large numbers of Black men were rounded up for petty infractions of the law such as littering and disorderly conduct. Others were arrested on various charges of suspicion. Heavy fines were often levied for such small violations, and frequently those who could not pay were imprisoned." Black men were arrested "when the labor market was in low supply and workers were needed for road work, ensuring that poor or working-class black males would have to spend time in prison."

Jerome G. Miller, *African American Males In The Criminal Justice System*, 78 PHI DELTA KAPPAN, June 1997, at K1, K5 (quoting Shirley Ann Vining Brown, Race as a Factor in the Intra-Prison Outcomes of Youthful First Offenders (unpublished Ph.D. dissertation, University of Michigan)).

[103] *Cf.* Snider, *supra* note 69, at 458 ("[B]anishment allows members of the judiciary and executive branches to unconstitutionally rearrange group associations, thus, violating the First Amendment. Such redistribution may be racially and politically motivated.").

[104] Professor Ellickson observes:

> While no one's will is fully free, virtually all of us have some capacity for self-control. Legal and ethical systems therefore properly subscribe to the proposition—or salutary myth—that an individual is generally responsible for his behavior. This policy, at the margin, helps foster civic rectitude.
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> To treat the destitute as choiceless underestimates their capacities and, by failing to regard them as ordinary people, risks denying them full humanity.

Ellickson, *supra* note 15, at 1187.

ted crimes.[105] But the last several years have witnessed a move to a more proactive model of policing, one that seeks to concentrate resources on problem areas and problem people. Some of these changes, such as community-based policing,[106] more random drug testing,[107] metal detectors in schools, and sobriety checkpoints,[108] can affect a large percentage of the community. Other practices, however, have a more focused impact.[109]

The most obvious example—and the most pernicious from a race standpoint—is the practice of pretextual stops. Complaints about racial profiling and stopping people for "driving (or walking) while black"[110] have been muffled by the Supreme Court's decision in *Whren v. United States*.[111] In *Whren*, the Court ruled that as long as there is an objectively reasonable basis for the police to stop a person, no inquiry into the actual reason for the stop is required. Given the high number of traffic laws, the relatively light burden required for *Terry* stops, and the Court's generous interpretation about what constitutes consent to search, it would be a particularly dense police officer who could not find some reason to briefly detain a person she had previously selected even if the reason for the stop is in fact race-based.[112] While we may have little sympathy for the person who turns out to be

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[105] For a brief but interesting history of the evolution of police discretion—how the goal in the early and middle part of the twentieth century was to achieve "reactive law enforcement" rather than proactive crime prevention—see Kelling, *supra* note 25, at 5-7.

[106] For an analysis of the evolution of policing theories, see Livingston, *supra* note 17, at 565-78. For a discussion of how "community based policing" does not necessarily translate into a less intrusive or even a more citizen-friendly law enforcement model, see Kelling, *supra* note 25, at 10. *See also* Roberts, *supra* note 26, at 775-76 ("[P]olicies that delegate to the police greater authority to maintain order are sometimes confused with a related innovation called community policing .... Although [the two] sometimes overlap ... [o]rder maintenance policing policies do not necessarily involve communities in either their design or their implementation.").

[107] *See* Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) (drug testing of school athletes); *see also* Nat Hentoff, *Don't Welfare Recipients Have Rights?*, WASH. POST, Jan. 8, 2000, at A19 (describing the implementation of 1996 federal welfare reform law that allows states to randomly drug test welfare recipients).

[108] *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990); *see also* Edmond v. Goldsmith, 183 F.3d 659 (7th Cir. 1999), *cert. granted sub. nom.* City of Indianapolis v. Edmond, 120 S.Ct. 1156 (2000).

[109] *See* Kelling, *supra* note 25, at 9 (discussing how shift in police practice to more "preventive interventionist model" can "take[] police to the edge, or even over the edge, of constitutional law—at least as it has been interpreted for the last 30 years").

[110] For a discussion of this topic, see David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Tracey Maclin, *"Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 243, 250-62 (1991); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999).

[111] 517 U.S. 806 (1996). For commentary on *Whren*, see Diana Roberto Donohoe, *"Could Have," "Would Have": What the Supreme Court Should Have Decided in* Whren v. United States, 34 AM. CRIM. L. REV. 1193 (1997); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997).

