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## GANG LOITERING AND RACE

LAWRENCE ROSENTHAL\*

When the United States Supreme Court held in *City of Chicago v. Morales*<sup>1</sup> that Chicago's anti-gang loitering ordinance—authorizing the police to disperse groups of loiterers containing criminal street gang members<sup>2</sup>—was unconstitutionally vague, Harvey Grossman, the attorney who had argued the case for the winning side, called the decision “a victory for ‘young men of

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\* Deputy Corporation Counsel, City of Chicago Department of Law. This article is the work of a partisan. I have been in law enforcement in Chicago for over sixteen years, both in my present position and previously as an Assistant United States Attorney for the Northern District of Illinois. I was involved in the drafting and defense of Chicago's original anti-gang loitering ordinance, and argued on behalf of the City of Chicago in defense of the ordinance before the United States Supreme Court in *City of Chicago v. Morales*. I also participated in the drafting of the new anti-gang loitering ordinance recently enacted by the Chicago City Council. The views expressed in this article are nevertheless my own and should not be attributed to the City of Chicago or its Department of Law. I must acknowledge a deep debt to the extraordinary group that have helped me to fashion this article. From academia, I must thank Dan Kahan, Debra Livingston, Tracey Meares, Geoffrey Stone, and David Strauss, who commented on drafts of this article and, in innumerable conversations, have been of immense help in enabling me to crystallize my own views. I was also enormously aided by the comments of a number of present and former prosecutors whom I consulted, including Scott Mendeloff, Norma Reyes, and Ronald Safer, as well as Deputy Superintendent of Police Harvey Radney, whose wisdom on the subject of gang crime I have found invaluable. I also am indebted to my colleague Benna Solomon and my spouse, Kate Sachnoff, for their comments and advice on earlier drafts, and, in Kate's case, for her indulgence during the many months that I worked on the article. I must also thank for their valuable suggestions the Research Fellows of the American Bar Association who participated in a seminar in which an earlier version of this article was presented.

<sup>1</sup> 527 U.S. 41 (1999).

<sup>2</sup> The ordinance provided: “Whenever a police officer observes a person whom he reasonably believes to be a member of a criminal street gang 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.” “Loiter” was defined as “to remain in any one place with no apparent purpose.” Anyone who did not “promptly obey” an order to disperse was subject to a fine of between \$100 and \$500 or imprisonment of up to six months, or both, and could also be required to perform up to 120 hours community service in addition to or instead of the fine and imprisonment. *Id.* at 47 n.2.

color.’”<sup>3</sup> That may seem a strange thing to say about a case in which no claim of racial discrimination was made by the parties or passed upon by the Court,<sup>4</sup> but Mr. Grossman’s reaction was far from idiosyncratic. Questions of racial fairness are consistently raised by the critics of anti-loitering and other public order laws.<sup>5</sup> Dorothy Roberts, for example, sees the Court’s holding in *Morales* as reflecting a concern about the risk of racial bias in the enforcement of public order laws.<sup>6</sup> Under Chicago’s anti-gang loitering ordinance, she contends, the potential for police abuse was especially high: “With no criminal conduct to go by, police officers probably used race as a critical factor in judging whether an individual might be a gang member.”<sup>7</sup> The inevitable racial friction that this type of law will produce, Professor Roberts argues, reinforces patterns of racial subjugation.<sup>8</sup> David Cole makes a similar argument and adds that when minorities perceive this type of unfairness in the criminal justice system they “have less incentive to play by the rules, and accordingly, double standards in law enforcement actually contribute to criminal conduct in those neighborhoods

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<sup>3</sup> Joan Biskupic, *Supreme Court Strikes Anti-Loitering Ordinance; Law Aimed At Gangs Is Called Too Vague*, WASH. POST, June 11, 1999, at A1.

<sup>4</sup> The Court held that the ordinance was fatally vague because it granted police officers effectively unchecked discretion to determine what types of activities constituted “loitering” within the meaning of the ordinance. See 527 U.S. at 60-64. Four justices also expressed concerns about whether the ordinance supplied individuals with sufficient notice of what conduct it regulated. See *id.* at 56-60 (plurality opinion); *id.* at 69-70 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>5</sup> See Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights? A Response To Professors Meares and Kahan*, 1998 U. CHI. LEG. F. 215; David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999); Bernard Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Randall Kennedy, *Guilty By Association*, AM. PROSPECT, May-June 1997, at 66; Toni Massaro, *The Gang’s Not Here*, 2 GREEN BAG 25 (1998); Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999). See also Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249 (1998); Matthew Mickle Werdegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409 (1999).

<sup>6</sup> See Roberts, *supra* note 5, at 786-87, 799, 804-10.

<sup>7</sup> *Id.* at 806.

<sup>8</sup> See *id.* at 811-18.

that are already most at risk of criminal behavior for socioeconomic reasons."<sup>9</sup>

The decision in *Morales* makes the questions raised by Professors Roberts and Cole even more urgent. The Court found the ordinance vague because it permitted enforcement against loiterers engaged in entirely "innocent" activities, but added that a law directed at loitering by groups containing gang members would sufficiently limit enforcement discretion "if the ordinance only applied to loitering that had an apparently harmful purpose or effect . . . ."<sup>10</sup> Justice O'Connor, in a concurring opinion joined by Justice Breyer, added that an anti-gang loitering law should be upheld if it defined loitering as "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities."<sup>11</sup> Thus, the Court appears to have endorsed anti-loitering laws

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<sup>9</sup> Cole, *supra* note 5, at 1091.

<sup>10</sup> 527 U.S. at 62 (footnote omitted). An anti-loitering law limited to conduct with a harmful purpose or effect would also appear to resolve the concerns of a three-justice plurality about the adequacy of notice. The plurality reasoned that the order to disperse which was required under the ordinance failed to provide constitutionally appropriate notice because "[i]f the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty." *Id.* at 58. *See also id.* at 69-70 (Kennedy, J., concurring in part and concurring in the judgment). Confining a law to loitering with a harmful purpose or effect, then, would appear to solve this problem. To be sure, the plurality raised additional concerns about the sufficiency of notice because the ordinance did not specify how far and for how long loiterers must disperse, but the plurality acknowledged that "[I]ack of clarity in the description of a loiterer's duty to obey a dispersal order might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear . . . ." *Id.* at 59-60. To the extent that greater precision is required to detailing the obligation to disperse, that should prove no serious obstacle to the next generation of anti-loitering laws. In *Cox v. Louisiana*, 379 U.S. 559 (1965), the Court upheld a statute prohibiting demonstrations "near" a courthouse, "at least as applied to a demonstration within the sight and hearing of those in the courthouse." *Id.* at 568. It should follow that an ordinance directing the police to order loiterers to remove themselves from within sight and hearing of the location from which they have been ordered to leave will readily pass muster.

<sup>11</sup> 527 U.S. at 68 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor observed that had the ordinance been construed by the state courts to embody this standard, it should have been upheld: "Such a definition would be consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court." *Id.* Justice O'Connor's view likely commands a majority of the Court, since it is consistent with the views of the Justices who would have upheld the ordinance. *See id.* at 89-95 (Scalia, J., dissenting); *id.* at 106-11 (Thomas, J., dissenting).

when loitering has an “apparently harmful purpose or effect”; a standard for judging loitering laws far more lenient than can be found in prior precedents.<sup>12</sup> Chicago has taken the Court’s hint. The Chicago City Council recently enacted a new anti-gang loitering ordinance that authorizes police officers to order groups containing members of criminal street gangs to disperse when they are engaged in “gang loitering.”<sup>13</sup> The new ordinance defines “gang loitering” as “remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.”<sup>14</sup> The new ordinance also defines “criminal street gang” in terms that track the federal racketeering statute’s definition of “racketeering activity.”<sup>15</sup> The City Council enacted a companion anti-drug loitering measure as well.<sup>16</sup>

While narrower than the original anti-gang loitering ordinance, these revised measures nevertheless provide a potent prophylactic policing tool: they authorize dispersal orders whenever the police reasonably believe that gang or drug activity is afoot. Indeed, a nationwide trend seems to be underway to enact anti-loitering laws as part of the movement toward com-

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<sup>12</sup> For a comprehensive account of state of the law prior to *Morales*, see Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 595-650 (1997).

<sup>13</sup> CHICAGO, ILL., MUNICIPAL CODE § 8-4-015(c)(1) (rev. 2000). The full text of this provision is:

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

*Id.* § 8-4-015(a).

<sup>14</sup> *Id.* at § 8-4-015(d)(1).

<sup>15</sup> Compare *id.* § 8-4-015(d)(2) with 18 U.S.C. § 1961 (2000).

<sup>16</sup> The anti-drug loitering ordinance authorizes dispersal orders when individuals “remain[] in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to facilitate the distribution of substances in violation of the Cannabis Control Act or the Illinois Controlled Substances Act.” CHICAGO, ILL., MUNICIPAL CODE § 8-4-017(c)(1) (rev. 2000).

munity-oriented and order-maintenance policing.<sup>17</sup> And because laws drafted to comply with the *Morales* decision are likely to withstand attack on other grounds, future debate on the fairness of public order laws is likely to focus on whether they can be fairly applied to racial minorities.<sup>18</sup>

To date, the debate over public order laws has largely been framed in terms of the supposed virtues and vices of order maintenance as a policing strategy. The advocates of public order laws argue that visible disorder in a community stimulates the commission of more serious crimes,<sup>19</sup> and that a policing strategy based on order maintenance is of particular benefit in inner-city minority communities, where social disorder is a particularly serious problem.<sup>20</sup> Critics of public order laws take the opposite tack; they question the relationship between disorder

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<sup>17</sup> See Dirk Johnson, *Chicago Tries Anew With Anti-Gang Ordinance*, N.Y. TIMES, Feb. 22, 2000, at A14. See also Livingston, *supra* note 12, at 573-91.

<sup>18</sup> For similar assessments of the extent to which the decision in *Morales* permits state and local governments to enact new public order laws, see, e.g., Craig M. Bradley, *The Changing Face of Criminal Procedure*, TRIAL, Oct. 1999, at 84; Dan M. Kahan & Tracey L. Meares, *Public-Order Policing Can Pass Constitutional Muster*, WALL ST. J., June 15, 1999, at A18; Debra Livingston, *Gang Loitering, The Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 190-91; Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1134-49 (2000); Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 93-94 (1999); Note, *The Supreme Court, 1998 Term—Leading Cases*, 113 HARV. L. REV. 200, 285-86 (1999); Note, Angela L. Clark, *City of Chicago v. Morales: Sacrificing Individual Liberty Interests for Community Safety*, 31 LOY. U. CHI. L.J. 113, 144-47 (1999); Note, Matt Wawrzyn, *Chicago v. Morales: Constitutional Principles at Loggerheads with Community Action*, 50 DEPAUL L. REV. 371, 411-18 (2000).

<sup>19</sup> The classic statement of this policing theory is the "Broken Windows" thesis, which argues that signs of visible disorder in the streetscape stimulate the commission of more serious crime. See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 31-38. See also, e.g., GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 71-107 (1996); WESLEY G. SKOGAN, *DISORDER AND DECLINE* 9-10, 51-57, 73-75, 85-124 (1990); JEROME H. SKOLNICK & DAVID H. BAYLEY, U.S. DEP'T OF JUSTICE, *COMMUNITY POLICING: ISSUES AND PRACTICES AROUND THE WORLD* 4-19 (1988).

<sup>20</sup> See Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) [hereinafter cited as "Kahan & Meares, *The Coming Crisis*"]; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEG. F. 197 [hereinafter cited as "Meares & Kahan, *Wages*"]; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

and crime,<sup>21</sup> and argue that the police are likely to unfairly target persons of color as "disorderly."<sup>22</sup> Largely missing from this debate, however, is an effort to evaluate public order laws in light of the considerable research that has been done in the past few decades on the ecology of the inner city. That research, I will argue, suggests a different kind of case to be made on behalf of public order laws.

Thus, in an effort to advance the debate over public order laws, I will focus not on the controversial relationship between disorder and crime, but on the ecology of the inner city. In particular, I intend to focus on the work identifying an inner-city, disproportionately minority "underclass," and on the implications of that concept for crime control. Underclass theorists assert that as a consequence of structural changes in the economy, coupled with the continuing effects of racism, an "underclass" has emerged that faces much more restricted opportunities for upward mobility than existed in the urban slums of earlier eras.<sup>23</sup> I focus on the concept of an "underclass" not only because it has such wide acceptance among students of the inner city, but also because it sheds so much light on the racial dimension of inequality in America. Underclass theory's special value lies in its ability to explain why the traditional vehicles for upward mobility have failed so many inner-city minorities. There have been insufficient attempts, however, to apply the teachings of underclass theory to criminal justice policy, and, in particular, to gang crime, the particular form of lawlessness that most profoundly affects inner-city underclass communities.

This effort to consider the implications of underclass theory for inner-city gang crime begins with the evidence showing the

<sup>21</sup> See, e.g., Harcourt, *supra* note 5, at 308-42.

<sup>22</sup> See, e.g., Cole, *supra* note 5, at 1074-82; Roberts, *supra* note 5, at 803-10.

<sup>23</sup> I use the term "underclass" in the sense that it has been employed by William Julius Wilson, the leading academic expositor of this concept. Professor Wilson has used this term to describe the impoverished residents of inner-city, predominantly minority communities inhabited by large numbers of persons lacking significant training and skills and who have experienced long-term unemployment; street criminals; and families that experience lengthy periods of poverty and reliance on welfare. See WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 7-8 (1987). Most other scholars use the term in similar ways. See, e.g., CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 144-49 (1992); Paul A. Jargowsky & Mary Jo Bane, *Ghetto Poverty in the United States, 1970-1980*, in *THE URBAN UNDERCLASS* 235-39 (Christopher Jencks & Paul E. Peterson eds., 1991) [hereinafter cited as "THE URBAN UNDERCLASS"].

dimensions of the problem that gang crime poses for the inner city. The emergence of entrenched criminal street gangs, I will then argue, is the natural consequence of the emergence of an entrenched urban underclass.<sup>24</sup> Gang crime in an underclass community has a predictable pattern, resulting in a thoroughly destabilized and demoralized community in which drug trafficking comes to be seen as one of the few economic opportunities available. Unless rampant gang criminality in underclass neighborhoods is curbed, the ability of other social and economic policies to ameliorate the plight of underclass communities is at best limited. I will also argue that an anti-loitering strategy is a vehicle for attacking conditions conducive to the success of street gangs without relying on mass incarceration strategies that impose enormously disproportionate burdens on minorities. From the standpoint of racial fairness, I will contend that the use of public order laws is preferable to conventional law enforcement strategies, both because public order laws address conditions that facilitate the success of inner-city gangs through relatively moderate police tactics, and because they are less susceptible to police abuse than the tactics that they replace.

The approach to criminal justice policy taken here long ago went out of fashion. In this era of harshly punitive criminal laws based on theories of retribution and deterrence, an effort to identify the root causes of inner-city crime may seem to many beside the point. But in my view, it is time for a rigorous reassessment of criminal justice policy in light of all that we have learned about the sociology and political economy of the inner city in the last thirty years—an inquiry rarely undertaken in the debate over public order laws. If poverty and racism are at the root of inner city crime, then the fairness of the harshly punitive

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<sup>24</sup> When I refer to the term "gang," I reference the concept as it is employed by the Chicago Police Department—an association of individuals that exhibits in varying degrees four characteristics: a gang name and recognizable symbols, a geographic territory, a regular meeting pattern, and an organized, continuing course of criminality. See ILL. CRIM. JUSTICE INF. AUTH., RESEARCH BULLETIN: STREET GANGS AND CRIME-PATTERNS AND TRENDS IN CHICAGO 2 (Sep. 1996). I will also refer to Chicago Police Department statistics for gang-related crime. The Chicago Police Department defines an offense as gang related when the preponderance of the evidence reflects a gang-related motivation. See *id.* at 2-3. This is a particularly stringent test, since it is unsatisfied merely by evidence that the victim or offender has a gang affiliation, which is the approach utilized in most jurisdictions. See Cheryl L. Maxson & Malcolm W. Klein, *Defining Gang Homicide*, in *GANGS IN AMERICA* 6 (C. Ronald Huff ed., 1996 ed.) [hereinafter cited as "GANGS IN AMERICA 1996 ED."].



regime reflected in current criminal justice policy—especially as represented by drug trafficking laws—is properly open to question. The sociology and political economy of the inner city also suggests, however, that if law enforcement is given no role to play in suppressing inner city crime, it is naive to think inner-city communities can be revitalized. Public order laws, I will suggest, can serve the twin goals of promoting racial fairness and revitalizing the inner city.

### I. THE MAGNITUDE OF GANG CRIME

Reliable statistics on gang membership and gang crime are hard to come by—there is no generally accepted methodology for identifying gangs, gang members, or gang-related crime.<sup>25</sup> Yet there is little genuine doubt that the problem of gang crime is of considerable proportion. The *National Youth Gang Survey*, a United States Department of Justice survey of law enforcement agencies nationwide, estimated that in 1998 there were 28,700 gangs in the United States with 780,200 members.<sup>26</sup> A survey of seventy-nine large and forty-three small-sized cities in the early 1990s found 249,324 gang members, 4,881 gangs, 46,359 gang-related crimes, and 1,072 gang-related homicides within a seventeen-month period.<sup>27</sup> The Los Angeles County Sheriff has estimated that Los Angeles County alone contains more than 1,200 gangs with more than 150,000 members.<sup>28</sup> The United

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<sup>25</sup> See, e.g., HERBERT C. COVEY, SCOTT MENARD & ROBERT J. FRANZESE, *JUVENILE GANGS* 3-13 (2d ed. 1997); G. DAVID CURRY & SCOTT H. DECKER, *CONFRONTING GANGS: CRIME AND COMMUNITY* 2-6 (1998). For example, the United States Department of Justice's *National Youth Gang Survey* leaves it to each responding law enforcement agency to decide for itself what it is willing to classify as a "gang," excluding motorcycle gangs, hate or ideology groups, prison gangs, and exclusively adult gangs. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, 1998 NATIONAL YOUTH GANG SURVEY: SUMMARY 6 (Dec. 2000) [hereinafter cited as "1998 NATIONAL YOUTH GANG SURVEY"].

<sup>26</sup> See *id.* at 12. The *Survey* reported that 60 percent of gang members were adults and 40 percent were juveniles. See *id.* at 14-15. Law enforcement agencies in large cities and suburban counties reported a higher average proportion of adult gang members, *id.* at 15, and the average percentage of adult gang members increased substantially as the population of the reporting jurisdiction increased. *Id.* 15-16. Females accounted for 8 percent of gang members and female membership was lowest in large cities. *Id.* at 17.

<sup>27</sup> See G. DAVID CURRY, RICHARD A. BALL & ROBERT J. FOX, U.S. DEP'T OF JUSTICE, *GANG CRIME AND LAW ENFORCEMENT RECORDKEEPING* (Aug. 1994).

<sup>28</sup> See *Gangs: A National Crisis: Hearing on S.54 Before the Senate Comm. on the Judiciary*, 105th Cong., 51 (April 23, 1997) (statement of James Mulvihill).

States Attorney for the Northern District of Illinois has estimated that Chicago alone has some 125 street gangs with more than 100,000 members.<sup>29</sup> This assessment of the magnitude of the gang problem is not confined to surveys of law enforcement agencies. For example, surveys have found that anywhere from 5 to 10 percent of all public school students claim gang membership.<sup>30</sup> A 1995 survey reported that 28 percent of students ages 12-19 reported gangs at their schools (up from 15 percent in 1989); the figure was 41 percent for students in central cities (up from 25 percent in 1989).<sup>31</sup>

With gangs comes violent crime. The *National Youth Gang Survey* reported that in 1997 there were 3,340 homicides involving gang members, and 1,880 homicides involving gang-related motives.<sup>32</sup> This means that gangs were involved in 18 percent of all homicides nationwide.<sup>33</sup> While reliable statistics are not available to evaluate trends in gang-related homicide, "levels of youth homicide remain considerably higher than those of the early and mid-1980's."<sup>34</sup> And there is little evidence that gang activity is declining along with the overall crime rate; the 1998

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<sup>29</sup> See U.S. Attorney's Office, N.D. Ill., U.S. Dep't of Justice, Anti-Violent Crime Initiative Fact Sheet for the Northern District of Illinois (1996) (unpublished release on file with author).

<sup>30</sup> See IRVING A. SPERGER, *THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH* 31-33 (1995).

<sup>31</sup> See NATIONAL CENTER FOR EDUCATION STATISTICS & BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, *INDICATORS OF SCHOOL CRIME AND SAFETY: 1999* 32-33 (Sep. 1999). See also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *STUDENTS' REPORTS OF SCHOOL CRIME: 1989 AND 1995* 8-9 (Apr. 1998). This data is based only on the proportion of students responding affirmatively when asked if there were street gangs at their school. When the data was reexamined for a broader measure of gang presence, including respondents who stated that gang members attended their schools or that gang members have been around their schools within the past six months, 37 percent of all students answered affirmatively, and over 50 percent of students residing in cities with a population of more than 50,000 answered affirmatively. See JAMES C. HOWELL & JAMES P. LYNCH, U.S. DEP'T OF JUSTICE, *YOUTH GANGS IN SCHOOLS* 2, 3-4 (Aug. 2000).

<sup>32</sup> OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *1997 NATIONAL YOUTH GANG SURVEY: SUMMARY* 15 (Dec. 1999) [hereinafter cited as "1997 NATIONAL YOUTH GANG SURVEY"]. The survey found a statistically significant relationship between the reporting jurisdiction's population and the rate of gang homicide. See *id.* at 16. The 1998 *Survey* did not attempt to estimate the number of gang-related homicides. See 1998 NATIONAL YOUTH GANG SURVEY, *supra* note 25, at 26.

<sup>33</sup> 1997 NATIONAL YOUTH GANG SURVEY, *supra* note 32, at 15.

<sup>34</sup> JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, *HOMICIDE TRENDS IN THE UNITED STATES: 1998 UPDATE* 2 (Mar. 2000).

*Survey* reported that 42 percent of responding jurisdictions believed that their gang problem was staying about the same, 28 percent felt it was worsening, and 30 percent felt that it was improving.<sup>35</sup>

There is wide agreement among scholars that the rate of violent crime among gang members is much higher than the rate of violent crime among other delinquent youth.<sup>36</sup> There is also general agreement that the level of gang violence has escalated dramatically in recent decades.<sup>37</sup> And the rate at which gang-related violent crime results in fatalities has also risen in recent years—a fact that gang researchers attribute to the increasing availability of high-powered handguns.<sup>38</sup> This rising

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<sup>35</sup> See 1998 NATIONAL YOUTH GANG SURVEY, *supra* note 25, at 14. There is also some reason to believe that gang-related homicide has not declined as fast as the overall homicide rate in recent years. Among cities with populations in excess of 25,000 that reported gang problems and gang homicides from 1996 through 1998, 49 percent reported a decrease in gang-related homicides, 15 percent reported no change, and 36 percent reported an increase. See *id.* at 26-27.

<sup>36</sup> See SARA R. BATTIN-PEARSON ET AL., U.S. DEP'T OF JUSTICE, GANG MEMBERSHIP, DELINQUENT PEERS, AND DELINQUENT BEHAVIOR 3-4, 5-8 (Oct. 1998); COVEY, MENARD & FRANZESE, *supra* note 25, at 35-37; CURRY & DECKER, *supra* note 25, at 55-58; JAMES C. HOWELL, U.S. DEP'T OF JUSTICE, YOUTH GANGS: AN OVERVIEW 9-10 (April 1998); C. RONALD HUFF, U.S. DEP'T OF JUSTICE, COMPARING THE CRIMINAL BEHAVIOR OF YOUTH GANGS AND AT-RISK YOUTHS 4 (Oct. 1998); MALCOLM W. KLEIN, THE AMERICAN STREET GANG: ITS NATURE, PREVALENCE, AND CONTROL 112-16 (1995); SPERGEL, *supra* note 30, at 40-42; C. Ronald Huff, *The Criminal Behavior of Gang Members and Nongang At-Risk Youth*, in GANGS IN AMERICA 1996 ED., *supra* note 24, at 83-87; Sara R. Battin et al., *The Contribution of Gang Membership To Delinquency Beyond Delinquent Friends*, 36 CRIMINOLOGY 93 (1998); Terence B. Thornberry et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, 30 J. RES. CRIME & DELINQ. 55 (1993).

<sup>37</sup> See, e.g., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S REPORT TO THE PRESIDENT: A COORDINATED APPROACH TO THE CHALLENGE OF GANG VIOLENCE: A PROGRESS REPORT 1 (April 1996); KLEIN, *supra* note 36, at 90-99; SPERGEL, *supra* note 30, at 34-36; Jeffrey Fagan, *Gangs, Drugs, and Neighborhood Change*, in GANGS IN AMERICA 1996 ED., *supra* note 24, at 44-46; Walter B. Miller, *Why The United States Has Failed To Solve Its Youth Gang Problem*, in GANGS IN AMERICA 263 (C. Ronald Huff ed., 1990 ed.) [hereinafter cited as "GANGS IN AMERICA 1990 ED."].

<sup>38</sup> See, e.g., COVEY, MENARD & FRANZESE, *supra* note 25, at 46-48; HOWELL, *supra* note 36, at 10; SPERGEL, *supra* note 30, at 35-36; Fagan, *supra* note 37, at 45. See also Beth Bjerregaard & Alan J. Lizotte, *Gun Ownership and Gang Membership*, 86 J. CRIM. L. & CRIMINOLOGY 37 (1995). See generally TOM DIAZ, MAKING A KILLING: THE BUSINESS OF GUNS IN AMERICA 91-105 (1999). For example, in Chicago, between 1987 and 1994 firearms were used in 96 percent of all gang-related homicides, and researchers attribute the increased mortality rate of gang-related shootings during this period to the increasing use of semi or fully automatic firearms than had been utilized in gang-related shootings in prior years. See ILL. CRIM. JUSTICE INF. AUTH., *supra* note 24, at 16-17.

level of gang violence, of course, has had a dramatic impact on the character of gang-infested communities. As a United States Department of Justice report observed: "Violent gangs are now having a major impact on the quality of life of communities throughout the nation."<sup>39</sup>

Perhaps the most repellent type of gang violence is the drive-by shooting, favored by gang members when they mean to attack rivals on their own turf, necessitating a quick approach and getaway.<sup>40</sup> Of course, it is not that easy to shoot someone from a moving car. Consequently, drive-bys and other gang-related shootings all too often injure innocent bystanders. For example, between 1987 and 1994, of the 956 gang-related homicides in Chicago, 138 of the victims were not gang members, and twelve victims were age nine or younger; non-gang-member victims were also disproportionately likely to be very young or elderly and most frequently were shot as the result of crossfire.<sup>41</sup> A study of gang-related homicides in Los Angeles found that half of the victims were not gang members.<sup>42</sup> This is one of a number of characteristics of gang-related homicides that make them especially destructive of a community's morale and stability, as a recent Department of Justice study concluded:

Homicides by gang members are more likely to take place in public settings (particularly on the street), involve strangers and multiple participants, and involve automobiles (drive-by shootings). Gang homicides are three times more likely than nongang homicides to involve fear of retaliation.<sup>43</sup>

<sup>39</sup> U.S. DEP'T OF JUSTICE, *supra* note 37, at 1. See also CATHERINE H. CONLY, U.S. DEP'T OF JUSTICE, STREET GANGS: CURRENT KNOWLEDGE AND STRATEGIES 12-13 (1993).

<sup>40</sup> See JOAN W. MOORE, GOING DOWN TO THE BARRIO: HOMEBOYS AND HOMEGIRLS IN CHANGE 60 (1991); WILLIAM B. SANDERS, GANGBANGS AND DRIVE-BYS: GROUNDED CULTURE AND JUVENILE GANG VIOLENCE 67-68 (1994). See also KLEIN, *supra* note 36, at 117-18; ILL. CRIM. JUSTICE INF. AUTH., *supra* note 24, at 17-18.

<sup>41</sup> ILL. CRIM. JUSTICE INF. AUTH., *supra* note 24, at 13. For example:

In Chicago, an 11 year old boy sought to impress members of his gang by shooting at rival gang members. He missed, instead killing a 14 year old girl and wounding two other bystanders. Four days later, he was executed for his mistake with two bullets to the head—by his own gang members.

U.S. DEP'T OF JUSTICE, *supra* note 37, at 1.

<sup>42</sup> C. Ronald Huff, *Gangs in the United States*, in THE GANG INTERVENTION HANDBOOK 13 (Arnold P. Goldstein & C. Ronald Huff eds., 1993).

<sup>43</sup> HOWELL, *supra* note 36, at 10 (citation omitted); see also, e.g., Gary W. Bailey & W. Pradha Unnithan, *Gang Homicides in California: A Discriminant Analysis*, 22 J. CRIM.

But the form of criminal activity most closely identified with criminal street gangs is drug trafficking. The 1998 *National Youth Gang Survey* found that reporting jurisdictions identified a larger proportion of gang members involved in drug sales than any other form of criminal activity and that 34 percent of all gangs were considered "drug gangs."<sup>44</sup> Academic researchers relying on self-reporting by urban youth have also consistently reported heavy involvement of inner-city gangs in narcotics sales.<sup>45</sup>

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JUSTICE 267 (1994); Malcolm W. Klein, Cheryl L. Maxson & Lea C. Cunningham, "Crack," *Street Gangs, and Violence*, 29 CRIMINOLOGY 623 (1991); Cheryl L. Maxson, Morse A. Gordon & Malcolm W. Klein, *Differences Between Gang and Nongang Homicide*, 23 CRIMINOLOGY 209 (1985).

<sup>44</sup> See 1998 NATIONAL YOUTH GANG SURVEY, *supra* note 25, at 28, 33. See also, e.g., *Gangs: A National Crisis: Hearing on S. 54 Before the Senate Comm. on the Judiciary*, 105th Cong. 12-13 (1997) (statement of Steven R. Wiley, Chief of Violent Crimes and Major Offender Section, FBI); *The Gang Problem in America: Formulating an Effective Federal Response: Hearing Before the Subcomm. on Juv. Just. of the Senate Comm. on the Judiciary*, 103rd Cong. 14-15 (1994) (statement of James C. Frier, Deputy Ass't Dir., FBI); AL VALDEZ, GANGS: A GUIDE TO UNDERSTANDING STREET GANGS 126-27, 233 (1997). Respondents to the 1997 *National Youth Gang Survey* estimated that nationwide 42 percent of all youth gangs were involved in the sale of drugs in order to generate profits for the gang. See 1997 NATIONAL YOUTH GANG SURVEY, *supra* note 32, at 22-23. In large cities, the figure was 49 percent. See *id.* The 1997 *Survey* produced a nationwide estimate that gang members conducted 33 percent of all crack cocaine sales, 32 percent of all marijuana sales, 16 percent of all powder cocaine sales, 12 percent of all methamphetamine sales, and 9 percent of all heroin sales. See *id.* at 27-28.

<sup>45</sup> See, e.g., COVEY, MENARD & FRANZESE, *supra* note 25, at 51-54; SCOTT H. DECKER & BARRICK VAN WINKLE, LIFE IN THE GANG: FAMILY, FRIENDS AND VIOLENCE 153-71 (1996); JOHN M. HAGEDORN, PEOPLE AND FOLKS: GANGS, CRIME, AND THE UNDERCLASS IN A RUSTBELT CITY 103-05 (1988); JAMES C. HOWELL & SCOTT H. DECKER, U.S. DEP'T OF JUSTICE, THE YOUTH GANGS, DRUGS, AND VIOLENCE CONNECTION 2-5, 7 (Jan. 1999); HUFF, *supra* note 36, at 4, 7; MARTIN SANCHEZ JANKOWSKI, ISLANDS IN THE STREET: GANGS AND AMERICAN URBAN SOCIETY 120-21 (1991); JOAN W. MOORE, HOMEBOYS: GANGS, DRUGS AND PRISON IN THE BARRIOS OF LOS ANGELES 75-93 (1978); FELIX M. PADILLA, THE GANG AS AN AMERICAN ENTERPRISE 97-117, 129-51 (1993); CARL S. TAYLOR, DANGEROUS SOCIETY 92, 97, 99 (1990); Huff, *supra* note 36, at 83-90; Ronald Glick, *Survival, Income, and Status: Drug Dealing in the Chicago Puerto Rican Community*, in DRUGS IN HISPANIC COMMUNITIES 77-101 (Ronald Glick & Joan Moore eds., 1990); Jerome H. Skolnick, Ricky Bluthenal & Theodore Correl, *Gang Organization and Migration*, in GANGS: THE ORIGIN AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES 193-202 (Scott Cummings & Daniel J. Monti eds., 1993) [hereinafter cited as "GANGS"]; Carl S. Taylor, *Gang Imperialism*, in GANGS IN AMERICA 1990 ED., *supra* note 37, at 103-15; Finn-Aage Esbensen & David Huizinga, *Gangs, Drugs, and Delinquency in a Survey of Urban Youth*, 31 CRIMINOLOGY 565, 573-75 (1993); Jeffrey Fagan, *The Social Organization of Drug Use and Drug Dealing Among Urban Gangs*, 27 CRIMINOLOGY 633, 635, 648-51 (1989) [hereinafter cited as "Fagan, Social Organization"]; John M. Hagedorn, *Homeboys, Dope Fiends, Legits, and New Jacks*, 32 CRIMINOLOGY 197 (1995); Tom Mieczkowski, *Geeking Up and Throwing Down: Heroin Street Life in De-*

Martin Sanchez Jankowski, the author of what appears to be the most comprehensive ethnographic survey of gangs to date, an examination of thirty-seven gangs in three different cities over ten years, found that “[t]he biggest money-maker and the one product nearly every gang tries to market is illegal drugs.”<sup>46</sup>

But likely the most insidious aspect of gang crime is one that the academic literature often overlooks: gang activity is frequently undertaken out in the open, on the public ways, and in full view of the rest of the community.<sup>47</sup> Openly conducted criminal activity signals to the community that the police must be either corrupt or inept—a complaint I have heard countless times at community meetings—and a view that is especially destructive of community morale.<sup>48</sup> Openly conducted criminality speaks volumes as well about the degree to which gangs have succeeded in intimidating the surrounding community. Few other types of criminals commit their crimes in broad daylight, and in full view of law-abiding persons. The fact that gangs are willing to engage in drug sales and other types of criminal activity in the open sheds great light on their confidence that they have thoroughly silenced law-abiding persons in their midst.<sup>49</sup> And when witnesses are too scared to testify and officers seem helpless to stop drug trafficking, the police and community alike become hopeless about their ability to restore community stability.

Reliable statistics on the racial and ethnic dimension of gang crime are also hard to come by, but the statistics that are available consistently indicate that African-Americans and Hispanics are disproportionately represented among gangs.<sup>50</sup> The

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*troit*, 24 *CRIMINOLOGY* 645 (1986). To be sure, there are skeptics about the relationship between drug sales and gangs who observe that many gangs exhibit levels of disorganization inconsistent with efficient distribution of narcotics, but even the skeptics acknowledge that larger and more sophisticated inner-city gangs are more likely to be organized around drug sales. See, e.g., KLEIN, *supra* note 36, at 126-35.

<sup>46</sup> JANKOWSKI, *supra* note 45, at 120 (footnote omitted).

<sup>47</sup> Walter Miller is one of the few academics to note the significance of this aspect of gang crime. See Miller, *supra* note 37, at 266. The leading example of openly conducted gang activity involves the control of turf in order to facilitate the sale of narcotics, a phenomenon considered at some length in Part III, *infra*.

<sup>48</sup> See Kahan, *supra* note 20, at 391.

<sup>49</sup> The prevalence of gang intimidation also is part of what makes gangs particularly successful at narcotics distribution, a point I will explore in Part III, *infra*.