[112] This argument was specifically raised and rejected in *Whren*. *See* Reply Brief for Petitioners at 17-19, Whren v. United States, 517 U.S. 806 (1996) (No. 95-5841).

breaking the law, an officer's ability to select targets for intervention at will presents two distinct problems. To the extent that selection process is unrestrained, the likelihood of stopping an innocent person is very high, since the legal cost to the officer of a false stop is negligible. Second, those in the targeted group inevitably will be over-represented in the arrest and conviction statistics, which in turn helps justify treating certain groups as if they were more crime prone than others. A law enforcement policy intent on dislocating citizens based on their characteristics rather than on behavior would thus have an easier time doing so.[113]

A second aggressive technique is the use of sting operations. Although the government may not create crimes to trap the innocent, the case law allows them to go a long way in this direction.[114] Police need not, for example, have probable cause to believe that a person is about to commit a crime before affording the opportunity to do so.[115] And for certain low level crimes—theft, possession of stolen goods, drug possession—it is extremely hard for certain defendants to show lack of predisposition.[116] Although some residual constraints remain on the ability to target certain suspects,[117] there is little doubt that there are broad opportunities for singling out disfavored people for arrest.[118]

A third technique, one of long standing, is the choice of enforce-

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[113] *Cf.* Roberts, *supra* note 26, at 783 ("Loitering laws inevitably involve judgments about people's criminal propensity. They embody legislative predictions about the likelihood that people engaged in certain activities, bearing certain characteristics, or belonging to certain groups will engage in criminal activity.").

[114] *See, e.g.*, United States v. Simpson, 813 F.2d 1462, 1466-68 (9th Cir. 1987) (admitting evidence from a paid F.B.I. informant who became romantically involved with the defendant).

[115] *See* Jacobson v. United States, 503 U.S. 540, 549-50 (1992) (noting that the government's mere affording the opportunity to commit a crime will not defeat prosecution).

[116] *See generally* Ian J. McLoughlin, Note, *The Meaning of Predisposition in Practice*, 79 B.U. L. REV. 1067 (1999) (arguing that many defendants cannot show lack of predisposition).

[117] *See, e.g.*, Paul Marcus, *The Due Process Defense in Entrapment Cases: The Journey Back*, 27 AM. CRIM. L. REV. 457, 460 n.24 (1990) (citing cases where courts have noted the validity of a due process claim).

[118] There have been claims, for example, that African-American public officials are disproportionately targeted for criminal investigation. In a 1992 article recounting the frequency of such charges, the ABA Journal offered the following information:

> A 1990 study by the National Council of Churches shows that more than 14 percent of the public corruption cases over the past five years targeted black officials, who make up less than two percent of the country's elected officials. In the South, where three percent of all elected officials are black, the study found that 40 percent of public corruption cases were pursued against blacks.
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> . . . .
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> Though less than one-half of one percent of the federal judiciary is black, three of the five U.S. District Court judges indicted in the past decade were Black.

Mark Curriden, *Selective Prosecution: Are Black Officials Investigative Targets?*, A.B.A. J., Feb. 1992, at 54, 55. Even the president of the National District Attorney's Association admitted that "while I do not believe that blacks are being selectively prosecuted, I certainly can understand how such a theory is gaining popularity." *Id.* For additional discussion and citations on this point, see Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 573-78 (1998).

ment priorities. At a general level it is impermissible to bring charges against a person because of an improper consideration such as race.[119] But as every defense lawyer knows, selective prosecution claims are hard to prove, since they require clear proof of discriminatory intent, not just discriminatory effect.[120] Prosecutors may legitimately concentrate their enforcement efforts against particular groups (such as street gangs) without running afoul of the Constitution, as long as the decision is based on the group's conduct and not its demographics.[121] As sensible as this rule is, it carries with it a danger that if prosecutors have the authority to extend to police the dispersal power—perhaps as part of a negotiated guilty plea—it could have a notable adverse effect on minority-race citizens.[122]

In short, there are risks to the proposal, some obvious, some less so. The last section offers some thoughts on whether the costs outweigh the benefits.

CONCLUSION

If the overriding goal is to minimize the opportunities for invidious law enforcement efforts, *Morales* is plainly a step in the right direction. Giving the police broad powers to enforce low-level crimes is inconsistent with a due process vision of criminal justice, and perhaps courts should continue to strike down any statute that sounds in the *Papachristou, Coates, Lawson,* and now *Morales* tradition. Although the burdens of this greater freedom will fall more heavily on those who live in dangerous neighborhoods, so too do some of the benefits, as the risks of police zealousness are kept in greater check.