<sup>50</sup> This fact also explains why it is so difficult to mount a discrimination case against a law that makes gang membership a basis for prosecution—the fact that those

1998 *National Youth Gang Survey* estimated that nationwide, gang membership was 46 percent Hispanic and 34 percent African-American.<sup>51</sup> Another survey of law enforcement agencies in seventy-nine large cities estimated that 48 percent of gang members were African-American and 30 percent were Hispanic.<sup>52</sup> Yet a third survey of the police departments of the nine cities with the largest gang populations estimated gang membership at 42.9 percent African-American and 44.4 percent Hispanic.<sup>53</sup> Research based on self-identification consistently shows that whites do not join gangs at the same rate as African-Americans and Hispanics.<sup>54</sup> And a 1995 survey of students ages 12-19 found that 61 percent of Hispanic students and 44 percent of African-American students reported gangs present at their schools, compared to 33 percent of white students.<sup>55</sup>

A similar pattern is reflected in the statistics concerning those charged with gang-related crime. For example, a study of gang-related homicides in Chicago from 1990 to 1994 showed that African-American males were about sixteen times more likely to be charged with gang-related homicide than nonminority males, and Hispanic males were about thirteen times more likely to be charged with gang-related homicide than nonminority males.<sup>56</sup> The available statistics also show that minorities are the victims of gang-related crimes more frequently than nonminorities.<sup>57</sup> For example, a study of gang-related homicide in

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prosecuted are disproportionately minority will not support a claim of selective prosecution absent a showing, at a minimum, that minorities have been selected for prosecution out of proportion to their representation among the universe of gang members. See, e.g., *United States v. Turner*, 104 F.3d 1180, 1185 (9th Cir. 1997); *United States v. Bourgeois*, 964 F.2d 935, 941 (9th Cir. 1992); *United States v. Trent*, 718 F. Supp. 39, 41 (D. Or. 1989). See generally *United States v. Armstrong*, 517 U.S. 456, 463-71 (1996).

<sup>51</sup> 1998 NATIONAL YOUTH GANG SURVEY, *supra* note 25, at 20. These percentages were even higher in large cities. See *id.* at 21.

<sup>52</sup> G. DAVID CURRY, RICHARD A. BALL & ROBERT J. FOX, U.S. DEP'T OF JUSTICE, GANG CRIME AND LAW ENFORCEMENT RECORDKEEPING 9 (Aug. 1994).

<sup>53</sup> See WALTER B. MILLER, U.S. DEP'T OF JUSTICE, CRIME BY YOUTH GANGS AND GROUPS IN THE UNITED STATES 76-79 (1992).

<sup>54</sup> See CURRY & DECKER, *supra* note 25, at 73-74; KLEIN, *supra* note 36, at 105-10; Finn-Aage Esbenson & L. Thomas Winfree, *Race and Gender Differences Between Gang and Nongang Youth: Results from a Multisite Survey*, 15 JUSTICE Q. 505 (1998).

<sup>55</sup> HOWELL & LYNCH, *supra* note 31, at 3.

<sup>56</sup> See ILL. CRIM. JUSTICE INF. AUTH., *supra* note 24, at 7.

<sup>57</sup> See SPERGEL, *supra* note 30, at 37-40. In general, the *National Crime Victimization Survey* has found that African-Americans are significantly more likely to be victims of

Chicago from 1990 to 1994 showed African-American males were about fifteen times more likely to be the victim of a gang-related homicide than nonminority males, and Hispanic males were about fourteen times more likely to be the victim of a gang-related homicide than nonminority males.<sup>58</sup>

The enormous problems that gang crime pose for inner-city neighborhoods helps to explain a phenomenon little remarked upon in legal scholarship, but which is commonplace for those actually involved in urban law enforcement: among the residents of inner-city minority communities, there is an intense demand for greater police presence and protection, not less.<sup>59</sup> This reality is reflected in the available polling data, which consistently indicates that minorities are more likely to believe that additional resources should be devoted to fighting crime than are nonminorities.<sup>60</sup> This phenomenon reflects a basic tenet of

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both violent and property crime than are nonminorities. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1999: CHANGES 1998-99 WITH TRENDS 1993-99 6, 9 (Aug. 2000). Hispanics are significantly more likely to be the victims of property crimes than are nonminorities but only slightly more likely to be victims of violent crime. *Id.* at 6, 9. This pattern has persisted since 1993. *Id.* at 13, fig. 3, 4, 7, 8.

<sup>58</sup> See ILL. CRIM. JUSTICE INF. AUTH., *supra* note 24, at 5.

<sup>59</sup> To be fair, Professors Kahan and Meares have made this point, but they appear to be about the only legal scholars aware of it. See Kahan & Meares, *The Coming Crisis*, *supra* note 20, at 1162-63; Meares & Kahan, *Wages*, *supra* note 20, at 208. Ethnographers, however, are well aware of this phenomenon. For example, it appears repeatedly in Sudhir Venkatesh's recent study of a Chicago housing project. See, e.g., SUDHIR ALLADI VENKATESH, AMERICAN PROJECT: THE RISE AND FALL OF A MODERN GHETTO 68-77 (2000).

<sup>60</sup> For example, in a 1999 survey, the National Opinion Research Center ("NORC") found that 70 percent of African-Americans but only 59 percent of whites thought that too little is spent to fight crime. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1999 126-27 tbl. 2.54 (Nov. 2000) [hereinafter cited as "1999 SOURCEBOOK"]. This pattern has persisted in each of the annual surveys since 1983. See *id.* Similarly, the Department of Justice's polling data indicates that the percentage of African-American households citing crime as a problem in their neighborhoods is about two and one-half times higher than for nonminority households, and even in central cities the percentage of African-American households citing crime as a neighborhood problem is about 50 percent higher than for nonminority households. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PERCEPTIONS OF NEIGHBORHOOD CRIME, 1995 1-2 (April 1998). Thus it comes as no surprise, at least to me, that in Chicago, attendance at beat meetings in Chicago's community-policing program is "highest in the city's African-American beats and lowest—once population is taken into account—in predominantly white areas." CHICAGO COMMUNITY POLICING EVALUATION CONSORTIUM, ILL. CRIM. JUSTICE INF. AUTH., COMMUNITY POLICING IN CHICAGO, YEARS FIVE AND SIX: AN INTERIM REPORT 19



urban sociology—communities view crime as a basic threat to their existence, and will organize in order to bring both public and private resources to bear against criminal activity to the extent that they are able.<sup>61</sup>

Nevertheless, I would not expect the statistics that I cite above—much less my own views—to be persuasive to those who have doubts about the fairness of gang suppression efforts in the minority community. Statistics about the racial dimensions of gang crime can readily be discounted as attributable to the biases of those who compile them. What is not so easy to discount, however, is the relationship between gang crime and the plight of what has come to be called the inner-city “underclass.” As John Hagedorn, one of our leading gang ethnographers, has observed:

To deny that gangs today are predominantly a minority problem inevitably leads to a failure to analyze the impact of our changing economy on various classes within minority communities. The significance of the formation of a minority urban underclass and the simultaneous emergence and entrenchment of gangs is completely overlooked.<sup>62</sup>

In an effort to avoid the mistake that Hagedorn charges has been made by so many who write about gang crime, I next advance a view of gang crime that takes account of the formation, existence, and entrenchment of an urban and disproportionately minority underclass.

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(May 1999). To similar effect, a reporter following narcotics enforcement in Harlem for the New York Times recently observed:

It's supposedly common knowledge: black New Yorkers distrust the police. But on the streets where Sergeant Brogli works, the biggest supporters of the police are African-American. In the last 15 years, this neighborhood may have changed from primarily African-American to Dominican, but the citizens council that meets monthly at the local precinct, the 30th, is headed by an African-American, Hazel O'Reilly, and dominated by African-Americans. At council meetings it is mainly black residents who attend to ask for *more* police enforcement, *more* drug arrests, who want *more* people jailed for loitering and trespassing.

Michael Winerip, *Why Harlem Drug Cops Don't Discuss Race*, N.Y. TIMES, July 9, 2000, at A1, 11 (emphasis in original). See also Blaine Harden, *On Edge but Optimistic, New York Blacks Offer Complex Views in Poll*, N.Y. TIMES, June 28, 2000, at B1.

<sup>61</sup> See, e.g., ROBERT J. BURSİK, JR. & HAROLD G. GRASMICK, NEIGHBORHOODS AND CRIME: THE DIMENSIONS OF EFFECTIVE COMMUNITY CONTROL 15-18, 34-57 (1993).

<sup>62</sup> HAGEDORN, *supra* note 45, at 25-26 (footnote omitted).

## II. TOWARD A THEORY OF GANG CRIME

The seminal work on gangs is Frederic Thrasher's study of 1920s-era Chicago gangs.<sup>63</sup> Thrasher's view, based on intensive field study, was that delinquent gangs were most likely to arise in relatively poor, unstable neighborhoods, which generally lack settled customs and institutions that inhibit delinquent conduct.<sup>64</sup> By the 1960s, a virtual consensus emerged around Thrasher's essential point—that gang formation is a consequence of the conflicts that emerge in socially disorganized lower-class milieus. The leading scholars in the field differed in their accounts of the nature of these conflicts, but essentially agreed that the social stresses commonly experienced in lower-class slum neighborhoods are at the heart of gang formation.<sup>65</sup>

<sup>63</sup> FREDERICK M. THRASHER, *THE GANG: A STUDY OF 1,313 GANGS IN CHICAGO* (1927). See generally, e.g., BURSİK & GRASMICK, *supra* note 61, at 119-21; Daniel J. Monti, *Origins and Problems of Gang Research in the United States*, in *GANGS*, *supra* note 45, at 4-17.

<sup>64</sup> See THRASHER, *supra* note 63. Thrasher's account of the origin and function of gangs is enormously rich and suggestive, and deserves to be quoted at some length:

Gangs represent the spontaneous effort of boys to create a society for themselves where none adequate to their needs exists. What boys get out of such association that they do not get otherwise under the conditions that adult society imposes is the thrill and zest of participation in common interests, more especially in corporate action, in hunting, capture, conflict, flight, and escape. Conflict with other gangs and the world about them furnishes the occasion for many of their exciting group activities.

The failure of the normally directing and controlling customs and institutions to function efficiently in the boy's experience is indicated by the disintegration of family life, inefficiency of schools, formalism and externality of religion, corruption and indifference in local politics, low wages and monotony in occupational activities, and lack of opportunity for wholesome recreation. All these factors enter into the picture of the moral and economic frontier, and, coupled with deterioration in housing, sanitation, and other conditions of life in the slum, give the impression of general disorder and decay.

The gang functions with reference to these conditions in two ways: It offers a substitute for what society fails to give; and it provides relief from suppression and distasteful behavior. It fills a gap and affords an escape. Here again we may conceive of it as an interstitial group providing interstitial activities for its members. Thus the gang, itself a natural and spontaneous type of organization arising through conflict, is a symptom of disorganization in the larger social framework.

*Id.* at 37-38 (footnotes omitted).

<sup>65</sup> See, e.g., ALBERT K. COHEN, *DELINQUENT BOYS: THE CULTURE OF THE GANG* (1955); RICHARD A. CLOWARD & LLOYD E. OHLIN, *DELINQUENCY AND OPPORTUNITY: A THEORY OF DELINQUENT GANGS* (1960); Walter B. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOC. ISSUES 5 (1958); Hyman Rodman, *The Lower Class Value Stretch*, 42 SOC. FORCES 205 (1963). This work, in turn, built upon the work of Clifford Shaw and Henry McKay, who had demonstrated that delinquency rates were related to the economic and social characteristics of inner-city communities. See BURSİK & GRASMICK, *supra* note 61, at 25-38. See also CLIFFORD R. SHAW & HENRY D. MCKAY, *JUVENILE DELINQUENCY IN URBAN AREAS* (1942).

Worthy of special attention—both because it accurately predicted much of what was to follow and because of the special pertinence that it has for racial minorities—is the “blocked opportunity” thesis advanced by Richard A. Cloward and Lloyd E. Ohlin.

Cloward and Ohlin advanced a “strain” theory, explaining the emergence of delinquent conduct among groups of youth in terms of the quest for upward mobility. Western industrialized societies, they observed, claim adherence to meritocratic principles, but when individuals come to believe that their aspirations cannot be realized by legitimate means, they experience pressure toward deviant behavior.<sup>66</sup> Cloward and Ohlin argued that when discrete groups come to believe that they cannot attain their economic and social objectives by legitimate means, they turn to illegitimate ones: “It is our view that pressures toward the formation of delinquent subcultures originate in marked discrepancies between culturally induced aspirations among lower-class youth and the possibility of achieving them by legitimate means.”<sup>67</sup> This pressure is most common within relatively disadvantaged classes, because although lower-class individuals “may yearn to rise in the social structure, the obstacles are great.”<sup>68</sup> And “[i]f traditional channels to higher position, such as education, are restricted for large categories of people, then pressures will mount for the use of alternative routes.”<sup>69</sup> The result is that “many lower class youths turn away from legitimate channels, adopting other means beyond middle class mores, which might offer a possible route to success-goals.”<sup>70</sup> Cloward and Ohlin premised this view on both sociological theory and research indicating that delinquency is most

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<sup>66</sup> See CLOWARD & OHLIN, *supra* note 65, at 80-82.

<sup>67</sup> *Id.* at 78.

<sup>68</sup> *Id.* at 85. In particular, Cloward and Ohlin argued, lower-class youths frequently perceive that their educational opportunities are limited. See *id.* at 97-99.

<sup>69</sup> *Id.* at 104. Cloward and Ohlin noted that among lower-class youths, sports or entertainment is frequently thought of as an alternative route to success by legitimate means, but eventually they discover that relatively few persons can succeed through these routes. See *id.* at 104-05.

<sup>70</sup> *Id.* at 105. As Cloward and Ohlin put it: “[D]emocratizing the criteria for evaluation without at the same time increasing the opportunities available to lower-class youngsters will accentuate the conditions that produce feelings of unjust deprivation.” *Id.* at 120-21.

frequent among those that believe that they have been unjustly denied opportunities for advancement.<sup>71</sup>

Where relatively large and coherent groups perceive that they confront common unjust barriers to advancement, Cloward and Ohlin reasoned, a deviant subculture is likely to form.<sup>72</sup> This occurs, they argued, when the prevailing social order is seen as illegitimate, so that guilt about the violation of social mores is unlikely to restrain deviant conduct.<sup>73</sup> One example of this phenomenon that Cloward and Ohlin identified was when discrete racial groups come to believe that despite the prevailing meritocratic dogma, racial criteria in fact are used to determine who can advance in society.<sup>74</sup> The type of deviant subculture that will develop in a given neighborhood, Cloward and Ohlin thought, depends on the character of the neighborhood.<sup>75</sup> When a lower-class neighborhood that experiences group pressure toward deviance also contains relatively stable criminal opportunities, what they called a "criminal subculture" will develop, as youths are drawn toward a stable organized crime structure.<sup>76</sup> But in relatively unstable neighborhoods, what develops is a "conflict subculture" that produces more violent behavior, as various groups compete for limited criminal opportunities.<sup>77</sup>

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<sup>71</sup> See *id.* at 113-21.

<sup>72</sup> See *id.* at 125-30.

<sup>73</sup> See *id.* at 130-39. Similarly, Cloward and Ohlin contended that the pressures toward delinquency were greatest when individuals attribute "the cause of failure to the social order rather than to oneself, for the way in which one explains his failure largely determines what he will do about it." *Id.* at 111.

<sup>74</sup> See *id.* at 119-21. They supported this argument in particular with reference to the barriers confronting African-Americans. See *id.* at 121-24.

<sup>75</sup> See *id.* at 166.

<sup>76</sup> See *id.* at 161-71. Cloward and Ohlin argued that the stability of the criminal structure in a neighborhood is essential to the formation of this subculture: "Only those neighborhoods where crime flourishes as a stable, indigenous institution are fertile criminal learning environments for the young." *Id.* at 148.

<sup>77</sup> See *id.* at 171-72. The less stable the neighborhood, the more likely a conflict subculture would develop: "Transiency and instability, in combination, produce powerful pressures for violent behavior among the young in these areas." *Id.* at 172. See also *id.* at 175-78. As for the factors that promote instability, Cloward and Ohlin explained:

The many forces making for instability in the social organization of some slum areas include high rates of vertical and geographic mobility; massive housing projects in which "site tenants" are not accorded priority in occupancy, so that traditional residents are dispersed and "strangers" reassembled; and changing land use, as in the case of residential

Cloward and Ohlin concluded with a prediction: "[D]elinquency will become increasingly aggressive and violent in the future as a result of the disintegration of slum organization."<sup>78</sup> Among the factors that they believed would contribute to increasing disorganization of lower-class communities were the decline in power of traditional organized crime, the decline of urban political machines and their ability to provide services to those communities, and massive "slum clearance" projects.<sup>79</sup> They concluded: "the major effort of those who wish to eliminate delinquency should be directed to the reorganization of slum communities."<sup>80</sup>

Of course, in the four decades since Cloward and Ohlin advanced their theory, social organization in the inner city has hardly improved. Instead, an increasingly service-oriented economy offered more restricted opportunities to individuals with limited skills and educational attainments; and reduced opportunities for upward mobility among the lower classes, in turn, helped to create what has come to be called an "underclass,"<sup>81</sup> a concept reflecting the characteristics that Cloward and Ohlin thought would produce violent gangs.<sup>82</sup>

The leading academic expositor of underclass theory is William Julius Wilson. His view—focusing on the inner-city African-

areas that are encroached upon by the expansion of adjacent commercial or industrial areas. Forces of this kind keep a community off-balance, for tentative efforts to develop social organization are quickly checked.

*Id.* at 172. Cloward and Ohlin also described what they labeled as the "retreatist subculture," in which individuals perceive themselves to have limited opportunities for advancement through both legitimate and illegitimate means, and therefore abandon any hope of advancement, frequently turning to drug use. *See id.* at 179-84.

<sup>78</sup> *Id.* at 203.

<sup>79</sup> *See id.* at 204-11.

<sup>80</sup> *Id.* at 211. The view that the degree of social organization in an underclass neighborhood has an important relationship to crime (recently stressed by Professors Kahan and Meares, *see, e.g.*, Kahan, *supra* note 20, at 355-61; Meares, *supra* note 20, at 194-98), is consistent with the view that limited economic opportunities available to the underclass provide a powerful stimulant to gang crime. Social organization theory does not purport to explain what causes people to turn to crime, but rather how social controls can deter such persons from committing crimes, and it is the absence of social organization in many underclass communities that prevents them from developing the public and private infrastructure necessary to provide legitimate opportunities to neighborhood youth. *See* BURSİK & GRAMSICK, *supra* note 61, at 143-46; COVEY, MENARD & FRANZESE, *supra* note 25, at 215-16.

<sup>81</sup> *See* WILSON, *supra* note 23, at 3-19.

<sup>82</sup> *See* CLOWARD & OHLIN, *supra* note 65, at 171-72.

American community in particular—is that in disadvantaged inner-city minority communities, an underclass has been created consisting of individuals who are “increasingly isolated socially from mainstream patterns and norms of behavior.”<sup>83</sup> In Wilson’s view, the urban underclass faces two primary impediments to upward mobility.<sup>84</sup> First, in the past thirty years economic opportunities available to persons with relatively limited educational attainment have sharply diminished as a result of structural changes in the economy that have reduced the demand for low-skill workers in the manufacturing and industrial sectors.<sup>85</sup> Second, there has been an enormous increase in female-headed families and out-of-wedlock births in the African-American community,<sup>86</sup> and that as well vastly diminishes the economic prospects for the members of these families.<sup>87</sup> The impediments that the underclass faces to upward mobility interact with the profound effects that Wilson believes the departure of the middle-class from inner-city slum neighborhoods has had on those too poor to leave.<sup>88</sup> He explains that

the exodus of middle- and working-class families from many ghetto neighborhoods removes an important “social buffer” that could deflect the full impact of the kind of prolonged and increasing joblessness that plagued inner-city neighborhoods in the 1970s and early 1980s, joblessness created by uneven economic growth and periodic recessions. This argument is based on the assumption that even if the truly disadvantaged segments of an inner-city area experience a significant increase in long-term spells of joblessness, the basic institutions in that area (churches, schools, stores, recreational facilities, etc.) would remain viable if much

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<sup>83</sup> WILSON, *supra* note 23, at 8.

<sup>84</sup> *See, e.g., id.* at 26-46.

<sup>85</sup> *See id.* at 39-46, 57-58, 100-04; WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 92-99, 113-15, 169 (2d ed. 1980).

<sup>86</sup> *See* WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 87-94 (1996); WILSON, *supra* note 23, at 26-29, 66-71; WILSON, *supra* note 85, at 132, 158.

<sup>87</sup> *See* WILSON, *supra* note 86, at 91-94; WILSON, *supra* note 23, at 26-29, 71-72; WILSON, *supra* note 85, at 130-34. Moreover, inculcating values that stress the importance of work is all the more difficult because so many families in underclass neighborhoods have only one parent present, making supervision of children more difficult. *See* WILSON, *supra* note 86, at 93-94; WILSON, *supra* note 23, at 74-76. Even when two parents are present, supervision of children is much more difficult in disordered underclass neighborhoods. *See* WILSON, *supra* note 86, at 62-64.

<sup>88</sup> *See, e.g.,* WILSON, *supra* note 86, at 13-17, 65-72; WILSON, *supra* note 85, at 151-54, 156-58.

of the base of their support comes from the more economically stable and secure families. Moreover, the very presence of these families during such periods provides mainstream role models that help keep alive the perception that education is meaningful, that steady employment is a viable alternative to welfare, and that family stability is the norm, not the exception.<sup>89</sup>

Accordingly, Wilson believes that "the groups that have been left behind are collectively different from those that lived in these neighborhoods in earlier years."<sup>90</sup>

The isolation of underclass neighborhoods from middle-class values makes upward mobility all the more difficult, Wilson argues.<sup>91</sup> The underclass becomes discouraged about opportunities for employment, believing that inner-city residents do not receive fair opportunities for advancement.<sup>92</sup> And employers, in turn, fear hiring residents of inner-city neighborhoods, believing that they are not reliable employees.<sup>93</sup> As a result, joblessness has persisted in underclass neighborhoods despite the prolonged economic expansion of the 1990s.<sup>94</sup>

The ultimate consequence of social isolation, Wilson argues, is that welfare and the underground economy become an important means of support in these neighborhoods.<sup>95</sup> Crime, in particular, flourishes in these underclass neighborhoods where economic opportunities are limited: "The underclass . . . knows that illegal activities, in many respects, provide a more lucrative alternative to low-wage employment."<sup>96</sup> And indeed, crime is endemic in these neighborhoods.<sup>97</sup>

<sup>89</sup> WILSON, *supra* note 23, at 56. Moreover, the pervasive instability in underclass neighborhoods reinforces social isolation: "[T]he communities of the underclass are plagued by massive joblessness, flagrant and open lawlessness, and low-achieving schools, and therefore tend to be avoided by outsiders." *Id.* at 58.

<sup>90</sup> *Id.* at 8.

<sup>91</sup> *See id.* at 56.

<sup>92</sup> *See* WILSON, *supra* note 86, at 72-86. Residents therefore do not pursue educational or employment opportunities because they become hopeless. *See id.* at 137-45; WILSON, *supra* note 85, at 107-10.

<sup>93</sup> *See* WILSON, *supra* note 86, at 111-45.

<sup>94</sup> *See id.* at 25-34, 145-46.

<sup>95</sup> *See* WILSON, *supra* note 23, at 57-62.

<sup>96</sup> *See* WILSON, *supra* note 85, at 108.

<sup>97</sup> *See* WILSON, *supra* note 23, at 21-23; WILSON, *supra* note 86, at 22-25. *See also* Lauren J. Krivo & Ruth D. Peterson, *Extremely Disadvantaged Neighborhoods and Urban Crime*, 75 SOC. FORCES 619 (1996).

The obstacles confronting the underclass are disproportionately experienced by African-Americans, since no other racial or ethnic group is so concentrated within impoverished and disorganized communities.<sup>98</sup> Many Hispanic neighborhoods have also experienced conditions that characterize the African-American underclass.<sup>99</sup> As a statistical matter, it is undeniable that African-Americans and Hispanics are grossly overrepresented among those who live in poverty.<sup>100</sup> And that overrepresentation is explained, at least in significant part, by the role that racism plays in creating a socially-isolated underclass. Wilson's account, for example, stresses the role of employment discrimination against minorities in entrenching the underclass.<sup>101</sup> Douglas Massey and Nancy Denton have added that the disproportionate representation of African-Americans in underclass neighborhoods is also a consequence of housing discrimination against African-Americans, who face potent discriminatory barriers when attempting to leave neighborhoods experiencing the social isolation that Wilson describes.<sup>102</sup>

The view that there is an identifiable group facing powerful barriers to upward mobility that can be fairly characterized as an "underclass" is now widely accepted.<sup>103</sup> As a statistical matter,

<sup>98</sup> See Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in *CRIME AND INEQUALITY* 40-44 (John Hagan & Ruth D. Peterson eds., 1995) [hereinafter cited as "CRIME AND INEQUALITY"].

<sup>99</sup> See generally Joan Moore, *Is There a Hispanic Underclass?*, 70 *SOC. SCIENCE Q.* 265 (1989); Anne M. Santiago & Margaret G. Wilder, *Residential Segregation and the Links to Minority Poverty: The Case of Latinos in the United States*, 38 *SOC. PROBS.* 492 (1991); Joan Moore & Raquel Pinderhughes, *Introduction*, in *IN THE BARRIOS: LATINOS AND THE UNDERCLASS DEBATE* x-xxxix (Joan Moore & Raquel Pinderhughes eds., 1993).

<sup>100</sup> The most recent statistics available from the Bureau of the Census indicate that while 11.8 percent of the population lives in poverty, see BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *POVERTY IN THE UNITED STATES: 1999* vii (Sep. 2000), the figure is 22.8 percent for Hispanics and 23.6 percent for African-Americans, see *id.* at vii-x. The poverty rate for white non-Hispanics was 7.7 percent, about one-third of the poverty rate for African-Americans and Hispanics. See *id.* at x.

<sup>101</sup> See WILSON, *supra* note 86, at 111-45.

<sup>102</sup> See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 7-9, 118-47 (1993). Wilson has also acknowledged the role that this form of racial segregation has played in creating a disproportionately minority underclass. See Sampson & Wilson, *supra* note 98, at 43-44.

<sup>103</sup> See, e.g., KEN AULETTA, *THE UNDERCLASS* 20-50 (1982); DOUGLAS G. GLASGOW, *THE BLACK UNDERCLASS: POVERTY, UNEMPLOYMENT AND ENTRAPMENT OF GHETTO YOUTH* 3-15 (1981); Paul E. Peterson, *The Urban Underclass and the Poverty Paradox*, in *THE URBAN UNDERCLASS*, *supra* note 23, at 15-25.



there can be little doubt that 1970 began an era in which upward mobility at the bottom rung of the economic ladder came to a halt—despite the booming economy of recent years, the proportion of Americans living in poverty in 1999 was higher than in 1969.<sup>104</sup> And of even greater pertinence to criminal justice policy, there is a growing body of evidence that as the economic opportunities available to low-skill residents of underclass communities have constricted, criminal activity has become a rational economic decision in those communities.<sup>105</sup>

The minority underclass thus has become a paradigmatic example of a discrete group confronting what Cloward and Ohlin called “blocked opportunities.”<sup>106</sup> While living in a nation that proclaims fealty to a meritocratic ideal, the minority underclass confronts an economy offering limited opportunities to unskilled workers, its children are confined to inferior schools, and it confronts both real and perceived racism as a powerful and wholly illegitimate barrier to upward mobility.<sup>107</sup> The

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<sup>104</sup> See BUREAU OF THE CENSUS, *supra* note 100, at B-7 tbl. B-2. Income inequality also has risen over the last thirty years. The lowest quintile’s share of household income declined from 4.0 percent in 1970 to 3.6 percent in 1999. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *MONEY INCOME IN THE UNITED STATES: 1999* xii tbl. C (Sep. 2000).

<sup>105</sup> For a useful review of the evidence that engaging in illegal activity constitutes a rational economic decision for many members of the minority underclass, see Jeffrey Fagan & Richard Freeman, *Crime and Work*, in *CRIME & JUSTICE: A REVIEW OF RESEARCH* 245-57 (Michael Tonry ed., 1999). One of the few studies to examine the economics of gang-related drug trafficking confirms this view. Professors Levitt and Venkatesh obtained the records of a large African-American gang involved in drug trafficking, and found that the wage structure of the gang was highly skewed, with foot soldiers’ earnings at or below minimum wage but superiors earning much higher relative wages than typically found in the private sector. See Steven D. Levitt & Sudhir Alladi Venkatesh, *An Economic Analysis of a Drug-Selling Gang’s Finances*, 115 Q.J. ECON. 755, 769-75 (2000). They add: “Given the enormous gap between the wages of the foot soldiers and those higher up in the gang, the most reasonable way to view the economic aspects of the decision to join the gang is as a tournament, i.e., a situation in which the participants vie for large awards that only a small fraction will eventually obtain.” *Id.* at 773 (citation omitted).

<sup>106</sup> See CLOWARD & OHLIN, *supra* note 65, at 105.

<sup>107</sup> For a particularly useful discussion of the impact that labor market barriers confronting underclass youth have on the culture in underclass neighborhoods, see MERCER L. SULLIVAN, “GETTING PAID”: YOUTH CRIME AND WORK IN THE INNER CITY 225-31 (1989). Indeed, there is reason to question whether the current labor market provides inner-city minorities with opportunities even as great as existed—at least in some parts of the country—prior to the emergence of the civil rights laws. Even before the demise of formal racial segregation, minorities at least on occasion were able to take advantage of the opportunities once available to low-skill workers. The waves of Afri-

blocked opportunity thesis thus suggests that minority underclass neighborhoods should be fertile breeding grounds for gang crime.<sup>108</sup>

And in fact, the work that has been done in gang ethnography confirms that underclass conditions powerfully stimulate gang formation. Indeed, there is a virtual consensus among gang researchers on this point.<sup>109</sup> In his ethnographic study of gang activity in a largely African-American Chicago housing project, for example, Sudhir Venkatesh observed a direct relationship between the decline in labor-market opportunities for inner-city youth in the Chicago area and the view that project residents took of gangs, finding that as economic opportunities constricted during the 1970s and 1980s "youth gangs' stature in the community shifted from 'delinquent' to economic . . . ."<sup>110</sup> Irving Spergel has observed, summarizing gang research in the 1980s and early 1990s, "in inner-city African-American communities, limited criminal opportunity systems have evolved as gangs change from status-oriented conflict groups to more rational but predatory organizations, with special interests in drug

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can-American migration to northern cities during the twentieth century, for example, were largely motivated by the economic opportunities available there. See generally NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991). Much Hispanic migration had a similar motivation. See Moore & Pinderhughes, *supra* note 99, at xvi-xx.

<sup>108</sup> In fact, Professor Massey has made a compelling statistical case that the disproportionate involvement of the minorities in the criminal justice system is a direct function of the extent to which minorities live in socially isolated underclass neighborhoods. See Douglas S. Massey, *Getting Away With Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203 (1995).

<sup>109</sup> See, e.g., BURSİK & GRASMICK, *supra* note 61, at 143-46; CURRY & DECKER, *supra* note 25, at 74, 124; HAGEDORN, *supra* note 45, at 111-28; JANKOWSKI, *supra* note 45, at 23-31 (1991); KLEIN, *supra* note 36, at 193-97; MOORE, *supra* note 40, at 5-7, 133-36; MOORE, *supra* note 45, at 27-54; PADILLA, *supra* note 45, at 32-54; SANDERS, *supra* note 40, at 41-46; TAYLOR, *supra* note 45, at 103-15; JAMES DIEGO VIGIL, *BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA* 24-34 (1988); Fagan, *supra* note 37, at 55-57; Miller, *supra* note 37, at 278-83; Daniel J. Monti, *Public Policy and Gangs: Social Science and the Urban Underclass*, in *GANGS*, *supra* note 45, at 310-14.

<sup>110</sup> Sudhir Alladi Venkatesh, *The Gang in the Community*, in *GANGS IN AMERICA* 1996 ED., *supra* note 24, at 247. See also VENKATESH, *supra* note 59, at 134-39, 161-62. For an historical account of how constricted opportunities have stimulated gang activity in Chicago's African-American community in recent decades, see USENI EUGENE PERKINS, *EXPLOSION OF CHICAGO'S BLACK STREET GANGS: 1900 TO PRESENT* 20-53 (1987).

trafficking and other criminal gain."<sup>111</sup> Pamela Jackson has even demonstrated a statistical relationship between the indicia of an underclass neighborhood and the indicia of gang activity.<sup>112</sup> In disorganized and disadvantaged underclass communities, ethnographers observe, gangs thrive because they provide prestige, social structure, and support systems for youths who may have little other structure in their lives.<sup>113</sup> Gang membership may also

<sup>111</sup> SPERGEL, *supra* note 30, at 62. Spergel describes the same phenomenon in underclass Hispanic neighborhoods. See *id.* at 63-64. Here is Wilson's complementary description of the role of drug trafficking in underclass neighborhoods:

Consider, for example, the problems of drug trafficking and violent crime. As many studies have revealed, the decline in legitimate employment opportunities among inner-city residents has increased incentives to sell drugs. The distribution of crack in a neighborhood attracts individuals involved in violence and lawlessness . . . . The association is especially strong in inner-city ghetto neighborhoods plagued by joblessness and weak social organization.

Violent persons in the crack-cocaine marketplace have a powerful impact on the social organization of a neighborhood. Neighborhoods plagued by high joblessness, insufficient economic opportunities, and high residential mobility are unable to control the volatile drug market and the violent crimes related to it. As informal controls weaken, the social processes that regulate behavior change.

Moreover, as Alfred Blumstein pointed out, the drug industry actively recruits teenagers in the neighborhood "partly because they will work more cheaply than adults, partly because they may be less vulnerable to the punishments imposed by the adult criminal justice system, partly because they tend to be daring and willing to take risks that more mature adults would eschew." Inner-city black youths with limited prospects for stable or attractive employment are easily lured into drug trafficking and therefore increasingly find themselves involved in the violent behavior that accompanies it.

WILSON, *supra* note 85, at 21-22. See also Alfred Blumstein, *Violence by Young People: Why the Deadly Nexus?*, JUVENILE JUSTICE J., Aug. 1995, at 2. I will consider the relationship between drug trafficking and violence at greater length in Part III, *infra*.

<sup>112</sup> See Pamela Irving Jackson, *Crime, Youth Gangs, and Urban Transition: The Social Dislocations of Postindustrial Economic Development*, 8 JUSTICE Q. 379 (1991).

<sup>113</sup> See, e.g., CURRY & DECKER, *supra* note 25, at 63, 124-25; KLEIN, *supra* note 36, at 74-80; DEBORAH PROTHROW-SITTH, DEADLY CONSEQUENCES 106-10 (1991); SPERGEL, *supra* note 30, at 71-73; VALDEZ, *supra* note 44, at 15-16 (1997); VIGIL, *supra* note 109, at 90-92, 150-69. For example, gangs frequently prescribe an elaborate code of behavior for members that creates considerable cohesion. See, e.g., CURRY & DECKER, *supra* note 25, at 76-78; JANKOWSKI, *supra* note 45, at 78-84. Accordingly, gangs provide the guidance and structure that children in underclass communities frequently do not receive from parents. See, e.g., KAREN L. KINNEAR, GANGS: A REFERENCE HANDBOOK 6 (1996); SPERGEL, *supra* note 30, at 94-96. Irving Spergel has elaborated:

A process of destructive socialization occurs: youths who have insufficient social support at home from separated, alienated, or unemployed parents receive inadequate and uncaring attention at school, where they consequently fail or are inadequately educated. Furthermore, youth or community agencies no longer have the resources or capabilities to reach out to these now more socially detached and disorganized young people. Youths must learn to survive on the streets, through attachment to a variety of semi-organized illegitimate structures and criminal and status-providing activities.

be an important means of self-protection from the many threats confronting residents of disadvantaged neighborhoods.<sup>114</sup> But even more important is the opportunity for financial gain that gang membership provides to those who perceive their legitimate opportunities for upward mobility to be limited at best. Gang ethnography again bears out this point. Jankowski's study, for example, found that the opportunity for material gain was the chief reason cited by gang members for joining a street gang.<sup>115</sup> Sudhir Venkatesh, whose ethnographic studies are nearly as comprehensive as Jankowski's, also found the prospect of material gain to be a principal motive for gang participation.<sup>116</sup> And this conclusion is consistent with the findings of many others.<sup>117</sup>

*Id.* at 62-63.

<sup>114</sup> See, e.g., CURRY & DECKER, *supra* note 25, at 63; JANKOWSKI, *supra* note 45, at 44-45; PADILLA, *supra* note 45, at 65-68; SPERGEL, *supra* note 30, at 92-93.

<sup>115</sup> See JANKOWSKI, *supra* note 45, at 40-42.