The strand of individual liberty running through this view—that some risk is the price of an open society[123]—is very appealing. It also is true that there is no clean divide between the impact of more rigorous law enforcement on "gang members" and "law abiding citizens." Aggressive police practices often inflict harm on the whole

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[119] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608 (1985).

[120] *See* United States v. Armstrong, 517 U.S. 456, 458 (1996) (defendant must show that the government declined to prosecute similarly situated suspects of other races). For a useful analysis of Armstrong, see Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998). *See also* Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999).

[121] *See, e.g.*, People v. Mantel, 388 N.Y.S.2d 565, 569 (1976) ("Any area of activity that carries with it a high incidence of crime is an appropriate choice for strenuous law enforcement.").

[122] Although prosecutors' discretion to recommend certain dispositions following a guilty plea is often constrained by sentencing guidelines, they retain a great deal of discretion in crafting the indictment or information in ways that make certain sentences more likely. *Cf.* FED. R. CRIM. P. 11(e)(1) (recognizing prosecutor's authority to dismiss certain charges, make sentencing recommendations, or agree to specific sentences in return for guilty plea).

[123] *Cf.* RESTATEMENT (SECOND) OF TORTS § 822 cmt. g (1979) ("It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together.").

community, even when the net result is less crime.[124]

Ultimately, however, the argument that there should be no restrictions on aggressive loitering is unsatisfying; the legitimate concerns of the law-abiding members of the community are simply too compelling to ignore. Justice Frankfurter correctly observed that "[w]ise accommodation between liberty and order always has been, and ever will be, indispensable for a democratic society,"[125] and yet the helplessness and anger caused by street-level lawlessness have been felt too sharply by too many to assume that the current situation strikes an appropriate equilibrium between freedom and security.[126] It is important to remember that a large majority of citizens (over seventy percent) of every race, both genders, and almost all ages, believe that courts are not tough enough on criminals[127] and that, despite the recent drop in the crime rate, more than forty percent of citizens continue to feel afraid when walking in their own neighborhoods after dark.[128] The fears of those who feel trapped in their homes are genuine and legitimate, and our desire to limit the reach of the criminal law should not lead us to forget the interests of those who pay a disproportionate price for the increased freedom that cases like *Morales* extend.

So if change is to be made, it is best done in measured steps. A targeted loitering proposal such as the one offered here will not solve all the problems, but it should lead to some improvement, despite the risks. By limiting police discretion over loiterers to those who have passed before a judicial eye; by targeting those who are actual wrongdoers rather than just those who associate with wrongdoers; and by depriving gangs of key members in a relatively unobtrusive manner that avoids incarceration, the proposal may help divide those most affected by street sweeping laws along behavioral rather than racial or class lines. Those who break the law deserve no better, but those who live within the laws *do* deserve better than the status quo.

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[124] Professor Roberts makes the point this way: "[t]he Chicago gang-loitering ordinance in particular entrenches the racialized division of Americans into the presumptively lawless whose liberties deserve little protection and the presumptively law-abiding who are entitled to rule over them." Roberts, *supra* note 26, at 779-80. For a recent example of this problem, see David Barstow, *Antidrug Tactics Exact Price on a Neighborhood, Many Say*, N.Y. TIMES, Apr. 1, 2000, at A1.

[125] Kovacs v. Cooper, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring).

[126] At a minimum, the political pressure to take action against street-level disorder continues at a high level, despite years of falling crime rates. *See* Kelling, *supra* note 25, at 9 ("Increasingly, police are under renewed and constant pressure from neighborhood groups and city halls across the country—not to mention State legislatures and the U.S. Congress—to "do something now" about eliminating the excesses of the drug market, getting guns off the street, and regaining control over public places." (footnote omitted)).

[127] *See* SOURCEBOOK 1998, *supra* note 19, at 128-29 tbl.2.50.

[128] *Id.* at 118-19 tbl.2.38. The survey cited divided people into two demographic groups: "white" and "black/other." Among the former group, forty percent said they were apprehensive about walking alone at night within a mile of their home. Among the latter group, forty-seven percent said they were apprehensive. *Id.*