<sup>116</sup> Venkatesh concluded:

Gang members do find in corporate gang activity a measure of peer group support and a sense of belonging to a larger community; however, these symbolic benefits alone also seems to be incapable of sustaining motivation in gang-based entrepreneurialism over an extended time period, perhaps because gang members eventually find social support from peers who are not affiliated with gangs.

Indeed, the life-course appears to be the best perspective from which to understand the interaction of symbolic and economic incentives. Ethnographic observations of several gangs over an extended period of time indicate an aging-out pattern. For example, at the most basic level, the successful corporate gang will provide for all of its members an immediate wage and a direct sense of community and identity. The significance of these two benefits changes, however, as the individual member ages. In his role as an entering foot soldier, the member has few financial commitments, and so gang involvement makes possible fairly continuous consumption and provides an alternative to menial work in the service sector, along with the fellowship of one's peers. The younger foot soldier is motivated to stay in the gang by the prospect of a potentially lucrative salary as an officer. However, for the older, more experienced drug trader, one with perhaps a growing number of financial and familial commitments, the immediate economic wage is no longer sufficient; similarly, while the benefits of the peer group continue to exist, opportunities for high income and promotion in the gang diminish. It is at this point that most of the gang members in this sample abdicated their involvement in the gang's entrepreneurial activities and chose instead to direct their energies to the mainstream labor market. While many continued to participate in the gang's social activities, the symbolic attraction of dramatic future material rewards appeared to lose its motivating capacity.

Sudhir Venkatesh, *The Financial Activity of a Modern American Street Gang*, in *I LOOKING AT CRIME FROM THE STREET LEVEL: PLENARY PAPERS OF THE 1999 CONFERENCE ON CRIMINAL JUSTICE RESEARCH AND EVALUATION—ENHANCING POLICY AND PRACTICE THROUGH RESEARCH 6-7* (U.S. Dep't of Justice Nov. 1999).

<sup>117</sup> See, e.g., CURRY & DECKER, *supra* note 25, at 62-63, 137-40; MOORE, *supra* note 40, at 42-44; PADILLA, *supra* note 45, at 101-03; SPERGEL, *supra* note 30, at 94; SULLIVAN, *supra* note 107, at 117, 222-50; TAYLOR, *supra* note 45, at 5-6, 10-12, 61, 99-102; Fagan, *supra* note 37, at 52-54; Jeffrey Fagan, *The Political Economy of Drug Dealing Among Urban*

Because of the persistence and magnitude of poverty in minority underclass neighborhoods, the underground drug economy is one of the primary sources of economic opportunity available in those neighborhoods.<sup>118</sup> Crime rates continue to reflect the sustained attraction of narcotics trafficking; there is little evidence that drug crime has declined with the general trend toward declining crime rates. To the contrary, drug arrests continue to rise,<sup>119</sup> and despite the enormous resources devoted to drug-law enforcement, the supply and price of illegal drugs has remained stable.<sup>120</sup> Phillippe Bourgeois has argued that disadvantaged minorities are particularly vulnerable to the attractions of the drug economy, since underclass minorities are particularly skeptical about the legitimate economy by virtue of their experiences with racism.<sup>121</sup> For racial minorities who confront

*Gangs*, in DRUGS AND THE COMMUNITY: INVOLVING COMMUNITY RESIDENTS IN COMBATting THE ILLEGAL SALE OF DRUGS 27-45 (Robert C. Davis, Arthur J. Lurigio & Dennis P. Rosenbaum eds., 1993) [hereinafter cited as "DRUGS AND THE COMMUNITY"].

<sup>118</sup> See, e.g., ELIJAH ANDERSON, STREETWISE: RACE, CLASS AND CHANGE IN AN URBAN COMMUNITY 3-5, 57-84, 239-47 (1990); PHILLIPPE BOURGEOIS, IN SEARCH OF RESPECT: SELLING CRACK IN EL BARRIO 2-9, 319-21 (1996); PADILLA, *supra* note 45, at 48-54, 101-03; SULLIVAN, *supra* note 107, at 239-41; Bruce D. Johnson et al., *Drug Abuse in the Inner City: Impact on Hard-Drug Users and the Community*, in DRUGS AND CRIME 23-26, 33-35 (Michael Tonry & James Q. Wilson eds., 1990) [hereinafter cited as "DRUGS AND CRIME"]; Fagan, *supra* note 37, at 58-63; Eloise Dunlap & Bruce D. Johnson, *The Setting for the Crack Era: Macro Forces, Micro Consequences (1960-92)*, 24 J. PSYCHOACTIVE DRUGS 307 (1992); Taylor, *supra* note 45, at 115; Venkatesh, *supra* note 110, at 245-47.

<sup>119</sup> According to the Federal Bureau of Investigation, arrests for drug-law violations rose 7.3 percent from 1995 to 1999, and 36.5 percent from 1990 to 1999. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: 1999 UNIFORM CRIME REPORTS 211, 216 tbl. 32, 218 tbl. 34. (2000). Among persons under 18 years old, drug arrests rose 132.2 percent from 1990 to 1999. See *id.* at 216 tbl. 3.89.

<sup>120</sup> Even the Office of National Drug Control Policy acknowledges that prices for cocaine, heroin and marijuana have remained stable in recent years, and remain readily available to purchasers. See OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: 2000 ANNUAL REPORT 12-18 (2000). The report also acknowledges that the availability of methamphetamine is increasing rapidly. See *id.* at 19-20. Moreover, while polling data suggests a decline in drug use in recent years, see 1999 SOURCEBOOK, *supra* note 60, at 248 tbl. 3.89, those statistics may reflect no more than increasing unwillingness of those polled to admit to drug involvement. The less manipulable statistics reflecting drug-related medical emergencies have not shown a similar decline. See *id.* at 257 tbl. 3.107. See generally Thomas M. Mieczkowski, *The Prevalence of Drug Use in the United States*, in CRIME AND JUSTICE: A REVIEW OF RESEARCH 349-414 (Michael Tonry ed., 1996).

<sup>121</sup> See Phillippe Bourgeois, *In Search of Horatio Alger: Culture and Ideology in the Crack Economy*, 16 CONTEMP. DRUG PROBS. 619 (1989).

racial as well as economic barriers, the economic opportunities that gangs offer are therefore especially potent.<sup>122</sup> That view is supported by statistics on the racial composition of gangs suggesting that poverty alone does not explain gang membership; the proportion of minorities among gang members substantially exceeds the proportion of minorities living in poverty.<sup>123</sup> In short, with an entrenched and disproportionately minority underclass comes entrenched and disproportionately minority gangs.<sup>124</sup>

This brief survey of contemporary ethnographic research on gang activity brings me back to Cloward and Olin's view of gang formation. A theory resting on "blocked opportunities" explains the propensity for gang activity in underclass neighborhoods, as well as the increasing emphasis gangs have placed on sales of narcotics.<sup>125</sup> It is also certainly consistent with the

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<sup>122</sup> Indeed, the 1996 *National Youth Gang Survey* found that minority gang members, especially African-Americans, were more likely to be involved in drug sales than nonminority gang members. See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, 1996 NATIONAL YOUTH GANG SURVEY: SUMMARY 41, 43-44 (Oct. 1999).

<sup>123</sup> Although the most recent census data shows that 22.8 percent of Hispanics and 23.6 percent of African-Americans live in poverty, see BUREAU OF THE CENSUS, *supra* note 100, at vi, the statistics on the racial composition of gang membership that I discuss above indicate the minorities represent an even higher proportion of gang membership. See text at notes 51-57.

<sup>124</sup> As Jeffrey Fagan has observed:

The structural changes in U.S. society that gave rise to these new forms of gangs and ganging will not easily be undone. If gangs have evolved in a way that responds to the new social, economic and cultural realities of the late 20th century, then gangs may become a durable and long-lasting feature of adolescent and neighborhood life – that is, gangs may become institutionalized in U.S. suburbs and cities as part of the social and cultural ecology of neighborhoods and as a career choice for young adolescents that may compete with diminishing jobs and other social roles.

Fagan, *supra* note 37, at 69.

<sup>125</sup> The difficulties of gathering reliable empirical evidence on the extent to which a "strain" theory such as that advanced by Cloward and Ohlin explains gang membership should be readily apparent. One of the few studies that have attempted to examine the matter, however, produced at least some support for this view. Based on a multivariate analysis of the results of two surveys—one a nationwide survey of young persons in custody and the other a survey of Seattle youth disproportionately likely to have a record of police contact or juvenile court disposition, the authors concluded that lack of maternal supervision, a discrepancy between financial goals and educational expectations, and the expression of deviant attitudes toward the law, were each significantly correlated to gang membership. See David Brownfield et al., *Correlates of Gang Membership: A Test of Strain, Social Learning, and Social Control Theories*, 4 J. GANG RES. 11 (1997).

analysis of Wilson and others about the character of the inner-city underclass.<sup>126</sup> But most important for present purposes is the implication for crime control that this view of gang formation holds. When crime comes to be seen as a rational choice for residents of a discrete neighborhood, that will ultimately have a profound impact on social norms in that neighborhood, and, therefore, the willingness and ability of its residents to choose legitimate paths to upward mobility. Mercer Sullivan, in his ethnographic study of three disadvantaged New York neighborhoods, made this point as he synthesized economic and cultural explanations for underclass crime, concluding that crime comes to be tolerated in a community to the extent that it comes to be seen as a necessary means of bringing resources into that community.<sup>127</sup> Frank Zimring and Gordon Hawkins have made a similar point, observing that openly conducted drug dealing in impoverished communities with few other economic opportunities causes a potent form of community demoralization to "set in, making all forms of illegitimate activities seem both more attractive and less credibly stigmatized."<sup>128</sup> This

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<sup>126</sup> Probably the most serious objection that has been made to Cloward and Ohlin in light of contemporary ethnographic research on gang crime is the failure of that research to identify the distinct subcultures that Cloward and Ohlin described. See, e.g., BURSİK & GRASMICK, *supra* note 61, at 138-42; Fagan, *supra* note 37, at 43-44. Indeed, Joan Moore has questioned the concept of distinct gang subculture altogether, at least for the Southern California Hispanic gangs that she has studied, observing that Hispanic gangs frequently reflect many of the values of the community in which they develop. See MOORE, *supra* note 45, at 49-54; Joan Moore, *Gangs, Drugs, and Violence*, in GANGS, *supra* note 45, at 33-34. I quite agree that the evidence does not support the existence of distinct subcultures as described by Cloward and Ohlin. For example, the evidence does not support a distinction between "criminal" and "conflict" subcultures; the same gangs may engage in stable, ongoing criminal activity punctuated by bouts of sustained violence, a point considered at some length in Part III, *infra*. Moreover, gangs that otherwise might be considered either conflict or criminally oriented also frequently reflect elements of what Cloward and Ohlin called a retreatist subculture, given the abundant evidence that gang members use drugs at high rates. See, e.g., COVEY, MENARD & FRANZESE, *supra* note 25, at 55-57; HOWELL & DECKER, *supra* note 45, at 2. But the problems with Cloward and Ohlin's effort to classify gangs do not impugn the importance that blocked opportunities has in gang formation, a point that even Joan Moore fully embraces. See MOORE, *supra* note 40, at 42-44; MOORE, *supra* note 45, at 27-34, 51-54.

<sup>127</sup> See SULLIVAN, *supra* note 107, at 244-50.

<sup>128</sup> FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SEARCH FOR RATIONAL DRUG CONTROL* 149 (1992). Vekatesh's study of a Chicago housing project powerfully documents community demoralization caused by open gang activity, especially narcotics trafficking. See VENKATESH, *supra* note 59, at 110-12.

assessment, of course, does not even take into account the plethora of other consequences of gang criminality for a community, such as its effects on property values, incentives to invest, the willingness of community residents to assist law enforcement efforts, and the incentive for those who can afford to out-migrate to do so.<sup>129</sup>

In short, gang crime is a real threat to the inner-city minority community, not just an excuse for aggressive policing. Whether, as a sociological matter, one accepts a "strain" theory like that advanced by Cloward and Ohlin, a theory stressing the absence of social controls in the inner city, or one stressing the patterns of social learning in certain communities as the basis on which gangs form, ultimately it should be plain that when community mores are undermined by gang criminality, the slim chance that the inner city has for revitalization becomes even slimmer.<sup>130</sup> Of course, the factors that determine what course any given individual's life will take are enormously complex, and indeed most residents of underclass communities do not turn to gang crime.<sup>131</sup> But if one takes seriously the magnitude of the barriers that confront the minority underclass, then one must also acknowledge that gangs will have a special attraction for the residents of those communities, and will pose a special threat to their future. Moreover, the underclass thesis suggests that contemporary gangs may be more entrenched than the urban gangs of previous eras, since the relative opportunities for

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<sup>129</sup> See BURSİK & GRASMICK, *supra* note 61, at 52-59; SKOGAN, note 19, at 65-84, 172-79; see also Susan W. Hillenbrand & Robert C. Davis, *Residents' Perceptions of Drug Activity, Crime and Neighborhood Satisfaction*, in DRUGS AND THE COMMUNITY, *supra* note 117, at 5-18.

<sup>130</sup> For this tripartite division of sociological theories of gang formation, see Brownfield et al., *supra* note 125, at 11-13. As should be apparent from the discussion above, from the standpoint of law enforcement it ultimately matters little what relative importance is afforded to each type of theory; as long as gangs are seen as an attractive alternative to the limited opportunity systems in the inner city, all three types of theories suggest that gang formation will be stimulated. Indeed, to my eye, strain, social control and social learning theories appear to complement more than compete with each other, as I suggested earlier. See *supra* note 80. For a particularly incisive discussion of the interrelationship between supposedly competing theories of gang formation, see J. Mitchell Miller & Albert Cohen, *Gang Theories and Their Policy Implications*, in GANGS: A CRIMINAL JUSTICE APPROACH 3-16 (J. Mitchell Miller & Jeffrey D. Rush eds., 1996).

<sup>131</sup> For a discussion of recent research into the many factors at work in the decision of a youthful offender to turn to crime, see Jeffrey Fagan, *Context and Culpability in Adolescent Crime*, 6 VA. J. SOC. POL'Y & L. 507 (1999).



economic advancement open to low-skill workers and the exposure of youth in underclass neighborhoods to middle-class values appears even more circumscribed now than during much of the twentieth century.

Because the underclass faces special economic disadvantages, underclass theorists properly argue that special efforts must be made to increase the educational and economic opportunities available to residents of those communities—advocating a sort of New Deal for the inner cities.<sup>132</sup> While I am myself in considerable sympathy with that approach, the case that has been made for it to date is at best incomplete. The advocates for greater social spending in the inner city all too often fail to come to grips with the need for enhanced policing as part of an effort to revitalize the inner city. The success of any social program, especially in communities rightly skeptical about the willingness of society to give them a fair chance at advancement, will be necessarily impaired as long as illegitimate economic opportunities remain abundant.<sup>133</sup> Elementary economics dictates this conclusion—to the extent that illegitimate opportunities for advancement remain available, the relative attractiveness of whatever legitimate opportunities that are available, particularly for those skeptical about those opportunities, is diminished. Indeed, studies of anti-gang programs consistently show that those programs that combine social services with increased enforcement initiatives enjoy the most success.<sup>134</sup> Ultimately, then, the case for using the criminal law to achieve gang suppression should be particularly compelling for those who are persuaded by the view that poverty is the most potent criminogenic force in the inner city.<sup>135</sup>

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<sup>132</sup> That, for example, is Wilson's view. See WILSON, *supra* note 85, at 207-35; WILSON, *supra* note 23, at 149-63.

<sup>133</sup> To take but one example, gang members are disproportionately likely to drop out of school. See CURRY & DECKER, *supra* note 25, at 129-32.

<sup>134</sup> See, e.g., JAMES C. HOWELL & DEBRA K. GLEASON, U.S. DEP'T OF JUSTICE, YOUTH GANG DRUG TRAFFICKING 9 (Dec. 1999); IRVING SPERGEL ET AL., U.S. DEP'T OF JUSTICE, GANG SUPPRESSION AND INTERVENTION: PROBLEM AND RESPONSE: RESEARCH SUMMARY 15-18 (Oct. 1994); Barbara E. Smith & Robert C. Davis, *Successful Community Anticrime Programs: What Makes Them Work?*, in DRUGS AND THE COMMUNITY, *supra* note 117, at 123-37. Conversely, there is little evidence that social intervention programs alone successfully suppress gang crime. See COVEY, MENARD & FRANZESE, *supra* note 25, at 272-300.

<sup>135</sup> To be fair, there are two conceivable alternatives for addressing problems that would not require an emphasis on gang suppression. The first is legalization of

Accordingly, an efficacious gang suppression strategy must minimize the attraction of street gangs for the residents of underclass communities. Since the available research suggests that the economic incentives underlying gang crime are particularly potent, mitigating those incentives should be a centerpiece of gang suppression strategy.<sup>136</sup> That, in turn, requires more de-

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drugs. Legalization would reduce the economic opportunities available to gangs through drug trafficking, although it would pose a host of other problems. *See, e.g.*, James A. Inciardi & Duane C. McBride, *The Case Against Legalization*, in *THE DRUG LEGALIZATION DEBATE* 45-79 (James A. Inciardi ed., 1991); Mark H. Moore, *Drugs: Getting a Fix on the Problem and the Solution*, 8 *YALE L. & POL'Y REV.* 8 (1990). Moreover, on the view that it is poverty that breeds inner-city crime advanced here, legalization of drugs would not so much reduce crime as encourage other forms of economically motivated criminal behavior that may well lead to even greater social costs than drug crime. Legalization, in any event, is far too unpopular to be a politically practicable option. In its 1999 survey, the NORC found that legalization of marijuana was supported by only 28 percent of respondents and opposed by 69 percent. *See* 1999 SOURCEBOOK, *supra* note 60, at 149 tbl. 2.81. The second option is resettlement of inner-city minority residents in middle class communities through a scattered-site program that would disperse groups that otherwise might cohere into gangs. This is the logical implication of Massey and Denton's work, for example. But, as even those sympathetic to Massey and Denton have observed, given the limited means of the minority underclass, it will be impossible to effectively integrate it into middle class communities without a massive subsidy, as well as the enactment of laws requiring relatively wealthy nonminority communities to accept affordable housing for minorities. *See, e.g.*, Florence Wagman Roisman, *Book Review: The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 *IOWA L. REV.* 479, 512-25 (1995). And the likelihood that the massive subsidies and new laws necessary to relocate inner-city minorities will be provided by the federal or state governments is surely minimal, however desirable such a policy might be. *See, e.g.*, Edward A. Zelinsky, *Book Review: Metropolitanism, Progressivism, and Race*, 98 *COLUM. L. REV.* 665 (1998). Indeed, even Massey and Denton seem to acknowledge the limited range of options currently within the ambit of political practicability, since their own policy recommendations are relatively modest, involving improved enforcement of antidiscrimination laws. *See* MASSEY & DENTON, *supra* note 102, at 229-36.

<sup>136</sup> I am perhaps more skeptical than some about the ability of government to address the noneconomic factors that make gang membership attractive in many communities, though I recognize the need to make the attempt. Surely even advocates of this approach, however, must acknowledge its limitations. In underclass communities facing potent barriers to upward mobility—barriers that many residents rightly see as illegitimate and racist—it is understandably difficult to convince residents that they have a fair opportunity for economic advancement by legitimate means. Wilson's work, for example, demonstrates this difficulty. *See supra* notes 91-97 and accompanying text. The emerging scholarship on social norms and law enforcement has yet to come to grips with Cloward and Ohlin's basic insight that when discrete and coherent groups come to see prevailing social norms as illegitimate, those norms will not restrain their conduct. Social norms research itself tends to confirm this point. *See, e.g.*, Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 *CHI.-KENT L. REV.* 1537, 1556-67 (2000). And as Professor Harcourt rightly observes, the advocates of order-

tailed consideration of gang drug trafficking, since it is the principal type of economically motivated crime associated with street gangs.<sup>137</sup> And, as we will see, drug trafficking holds special advantages for gangs when compared to other types of crime.

### III. GANGS AND THE ECOLOGY OF INNER-CITY DRUG TRAFFICKING

It is not difficult to imagine how a rational gang wishing to maximize its drug profits would organize itself. Because drug buyers lack reliable pricing information, drug sellers should be able to charge higher prices than they would obtain in a perfectly competitive market. Prices can rise even higher if a gang can exclude competition from a given market. That can be done by identifying and then monopolizing a territory that can operate as a drug market—preferably a lucrative one where demand is high—through the use of coercive tactics against potential competitors. That is pretty much how successful gangs operate.

Gangs begin with a particular advantage in establishing territorial monopolies, since they are frequently organized around an identifiable geographic territory.<sup>138</sup> The ethnographic work confirms that, within their territory, gangs attempt to control drug trafficking in order to increase profits.<sup>139</sup> John Hagedorn provides an example from Chicago: “gangs carved out turf in large high-rise housing projects, where a small organized group could control drug sales and reap enormous profits simply by controlling the housing project elevators by armed force.”<sup>140</sup> Of

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maintenance policing as a means of influencing social norms have yet to identify compelling empirical evidence to support their claims. See Bernard E. Harcourt, *After the “Social Meaning Turn”: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 *LAW & SOC’Y REV.* 179, 191-97 (2000); Harcourt, *supra* note 5, at 308-39.

<sup>137</sup> See *supra* notes 44-46 and accompanying text.

<sup>138</sup> See, e.g., SPERGEL, *supra* note 30, at 87-89; SULLIVAN, *supra* note 107, at 109-13; TAYLOR, *supra* note 45, at 6-7; VALDEZ, *supra* note 44, at 25, 29, 66-67, 119-24; Fagan, *supra* note 37, at 41.

<sup>139</sup> See, e.g., DECKER & VAN WINKLE, *supra* note 45, at 163-64; KINNEAR, *supra* note 113, at 17-18; PADILLA, *supra* note 45, at 16; SPERGEL, *supra* note 30, at 47-49; Ansley Hamid, *The Political Economy of Crack-Related Violence*, 17 *CONTEMP. DRUG PROBS.* 31, 61-63 (1990); Venkatesh, *supra* note 110, at 247-50. And Levitt and Venkatesh found evidence that the drug-trafficking gang they studied increased its market power as the turf it controlled expanded. See Levitt & Venkatesh, *supra* note 105, at 781-82.

<sup>140</sup> HAGEDORN, *supra* note 45, at 104. Similarly, in his study of Milwaukee gangs, Hagedorn found: “The degree to which drug markets were ‘closed’ (only gang members were allowed to sell drugs in the neighborhood) also helped stabilize the drug-

course, not all turf is created equal. Most lucrative are those areas relatively accessible to affluent outsiders; one of the few studies to examine this issue, Hagedorn's study of Milwaukee gangs, found that the most important factor stimulating the growth of gang drug trafficking was whether a gang operated in an area readily accessible to and frequented by drug buyers from relatively wealthier areas.<sup>141</sup> This makes eminent sense; drug dealing would not be terribly lucrative if it did no more than attract the money already in disadvantaged neighborhoods—neighborhoods that have little enough of money to begin with.

Gangs thus take on an entrepreneurial character; indeed, they are forced to do so by the imperatives of the market, just like any other business. In time, the more successful gangs prosper while the less successful die, as the ethnographic work shows.<sup>142</sup> The structure of a street gang is well-suited to success in the drug business, precisely because the gang provides a potent means by which monopoly power over identifiable turf can be achieved. Skolnick, Bluthenal and Correl, in their study of Southern California gangs, make the point:

[B]eing a member of gang facilitated drug dealing success. This facilitation was apparent in myriad ways. Gangs, for example, offer a rich source of shared marketing information. Information about who sells, for what price, and who has drugs available is frequently communicated along gang lines. The gang member can also rely on his homeboys for protection and concerted retribution if anything should happen to him inside or outside his gang turf. Gang members, furthermore, enjoy easy access to and control of territorial markets. They can sell drugs in their own neighborhood without intruding on the turf of others. In return, they can exclude others from selling on their turf. This territorial monopoly is backed by force since the gang automatically protects against outside intruders. Finally, there is a well-developed and virtually sacrosanct sense of trust inhering in the homeboy relationship, so that gang

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selling environment, thereby increasing drug profits." John Hagedorn, *Neighborhoods, Markets, and Gang Drug Organization*, 31 J. RES. CRIME & DELINQ. 264, 275 (1994).

<sup>141</sup> See *id.* at 264, 275, 279, 287-88.

<sup>142</sup> For example, this was the pattern observed by Hagedorn in his study of largely African-American gangs in Milwaukee. See *id.* at 274-75, 290. Similarly, in his study of a Puerto Rican gang in Chicago, Padilla concluded that the gang owed its success to its entrepreneurial organization centered on drug trafficking. See PADILLA, *supra* note 45, at 95-116. This is in fact the general pattern observed among drug trafficking organizations, which become more centralized and entrepreneurial over time as they face competition. See, e.g., Johnson et al., *supra* note 118, at 33-39.

members are expected not to betray other members to the police or rival gangs.<sup>143</sup>

The importance of controlling identifiable turf is enhanced by the fact that drug sales are frequently conducted outdoors, in open-air markets. The best data on this point currently available, a United States Department of Justice survey of arrestees in six large cities, found that the vast majority of crack and heroin purchases are made outdoors, with powder cocaine somewhat less likely to be purchased outside.<sup>144</sup> At first blush this may seem puzzling; one would think that persons engaged in unlawful activities would prefer to do so indoors, away from prying eyes, and not where they are especially vulnerable to surveillance and arrest. But once again there is an entrepreneurial explanation. Visible drug markets are easy for potential customers to find, and aside from customers' preference, those involved in illegal transactions may be distrustful of indoor drug houses, where they lack mobility and are relatively more vulnerable to robbery or police raid.<sup>145</sup> This is especially true when drug markets cater to relatively affluent outsiders, who are likely to be unfamiliar with disadvantaged neighborhoods and unable or unwilling to look for covert drug distribution centers. Even where drugs are sold indoors, traffickers will still require look-outs to be posted outside to warn of police activity, again, requiring the visible control of turf.<sup>146</sup>

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<sup>143</sup> Skolnick et al., *supra* note 45, at 199 (footnote omitted). The available research does not show that all gangs are as well organized as those studied by Skolnick, Bluthenthal and Correl, or, for that matter, the well-organized gangs described in the other research I have cited. In fact, research discloses that many gangs are relatively loosely organized and accordingly much less efficient as drug-selling organizations. See CURRY & DECKER, *supra* note 25, at 84-93. Indeed "drug gangs" appear to be a subset of all street gangs. See HOWELL & DECKER, *supra* note 45, at 3. The point is not that gangs are invariably efficient drug-selling monopolists, but that the most successful gangs adopt these characteristics. It is these gangs that provide the most attractive alternatives to the limited legitimate opportunities available in the inner city, and that therefore pose the greatest threat to its stability and future.

<sup>144</sup> See K. JACK RILEY, U.S. DEP'T OF JUSTICE, CRACK, POWDER COCAINE AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES 16-17 (Dec. 1997).

<sup>145</sup> See, e.g., TERRY WILLIAMS, THE COCAINE KIDS: THE INSIDE STORY OF A TEENAGE DRUG RING 46-47 (1989); Hamid, *supra* note 139, at 63.

<sup>146</sup> This account is consistent with a general theory of illicit markets developed by John Eck, who has postulated that in order to increase revenues over what can be garnered by engaging in transactions with only those who can be trusted because of their involvement in local social networks, drug dealers will establish well-known mar-

The phenomenon of open-air drug markets, as well as the necessity to post lookouts, requires gangs to be able to thoroughly intimidate the law-abiding residents of their neighborhoods, in order to ensure that they will refrain from informing the authorities of drug trafficking in the neighborhood. This imperative of intimidation is perhaps the leading reason why conventional criminal laws are so difficult to enforce against gangs. The drug trafficking laws, as well as laws targeting gang intimidation and harassment, are enormously difficult to enforce if witnesses are too scared to testify.<sup>147</sup> Although the academic literature evinces little awareness of this problem, it is terrifically difficult to convince witnesses to testify against gang members, given the prevalence of gang intimidation.<sup>148</sup>

The structure of drug markets also explains quite a bit about the causes of gang violence. Researchers have found no consistent relationship between gang activity and violence, nor between drug trafficking and violence.<sup>149</sup> The entrepreneurial character of gangs explains this phenomenon. If a gang can establish a stable monopoly over relatively lucrative turf, it will do what it can to discourage violence, which is only likely to draw the attention of the authorities and ultimately depress revenue.<sup>150</sup> Gang truces are often motivated by this objective; truces can end a costly dispute by establishing a stable market alloca-

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ketplaces where buyers can expect to find sellers whom they come to trust through repeated transactions. See John E. Eck, *A General Model of the Geography of Illicit Retail Marketplaces*, in CRIME AND PLACE 74-77 (John E. Eck & David Weisburd eds., 1995).

<sup>147</sup> Undercover operations, such as drug purchases by undercover police officers, can be used against many kinds of gang activity even in the absence of civilian witnesses willing to testify, but they present their own problems, considered below.

<sup>148</sup> See VALDEZ, *supra* note 44, at 19-20; Johnson et al., *supra* note 118, at 35-37.

<sup>149</sup> See, e.g., HOWELL & DECKER, *supra* note 45, at 5; HOWELL, *supra* note 36, at 11-12. One study based on interviews of admitted drug sellers in New York City, however, did find a significantly higher level of violence among those who sold drugs as part of a larger organization than those who sold outside of any formal or informal structure. See Jeffrey Fagan & Ko-lin Chin, *Violence as Regulation and Social Control in the Distribution of Crack*, in DRUGS AND VIOLENCE: CAUSES, CORRELATES, AND CONSEQUENCES 25-28 (Mario De La Rosa, Elizabeth Y. Lambert & Bernard Gropper eds., 1990).

<sup>150</sup> For example, Levitt and Venkatesh found that inter-gang violence adversely affected gang revenues, because drug buyers become afraid to patronize gang-controlled drug markets, and because the wages that gangs must pay to their soldiers rise. See Levitt & Venkatesh, *supra* note 105, at 775-80. See also MOORE, *supra* note 40, at 66-67. Professors Blumstein and Rosenfeld speculate that one of the causes of the decline in homicide rates in the 1990s was the increasing stability of maturing crack markets. See Alfred Blumstein & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. CRIM. L. & CRIMINOLOGY 1175, 1208-10 (1998).

tion. But when competitors cannot agree on who will control lucrative turf or when intra-gang disputes over who will control narcotics or other illicit revenues arise, violence is frequently the means to resolve the dispute.

Academic research, for example, has found a close relationship between disputes over turf or similar gang prerogatives and violence.<sup>151</sup> That view that is also widespread among law enforcement officials.<sup>152</sup> The enormous increase in violence that accompanied the entry of crack cocaine into urban markets in the mid-1980s illustrates this point as well; violence followed when drug-trafficking organizations competed in order to exploit a new drug which, by virtue of its unusually low price, created a host of new marketing opportunities.<sup>153</sup> Rigorous empirical work in this area is rare and difficult to perform, but one of the best such analyses is of gang-related homicide in Chicago, and it supports the view advanced here. An analysis of homicide data from 1965 to 1990, subsequently updated with data through 1994, found that gang-related homicides were more closely related to areas in which turf was under dispute than any other factor, including the incidence of drug traffick-

<sup>151</sup> See, e.g., *Drugs in the 1990s: Emerging Trends: The Challenges Facing the Drug Enforcement Administration, the Justice Department, and the Coast Guard: Hearing Before the Information, Justice, Transportation and Agriculture Comm. of the House Comm. on Govt. Operations*, 103rd Cong., 21-23 (May 25, 1994) (statement of Mark Kleiman); HOWELL & DECKER, *supra* note 45, at 6-7; JANKOWSKI, *supra* note 45, at 161-62; SANDERS, *supra* note 40, at 83; VENKATESH, *supra* note 59, at 110-11; Scott H. Decker, *Collective and Normative Features of Gang Violence*, 13 JUSTICE Q. 243 (1996); Scott H. Decker & Barrik Van Winkle, "Slinging Dope: The Role of Gangs and Gang Members in Drug Sales," 11 JUSTICE Q. 583 (1994); Fagan, *Social Organization*, *supra* note 45, at 648-52; Paul J. Goldstein et al., *Crack and Homicide in New York City 1988: A Conceptually Based Event Analysis*, 16 CONTEMP. DRUG ISSUES 651 (1989); Johnson et al., *supra* note 118, at 37-38; Skolnick et al., *supra* note 45, at 21-23. For an ethnographic account of turf disputes leading to violence at a public housing project in Chicago, see Venkatesh, *supra* note 110, at 243-54. Conversely, Venkatesh found that efforts to mediate gang disputes assisted the entrepreneurial activities of gangs, such as drug trafficking. See VENKATESH, *supra* note 59, at 223-37.

<sup>152</sup> See, e.g., *Gangs: A National Crisis: Hearing on S.54 Before the Senate Comm. on the Judiciary*, 105th Cong. 12-13 (1997) (statement of Steven R. Wiley, Chief of Violent Crime and Major Offender Section, FBI); *The Gang Problem in America: Formulating an Effective Federal Response: Hearing Before the Subcomm. on Juv. Just. of the Senate Comm. on the Judiciary*, 103rd Cong. 14-15 (1994) (statement of James C. Frier, Deputy Ass't Dir., FBI).

<sup>153</sup> See Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. CRIM. L. & CRIMINOLOGY 10 (1995). See also Fagan & Chin, *supra* note 149, at 28-37.

ing.<sup>154</sup> Carl Taylor, in his ethnographic study of Detroit gangs, reached a similar conclusion:

Gangs defend their territories in order to protect their narcotic business. The word is out on the street to everyone: "This is gang territory—stay away." Each street corner, dopehouse, salesperson, distributor, or customer is part of the territory. Anyone who attempts to enter the territory becomes the invader, the intruder, the enemy. Unlike the legitimate business world, gangs use physical violence as their only enforcement tool to stop competition and opposition. All gang types in this study respect the conditions of territorial law and the necessity that it generates for punishment.<sup>155</sup>

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<sup>154</sup> ILL. CRIM. JUSTICE INF. AUTH., *supra* note 24, at 10-20. See also, CAROLYN REBECCA BLOCK & RICHARD BLOCK, U.S. DEP'T OF JUSTICE, RESEARCH IN BRIEF: STREET GANG CRIME IN CHICAGO 2-4, 8 (Dec. 1993). The authors of the study concluded:

In general, the street gang situations that are potentially most lethal are those of escalating turf battles where gangs are battling over territorial boundaries. In Chicago and Los Angeles, these traditional turf-based gangs tend to be Latino or non-Latino white, and the most violent tend to be the smaller gangs that control only a few, strongly defended blocks. As we have seen, these are the street gangs that specialize in violence. Street gangs specializing in drug offenses (entrepreneurial gangs) tend to downplay and discourage violence because it is bad for business. Despite this general pattern, however, entrepreneurial gangs can still be responsible for periodic spurts of lethal and non-lethal violence, when there is a conflict over control of the drug market.

ILL. CRIM. JUSTICE INF. AUTH., *supra* note 24, at 20. Levitt and Venkatesh also found that drive-by shootings on a rival gang's turf are a useful means of scaring drug customers away from that turf and thereby shifting demand to drug markets that the gang controls. See Levitt & Venkatesh, *supra* note 105, at 782-83.

<sup>155</sup> TAYLOR, *supra* note 45, at 6. I do not mean to suggest that the only significant contributing factor to gang violence is the existence of turf disputes. Of course, many factors contribute to gang violence. For example, one generalization made frequently by both law enforcement and gang researchers is that Hispanic gangs tend to be more turf-oriented and violent, while African-American gangs are more entrepreneurial. See, e.g., HOWELL, *supra* note 36, at 3. The explanation for this may lie in the deep identification that many Hispanics have with particular neighborhoods, as Joan Moore has explained. See MOORE, *supra* note 45, at 35-42, 268-75. See also Jerome H. Skolnick et al., *The Social Structure of Street Drug Dealing*, 9 AM. J. POLICE 1, 4-5 (1990) (distinguishing between "cultural" gangs originally organized around a neighborhood and "entrepreneurial" gangs organized around financial objectives). Conversely, John Hagedorn has suggested that one byproduct of school desegregation in many cities has been to make African-American gangs less turf-oriented and more entrepreneurial, since busing to achieve desegregation forced African-American gangs to recruit from a wider variety of neighborhoods. See HAGEDORN, *supra* note 45, at 135-38. And as Levitt and Venkatesh add, intergang violence also frequently stems from the individual act of a particular gang member interested in moving up in the gang's hierarchy, which induces a rival gang to retaliate. See Levitt & Venkatesh, *supra* note 105, at 781.



The need to maintain control over turf—both as a means of staffing drug distribution locations and to identify and retaliate against competitors—is why loitering is so important to gangs. Perhaps the best description of this process is found in Felix Padilla's ethnographic study of a Puerto Rican gang in Chicago, in which he found that gang members are required to "hang out," primarily to prevent rival groups from taking over their turf, but also because their time spent hanging out on the street block or corner determines the earning power of the organization.<sup>156</sup> When gang members did not "hang out" they were disciplined, usually beaten.<sup>157</sup> Padilla also reported that "labor relations" issues in the gang centered around the process of hanging out on the street. For example, gang members engaged in a form of work stoppage by refusing to hang out when they had a grievance with their superiors in the gang.<sup>158</sup> Hanging out also facilitates gang recruitment. In his study of barrio gangs in southern California, James Diego Vigil found that the younger children that hang out on street corners with gang members typically become members themselves.<sup>159</sup> And in one of the few studies of its kind, Curry and Spergel found that for both African-American and Hispanic youth in Chicago, hanging out in places where drug distributors are found was a statistically significant predictor of gang involvement; this was the only factor they were able to identify that accurately predicted gang involvement for both African-Americans and Hispanics.<sup>160</sup>

In short, gangs are strongest when they can establish stable monopolies over lucrative drug-trafficking turf. This requires them to post gang members on that turf in order to sell drugs and to protect the turf from rivals. What gang members who are hanging out in order to protect turf and sell drugs appear to be doing—at least when the police come on the scene—is loitering. If they can loiter with impunity, the arrival of uniformed police will put no real dent into their organization. Although drug sales must temporarily cease while the police are present,

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<sup>156</sup> See PADILLA, *supra* note 45, at 176-77.

<sup>157</sup> See *id.* at 177.

<sup>158</sup> See *id.* at 176-77.

<sup>159</sup> See VIGIL, *supra* note 109, at 48-53. See also CURRY & DECKER, *supra* note 25, at 62-63; MOORE, *supra* note 40, at 47-48.

<sup>160</sup> See G. David Curry & Irving A. Spergel, *Gang Involvement and Delinquency Among Hispanic and African-American Adolescent Males*, 29 J. RES. CRIME & DELINQ. 273 (1992).

by loitering gang members can still control their turf. Of course, drug sales can resume when the police leave.

This survey of the ecology of inner-city drug trafficking suggests the efficacy of a gang suppression strategy targeting loitering. A focus on suppressing drug trafficking is suggested by the strong theoretical and empirical case that economic crime—especially crime that can attract money from relatively affluent outsiders—is a powerful stimulant to gang formation. A focus on loitering is suggested by the need to undermine the ability of gangs to maximize their advantage in drug markets. When the police can disperse loiterers, gangs cannot reliably staff the locations at which their customers expect to be able to find and buy drugs, nor count on the efficacy of lookouts who can identify both police activity and potential competitors.<sup>161</sup> This is a particular problem for gangs selling to customers from other, wealthier neighborhoods who are not likely to be intimately familiar with either gang members or their neighborhoods.<sup>162</sup> Students of drug enforcement agree that crackdowns on drug hot spots designed to make it more difficult and risky for drug dealers to remain easily accessible to their buyers are a particularly effective means for disrupting drug markets.<sup>163</sup> That is ex-

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<sup>161</sup> See, e.g., Eck, *supra* note 146, at 76. This is also why an anti-loitering strategy is not likely to merely move drug trafficking to different locations when traffickers are selling outside of their own social networks. As Professor Eck has explained:

[I]n contrast to retail illicit markets using a network solution, those using a routine activities solution will show evidence of high place attachment. Sellers will try to stay at specific places and, if required to move, will try to limit the distance they move. High place attachment will occur both for security and access reasons. Displacement will be much more limited. When spatial displacement occurs it will be restricted to the high routine activity area and to places within this area that are suitable for selling the goods or services in question (i.e., locations that allow customers to find the place and that provide reasonable security).

*Id.*

<sup>162</sup> To be sure, neighborhood addicts are always going to be able to find someone to sell them drugs, but from the standpoint of gangs, what makes drug markets particularly lucrative is their ability to attract relatively affluent outsiders, and it is their access to drugs that is most likely to be impaired by an anti-loitering strategy. Even for habitual drug users, as Mark Moore has observed, empirical data increasingly suggests that drug enforcement policy is most effective when it “create[s] an environment in which it is difficult and inconvenient for potential users to acquire drugs, and in which life for experienced users is sufficiently uncomfortable that they are motivated to seek treatment.” Moore, *supra* note 135, at 33 (footnote omitted).

<sup>163</sup> See, e.g., Robert E. Worden, Timothy S. Bynum & James Frank, *Police Crackdowns on Drug Abuse and Drug Trafficking*, in *DRUGS AND CRIME: EVALUATING PUBLIC POLICY INITIATIVES* 95, 100-10 (Doris Layton MacKenzie & Craig D. Uchida eds., 1994); David

actly what an anti-loitering strategy can achieve. And without stable and lucrative drug-trafficking monopolies, the appeal of gang membership is concomitantly reduced.<sup>164</sup> Making drug trafficking less profitable, in turn, can create real problems for gangs. The available evidence suggests that the wages of gang foot soldiers are not much higher than those in the legitimate market.<sup>165</sup> Hence, even modest reductions in gang revenues could critically alter the financial incentives to join gangs.

One might think that a strategy that makes it harder to develop and maintain stable drug monopolies over identifiable turf would increase gang violence in light of the view advanced here that gang violence is a product of turf disputes between

M. Kennedy, *Pulling Levers: Chronic Offenders, High-Crime Settings, and a Theory of Prevention*, 31 VAL. U.L. REV. 449, 470-72 (1997); Mark A.R. Kleiman & Kerry D. Smith, *State and Local Drug Enforcement: In Search of a Strategy*, in DRUGS AND CRIME, *supra* note 118, at 78-90; Stephen J. Schulhofer, *Solving the Drug Enforcement Dilemma: Lessons from Economics*, 1994 U. CHI. LEG. F. 207, 232-35 (1994). See generally Mark H. Moore, *Policies To Achieve Discrimination on the Effective Price of Heroin*, 63 AMER. ECON. REV. 270, 271-77 (1973). As Professor Kleiman has explained, when speaking of inner-city open air drug markets predominantly patronized by suburban drug buyers (whom he calls "suburban drive-throughs"):

The suburban drive-throughs disproportionately depend on open street markets, whose speed and anonymity appeal to them. Focused market-disruption tactics, aimed at dealers, users, and the physical and social conditions that support efficient retail dealing, have been shown capable of driving a wedge between such users and inner city dealing activity. This focused crackdown approach is quite different in intent and execution from "street sweeps" of users, dealers, and hangers-on and from the repetitive, undirected use of "buy-and-bust" undercover operations. While sweeps and buy-busts are designed to maximize the number of arrests and convictions, the goal of market disruption is to minimize the number of completed transactions, using as little enforcement capacity as possible in the process. Since much of the harm done by dealing to dealers comes from enforcement, this is an important distinction between market disruption and "sweeps."

Mark A.R. Kleiman, *Reducing the Prevalence of Cocaine and Heroin Dealing Among Adolescents*, 31 VAL. U.L. REV. 551, 554-55 (1997) (footnote omitted).

<sup>164</sup> Under an anti-gang loitering law like Chicago's, targeting groups of at least two persons, it is true that gang members may loiter alone, but that should not unduly undermine the efficacy of this approach. At most, only a single individual can stand at a particular location, and that lone person must be responsible for the drugs, the money, and to act as a lookout. That lone individual is therefore much more vulnerable, both to the police and to rival gangs who may come along. That person is also more difficult for his superiors to monitor in order to ensure that he is accurately reporting his sales activity to superiors. Finally, when gang members can only loiter alone, the comradery and excitement of gang life is significantly reduced. In any event, Chicago's new anti-drug loitering ordinance is applicable even to those who loiter alone.

<sup>165</sup> See BOURGEOIS, *supra* note 118, at 91-105; PADILLA, *supra* note 45, at 169-74; Hagedorn, *supra* note 45, at 202-04; Levitt & Venkatesh, *supra* note 105, at 756, 770-75.

competitors. There is, however, little evidence that gang violence increased during the enforcement of the earlier iteration of the gang-loitering ordinance in Chicago. In 1995, the last year the ordinance was enforced, and the year in which its enforcement was most widespread (more than half of all arrests under the ordinance were in 1995), the overall homicide rate in Chicago dropped 9 percent, but the gang-related homicide rate dropped 26 percent. Yet in 1996, when the ordinance was not enforced due to adverse judicial decisions, the overall homicide rate dropped another 4 percent, while the gang-related homicide rate rose 7 percent.<sup>166</sup>

Of course, these figures are hardly conclusive. Gang-related homicide statistics are notoriously spiky—a predictable consequence of the fact that gang violence is a function of the magnitude of gang turf disputes that may exist at any given time, rather than other factors that may be more stable.<sup>167</sup> But these statistics do suggest that whatever impetus to gang violence an anti-loitering strategy may create would be more than offset by the reduced friction between and among gangs—and the greater tactical difficulties in planning a drive-by shooting—when gang members no longer can occupy identifiable turf by loitering with impunity at predictable locations.<sup>168</sup>

Another aspect of anti-loitering laws that merits consideration is their impact on what the streetscape looks like. If one takes Wilson's work seriously, there is a reason to worry about visible signs of disorder on the streetscape even if there is no di-

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<sup>166</sup> See City of Chicago, *Gang and Narcotic Related Violent Crime: 1993-97*, 3-4 (June 1998) (unpublished report on file with the author, hereinafter cited as "Chicago Crime"). In *Morales*, the Court noted that gang-related homicides in Chicago declined by 19 percent in the following year, 1997. See *Morales*, 527 U.S. at 49 n.7. Yet gang-related shootings actually rose in 1997; it appears that only the accuracy of the shooters declined that year. See *Chicago Crime*, *supra*, at 7. Professor Harcourt has found significance in an unpublished analysis by Professors Schulhofer and Alschuler finding no relationship between the number of gang-loitering arrests in a police district and declines in homicides and aggravated assaults. See Harcourt, *supra* note 136, at 192-93. That analysis, however, was based on all homicides and aggravated assaults, and not gang-related offenses.

<sup>167</sup> See HOWELL & DECKER, *supra* note 45, at 5. See also ILL. CRIM. JUSTICE INF. AUTH., *supra* note 24, at 4.

<sup>168</sup> In fact, Professors Fagan, Zimring and Kim believe that one explanation for the precipitous decline in homicides in New York City in the 1990s was that more aggressive patrol tactics moved criminal activity indoors, decreasing the opportunities for conflicts over drug trafficking. See Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY, 1277, 1313-16 (1998).

rect relation between crime and disorder.<sup>169</sup> Wilson stresses that the significance of the social isolation results when working class people leave an inner-city neighborhood.<sup>170</sup> Surely no one can doubt that open and notorious gang and drug activity contributes to this type of social isolation.<sup>171</sup> Of course, no one wants to raise children in the midst of open drug markets. Anyone who can afford to move out of neighborhoods afflicted by this type of overt criminality doubtlessly do so. That, in turn, leads to increasingly isolated underclass communities. If an anti-loitering law accomplishes no more than to enable the police to chase gang activity and drug dealing indoors, forcing it to become more covert, that alone can contribute to community stability.<sup>172</sup>

Of course, one does not need public order laws if one's objective is to disrupt drug markets; enforcing conventional drug laws through mass arrests of dealers would seem to do the trick even more effectively. Undercover operations are particularly well suited to that approach, since, as I have explained above, gangs want to attract relatively wealthier customers from other neighborhoods and therefore should be willing to sell drugs to undercover officers.<sup>173</sup> Whether this is a practical approach

<sup>169</sup> Skepticism about the relationship between crime and disorder, for example, is the primary basis on which Professor Harcourt questions the efficacy of public order laws. See Harcourt, *supra* note 5, at 308-43.

<sup>170</sup> See *supra* notes 83-90, and accompanying text.

<sup>171</sup> See Jack R. Greene & Edward McLaughlin, *Facilitating Communities Through Police Work: Drug Problem Solving and Neighborhood Involvement in Philadelphia*, in DRUGS AND THE COMMUNITY, *supra* note 117, at 142. Greene and McLaughlin have explained the process when the streetscape is taken over by gangs:

[T]he unwatched neighborhood corner will first fall prey to "hanging out" behaviors which intimidate local residents. As these residents seek to avoid these locations, other minor and later criminal problems arise. Ultimately, these corners receive no community surveillance at all, and they become "open-air" drug-marketplaces which continue to intimidate local law-abiding residents. The slippery-slope of the public's abandonment of public places, according to this approach, ends in drug-infested neighborhoods, unable to reestablish meaningful neighborhood relations which would counteract such negative behaviors.

*Id.*

<sup>172</sup> What is more, the process by which police disperse loiterers creates a visible police presence on the streetscape, and that in turn enhances community morale and community willingness to cooperate with the police on a wide variety of anti-crime efforts. See *id.* at 151-60.

<sup>173</sup> Undercover operations do pose serious problems from the community's standpoint, however. Undercover operations can succeed only when uniformed police officers are absent from drug markets. What the community sees in such a setting,

given the magnitude of gang drug trafficking, however, is open to serious debate. To the extent that the use of undercover operations to clear inner-city neighborhoods of narcotics trafficking relies on long-term incapacitation of drug sellers through incarceration, even with the massive prison systems that this country has produced, it is doubtful that the prison capacity exists to absorb the massive increase in incarceration that such a strategy would require.<sup>174</sup> There are equally serious doubts about the extent to which arrests for drug offenses can create a meaningful deterrent effect, given the prevalence of that conduct.<sup>175</sup> And the likely efficacy of any incapacitation or deterrence strategy is seriously undermined by the fact that even with the enormous increase in the rate of incapacitation of drug offenders that we have seen over the past two decades, there has been no discernable impact on the supply or price of illegal drugs.<sup>176</sup> What is more, the efficacy of undercover operations—whether involving the purchase of drugs or their sale in “reverse stings”—is considerably circumscribed, because when buyers and sellers learn that undercover tactics are in use, they also learn to

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however, is not an undercover operation, but blatant criminality, which the police seem unable or unwilling to stop.

<sup>174</sup> The most recent statistics available indicate that 22 states and the federal prison system all operate at more than 100 percent of their capacity. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1999 8 tbl. 11 (Aug. 2000). Overall, the federal prison system was 32 percent over its capacity, and state prisons were at one per cent above their highest capacity and 17 percent above their lowest capacity. See *id.* at 9. During 1999, of the two states with the greatest gang crime problems, California was operating at between 194 and 101 percent of prison capacity, and Illinois was between 162 and 138 percent of its capacity. See *id.* at 8 tbl. 11. Despite falling overall crime rates, prison population continues to increase, up 3.4 percent between 1998 and 1999. See *id.* at 3. Indeed, “[s]ince 1990 the number of sentenced prisoners per 100,000 residents has risen from 292 to 476.” *Id.* at 4.

<sup>175</sup> For a useful review of the recent literature expressing skepticism on the utility of general deterrence, see Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. L. REV. 453, 458-68 (1997). An analysis of the limited value of deterrence in the context of drug crime in particular is found in Jeffrey A. Fagan, *Do Criminal Sanctions Deter Drug Crimes?*, in DRUGS AND CRIME: EVALUATING PUBLIC POLICY INITIATIVES (Doris Layton MacKenzie & Craig D. Uchida eds., 1994). And given that mass arrests of gang members for street-level drug dealing and similar offenses rarely result in serious sanctions for a substantial proportion of gang membership, the utility of that sanction as a means of creating general deterrence of gang-related crime is open to special doubt. See Malcolm W. Klein, *Attempting Gang Control By Suppression: The Misuse of Deterrence Principles*, in THE MODERN GANG READER (Malcolm W. Klein, Cheryl L. Maxson & Jody Miller eds., 1995).

<sup>176</sup> See *supra* note 120.

deal only with those whom they know. That, in turn, only makes existing distribution networks more profitable and entrenched. It also gives gangs an incentive to warn customers when a "reverse sting" is underway—and given how well gangs understand their turf, this is a very real problem with that tactic, and one likely to become worse if it were to become commonplace. Undercover operations also take uniformed officers off the street, which can itself promote instability. It is reasonable to believe, in short, that if undercover operations were a panacea, we would have discovered that fact long ago. But even putting aside these doubts, what should be especially troubling about reliance on undercover tactics as a means of ridding the streets of open drug trafficking are the consequences of that approach from the standpoint of racial fairness.

In general, minorities are incarcerated at far greater rates than nonminorities.<sup>177</sup> This racial skewing is most dramatic, however, when it comes to drug crimes. The most recent data available indicates that African-Americans comprise 56 percent of those convicted of drug trafficking offenses and 49 percent of those convicted of drug possession offenses in state courts.<sup>178</sup> Among the federal prisoners convicted of drug offenses, 44.7 percent are African-American and 31.6 percent are Hispanic.<sup>179</sup> According to the Department of Justice's prisoner population statistics for 1999, among prisoners in state facilities for drug offenses, 134,800 were African-American, 51,700 were Hispanic, and only 46,300 were white.<sup>180</sup> According to another study,

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<sup>177</sup> The most recent statistics available for incarceration show a huge racial disparity. For example, among males ages 20-24, the number of sentenced prisoners per 100,000 population was 832 for white males, 7,326 for African-American males, and 2,824 for Hispanic males. See BUREAU OF JUSTICE STATISTICS, *supra* note 174, at 9 tbl. 14. Statistics on the likelihood of incarceration by race reflect the same gross disparity: based on 1991 rates of incarceration, 28.5 percent of African-American males and 16.0 percent of Hispanic males will be incarcerated during their lifetime, but only 4.4 percent of white males will be incarcerated during their lifetimes. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1-3 (Mar. 1997).

<sup>178</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1996 5 tbl. 5 (May 1999).

<sup>179</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1998 98 tbl. 7.10 (May 2000).

<sup>180</sup> See BUREAU OF JUSTICE STATISTICS, *supra* note 174, at 10 tbl. 15. And this racial disparity continues to grow. From 1990-98, among sentenced prisoners under state jurisdiction, the number of African-Americans sentenced for drug offenses increased

while African-Americans represent only 13 percent of drug users, they constitute 74 percent of those who are imprisoned for drug offenses.<sup>181</sup> And those sentences have become considerably harsher in recent years by virtue of the proliferation of federal and state laws imposing mandatory minimum prison sentences or sentencing guidelines for drug offenses.<sup>182</sup> Statistics for juvenile offenders also show similar racial skewing, greater for drug offenses than any other category.<sup>183</sup>

It is difficult to determine whether these statistics reflect anything that can fairly be called discrimination. Incarceration rates are at least partly explained by the greater ability of the police to identify inner-city drug traffickers operating in open air markets than upscale traffickers and buyers who are more likely to operate in a relatively covert fashion difficult for the police to target.<sup>184</sup> But even if the huge racial disparity in drug sentencing cannot be fairly characterized as discriminatory, it should nevertheless be enormously troubling.

No one but the lunatic racist fringe believes that race is criminogenic; what the research shows is that crime rates are higher in impoverished and socially disorganized areas, and that

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by 25 percent, the number of Hispanics increased by 18 percent, and the number of whites increased by 12 percent. *See id.* at 10 tbl. 17.

<sup>181</sup> *See* MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 12 (1995). As a statistical matter, nearly all of the rate at which minorities are disproportionately incarcerated is explained by disproportionate arrests of minorities for drug offenses. *See* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 743-745 (1993).

<sup>182</sup> *See, e.g.*, Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 343-66 (1995); Note, *Developments in the Law - Alternatives To Incarceration*, 111 HARV. L. REV. 1863, 1876-88 (1998). For statistical analyses of the dramatic increases in the proportion of the prison population that consists of drug offenders over the last 15 years, *see* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *TIME SERVED IN PRISON BY FEDERAL OFFENDERS, 1986-97*, 5 (June 1999) (federal prison population); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1996*, 6 (Apr. 1999) (state prison population). For example, in 1999 prisoners sentenced for drug violations constituted 58 percent of all federal inmates, up from 53 percent in 1990. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 174, at 12.

<sup>183</sup> *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, *MINORITIES IN THE JUVENILE JUSTICE SYSTEM* 9, 11 (Dec. 1999).

<sup>184</sup> Professors Tonry and Stuntz have persuasively advanced this explanation for the enormous racial skewing in drug enforcement. *See* MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 105-16 (1995); William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1819-24 (1998).



minorities are far more likely to live in areas of concentrated poverty associated with high crime rates than nonminorities, and face more potent barriers to upward mobility than nonminorities.<sup>185</sup> Gang research in particular bears out the relationship between inner-city underclass conditions and gang crime.<sup>186</sup> When we incarcerate inner-city residents for drug trafficking, then, we are, in significant part, sending people to jail because they have grown up in poverty. Affluent white suburbanites are simply never put to the tests posed by the economic and social stresses of the inner city. Nor could anyone fairly doubt that the disproportionate minority representation among the impoverished inner-city underclass is one of the many continuing consequences of racism. Indeed, as I suggested earlier, underclass scholarship has persuasively demonstrated that the existence of a disproportionately minority underclass is in significant part a consequence of racial discrimination in both housing and employment.<sup>187</sup> A strategy that relies on drug trafficking arrests as the principal tool available to disrupt drug markets, then, will likely only exacerbate the burdens that the minority community continues to experience as a consequence of racism.<sup>188</sup> And when we incarcerate minorities for crimes that they commit at least in part because they have been discriminatorily confined to socially isolated, underclass neighborhoods, we compound the sins of racism. That is not to suggest that we should abandon ef-

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<sup>185</sup> See, e.g., KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 28-31 (1998); TONRY, *supra* note 184, at 128-34; Janet L. Lauritsen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, in *THE HANDBOOK OF CRIME AND PUNISHMENT* 58, 65-70 (Michael Tonry ed., 1998); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in *ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES* 311, 333-41 (Michael Tonry ed., 1997). Professor Jackson's study of the relationship between gang crime and underclass conditions also reaches this conclusion. See Jackson, *supra* note 101, at 387-93.

<sup>186</sup> See *supra* notes 109-17 and accompanying text.

<sup>187</sup> See *supra* notes 101-02 and accompanying text.

<sup>188</sup> Moreover, there are costs to mass incarceration of minorities that go beyond the punishment of individual offenders. As Professors Meares and Stuntz have importantly observed, the disproportionate incarceration of minorities delegitimizes the criminal justice system in the eyes of many minorities, and for that reason may ultimately reduce even further the social controls that inhibit crime. See Tracey L. Meares, *Place and Crime*, 73 *CHI.-KENT L. REV.* 669, 680-84 (1998); Stuntz, *supra* note 184, at 1825-32. Professor Cole appears to share this concern. See *supra* note 8 and accompanying text.

forts to curb inner-city lawlessness—that too would compound the sins of racism—but it is to suggest that the demands of racial justice argue for considering tactics that stop short of mass incarceration of inner-city minorities.

Thus, in my view, the use of public order laws is ultimately justified in terms of racial justice. If underclass minority neighborhoods are not to be simply abandoned to the tender mercies of street gangs, something must be done to limit the power of those gangs. Using public order laws to chase gangs off the turf that is their lifeblood represents the most feasible step in this direction short of a mass incarceration strategy. I do not minimize the trauma that accompanies a custodial arrest, even on a misdemeanor public-order charge.<sup>189</sup> And in order to reclaim particularly lucrative turf, the police may well have to make repeated loitering arrests of the same person—in effect threatening drug dealers with the specter of “doing life in prison one night at a time” (a formulation that a police commander once commended to me). But surely the prospect of even repeated misdemeanor arrests pales in comparison to the burdens imposed on inner-city minorities through a mass incarceration strategy. However disagreeable a night in jail before bonding out on a misdemeanor charge is, the consequences of conviction and incarceration on felony drug trafficking charges, especially in this era of mandatory minimum sentencing, are far more onerous. And in light of the research suggesting that prison sentences increase the risk of recidivism, there is even greater reason for the criminal justice system to move toward less onerous sanctions.<sup>190</sup>

My aim here is not only to defend anti-loitering laws, but to suggest that they represent an approach that should be particularly attractive to those who believe that poverty and racism are at the root of inner-city crime. The view that poverty is powerfully criminogenic and that racism explains much inner-city poverty should not lead to the conclusion that the criminal justice system has no role to play in ameliorating inner-city crime; as long as crime is profitable and attractive for inner-city residents, it will undermine the efficacy of the other social programs necessary to stabilize and revitalize the inner city.

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<sup>189</sup> See Harcourt, *supra* note 5, at 368-84; see also Roberts, *supra* note 5, at 815-16.

<sup>190</sup> For a helpful review of the research, see JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* 115-25 (1996).

Accordingly, law enforcement strategy should be based on an identification of aspects of the ecology of the inner city that make crime profitable and attractive.<sup>191</sup> Aspects of inner-city ecology that can be considered criminogenic may range from an absence of working streetlights, which facilitates robbery, to the ability of gangs to loiter with impunity, which facilitates stable drug markets.<sup>192</sup> But if the case for a policing strategy based on something other than sheer incapacitation is to be made, its advocates must be willing to identify and target criminogenic conditions and behavior. If, conversely, law enforcement does nothing to address criminogenic conditions because that risks punishing "innocent" behavior, then punitive regimes will always carry the day. And the risk of punishing "innocent" behavior that is said to attend public order law enforcement brings me back to the racial critique of the anti-gang loitering ordinance with which I began this article.

#### IV. GANG LOITERING AND THE POLICE

It is entirely fair to debate the efficacy of public-order law enforcement as compared to more conventional police tactics; I would not argue that compelling empirical evidence is yet available demonstrating the superior efficacy of public-order policing compared to conventional police tactics.<sup>193</sup> But the debate over whether public order laws unreasonably facilitate police abuse all too often is played out in only two dimensions—comparing the benefits of those laws to the risk that they will be used against innocent persons—while ignoring the critical ques-

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<sup>191</sup> See, e.g., Ronald V. Clarke, *Situational Crime Prevention*, in BUILDING A SAFER SOCIETY: STRATEGIC APPROACHES TO CRIME PREVENTION 101-22 (Michael Tonry & David P. Farrington eds., 1995).

<sup>192</sup> See generally JUDITH D. FEINS, JOEL C. EPSTEIN & REBECCA WIDOM, U.S. DEP'T OF JUSTICE, SOLVING CRIME PROBLEMS IN RESIDENTIAL NEIGHBORHOODS: COMPREHENSIVE CHANGES IN DESIGN, MANAGEMENT, AND USE (April 1997). For a particular example of another anti-gang initiative based on an analysis of the ecology of inner city gang-crime involving the use of traffic barriers to combat drive-by shootings, see JAMES LASLEY, U.S. DEP'T OF JUSTICE, "DESIGNING OUT" GANG HOMICIDES AND STREET ASSAULTS (Nov. 1998).

<sup>193</sup> Indeed, substantial debate continues over the import of the statistical evidence generated during the enforcement of Chicago's original anti-gang loitering ordinance. See Harcourt, *supra* note 136, at 191-94. See also *supra* note 166. Empirical study is particularly difficult since, on the view advanced here, the primary benefit of anti-loitering laws should be in disrupting drug trafficking, and there is no reliable way to measure the volume of drug trafficking in a given neighborhood.

tion of how those laws compare with police tactics that would otherwise be employed. A more complete evaluative framework for any policing strategy's potential for abuse would consider not only the likelihood that it will be used against innocent persons, but also the magnitude of the intrusion on personal liberty that it authorizes, contrasted with the risk of abuse and the magnitude of the intrusion that inhere in the policing strategy it would replace. And that requires consideration of conventional policing tactics.

The police exercise enormous discretion under the Fourth Amendment standard of "reasonableness" for justifying the "seizure" of a person.<sup>194</sup> The Supreme Court tells us that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause."<sup>195</sup> The standard for reasonable suspicion, like the standard for probable cause necessary to justify a full-fledged custodial arrest, leaves ample room for police discretion; the Supreme Court has acknowledged that "[a]rticulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible."<sup>196</sup> The exercise of judgment and discretion therefore is inevitable as the police apply these standards, since "[r]easonable suspicion, like probable cause, is dependent upon both the content of information possessed by the police and its degree of reliability."<sup>197</sup> And the magnitude of the power that the police are granted on the basis of "reasonable suspicion" is substantial. For one thing, the "brief" detention authorized under the reasonable suspicion standard can last at least 20 minutes, and 20 minutes of custody can be a terrifying intrusion.<sup>198</sup> Moreover, the reasonable suspicion standard authorizes not only detention but physical intrusion as well; the Supreme Court has permitted the police to conduct "a protective search –

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<sup>194</sup> See U.S. CONST. amend. IV, § 1.

<sup>195</sup> *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry v. Ohio*, 390 U.S. 1, 30 (1968)).

<sup>196</sup> *Ornelas v. United States*, 517 U.S. 690, 695 (1996). See also, e.g., *Sokolow*, 490 U.S. at 7 ("The concept of reasonable suspicion, like probable cause, is not 'readily, or even useful, reduced to a neat set of legal rules.'" (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983))).

<sup>197</sup> *Alabama v. White*, 496 U.S. 325, 330 (1990).

<sup>198</sup> See, e.g., *United States v. Sharpe*, 470 U.S. 675, 683 (1985).

permitted without a warrant and on the basis of reasonable suspicion less than probable cause . . . ."<sup>199</sup>

Of particular relevance to policing in the inner city is the degree to which courts will grant police even greater leeway in "high crime areas." As Professor Raymond has observed, courts frequently permit the police to stop, detain and search individuals based on highly ambiguous conduct merely because that conduct occurs in what the police can fairly characterize as a "high crime neighborhood."<sup>200</sup> That approach was blessed by the Supreme Court in *Illinois v. Wardlow*,<sup>201</sup> when it held that the Fourth Amendment permitted police to detain an individual who fled upon their arrival in an area known for drug trafficking.<sup>202</sup> Thus, the Court has effectively granted the police greater authority to search and seize in many minority neighborhoods than they have elsewhere.<sup>203</sup> And whatever one thinks of the result in *Wardlow*, the rule that the Court has endorsed is not going to go away any time soon; on the question whether the

<sup>199</sup> *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993). Moreover, even the most minor traffic infraction can authorize the arrest and search of both the driver and vehicle, with the Fourth Amendment proving no obstacle even in the face of a claim that the traffic violation was a mere pretext. See *Whren v. United States*, 517 U.S. 806 (1996). As Professor Livingston has observed, the traffic laws afford at least as much and perhaps more discretion to police as public order laws. See Livingston, *supra* note 18, at 172-76.

<sup>200</sup> See Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 115-24 (1999).

<sup>201</sup> 528 U.S. 119 (2000).

<sup>202</sup> See *id.* at 124-25.

<sup>203</sup> Indeed, in *Wardlow* the Court acknowledged that its holding, like the general Fourth Amendment standards governing search and seizure, anticipate that the police will detain and search persons even when the evidence that they are engaged in misconduct is ambiguous at best. The Court wrote:

Respondent and *amici* also argue that there are innocent reasons for flight from police and that, therefore, flight is not necessarily indicative of ongoing criminal activity. This fact is undoubtedly true, but does not establish a violation of the Fourth Amendment. Even in *Terry* [v. Ohio, 392 U.S. 1 (1968)], the conduct justifying the stop was ambiguous and susceptible of an innocent explanation . . . . *Terry* recognized that the officers could detain the individuals to resolve the ambiguity.

In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe that they have committed a crime may turn out to be innocent.

*Id.* at 125-26. See also Livingston, *supra* note 18, at 176-79. In *Wardlow*, the Court also ignored Justice Stevens' argument that racial minorities have particular reason to fear police misconduct. See *Wardlow*, 528 U.S. at 132-35 (Stevens, J., dissenting).

police may consider whether they are in a "high-crime area" when making judgments about whether to detain individuals, the Court was unanimous.<sup>204</sup>

In the absence of rigorous statistical evidence, reasonable persons will differ on how frequently police use their discretion to stop and search under conventional laws to engage in racial profiling—the practice of using race as a basis on which to stop or detain individuals. But given the ample discretion that the police are granted by settled Fourth Amendment standards, few could doubt that a substantial potential for serious abuse is present even under quite ordinary laws, such as traffic regulations. My own guess is that racial profiling is probably less prevalent on urban police forces where officers more frequently interact with people of color than it is elsewhere, but there is no doubt that the evidence of racial profiling is becoming increasingly potent.<sup>205</sup> There is also no doubt that police departments must struggle with racism in their midst no less than other institutions. Moreover, because a substantial proportion of offenders that officers encounter are minorities, police daily confront the temptation to utilize racial stereotypes and generalizations. For those officers who give into that temptation, conventional law enforcement tactics grant considerable freedom to unfairly target persons of color. If nothing else, the current debate over racial profiling in the enforcement of quite conventional laws vividly illustrates just that point.<sup>206</sup>

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<sup>204</sup> In dissent, Justice Stevens opined that a suspect's flight from police while in a high-crime area was not sufficient to justify his seizure, but he did not reject the relevancy of a neighborhood's characteristics to the reasonable-suspicion inquiry. *See id.* at 128-29 (Stevens, J., dissenting).

<sup>205</sup> *See* David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 275-88 (1999) (summarizing recent statistical evidence suggesting that at least some state police departments use race as a basis on which to make traffic stops). *See also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC (March 2001). Moreover, there is a body of research suggesting that on average police officers perceive minority youth to be more hostile and threatening than similarly situated non-minorities, and take enforcement action based on that perception. *See* John Hagan & Ruth D. Peterson, *Criminal Inequality in America*, in CRIME AND INEQUALITY, *supra* note 98, at 24-28.

<sup>206</sup> *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 16-62 (1998); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 136-67 (1997); RUSSELL, *supra* note 185, at 33-46; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994); Harris, *supra* note 192; Erika L. Johnson, "A Menace to Society": *The Use of Criminal Profiles and*

Enforcement of conventional laws, accordingly, allows the police enormous freedom to undertake a variety of quite heavy-handed measures against the residents of inner-city minority communities, authority that officers who may harbor racial biases are frequently accused of misusing. Chicago-style anti-loitering laws that rely on police dispersal orders, in contrast, are a good deal less heavy-handed than a strategy that relies on officers stopping, detaining, and searching anyone who appears suspicious. Indeed, an anti-loitering ordinance targeted in the manner that *Morales* requires provides a dramatic example of limited enforcement discretion.<sup>207</sup> Under such an ordinance, both tactics and objectives are sharply circumscribed. An area can be targeted for enforcement only when the police reasonably believe that loitering in an identifiable area has a harmful purpose or effect.<sup>208</sup> Moreover, applying the “apparently harm-

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*Its Effects on Black Males*, 38 HOW. L.J. 629 (1995); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); Tracey Maclin, Terry V. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion, 72 ST. JOHN'S L. REV. 1271 (1998); Adina J. Schwartz, “Just Take Away Their Guns”: The Hidden Racism of Terry v. Ohio, 23 FORDHAM URB. L.J. 317 (1996); Randall S. Susskind, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999). Indeed, statistical evidence suggests that in New York City the reasonable suspicion standard has facilitated racial profiling under conventional laws. See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000).

<sup>207</sup> In this respect, Chicago's anti-loitering ordinance is typical of quality-of-life law enforcement, which has been accompanied by a substantial effort to develop meaningful limitations on enforcement discretion. See, e.g., GEORGE L. KELLING, U.S. DEP'T OF JUSTICE, “BROKEN WINDOWS” AND POLICE DISCRETION 33-45 (Oct. 1999). In my view, this is no accident, but a predictable consequence of police culture. As Professor Livingston has observed, in recent decades police culture has favored motorized patrol, centralized dispatch systems designed to respond quickly to breaches of the peace, and investigation of what is thought to be “serious” crimes rather than quality-of-life policing. See Livingston, *supra* note 12, at 565-68. For that reason, in my experience the police rarely devote substantial efforts to enforcement of public order laws—laws that they ordinarily believe to be insignificant and lacking the “glamour” of felony prosecution—without fairly searching inquiries into strategy and tactics.

<sup>208</sup> Probable cause is, of course, the standard required by the Fourth Amendment to support an arrest, and by virtue of that standard the police are subject to at least some measure of judicial oversight. When the police lack probable cause to believe that loitering has the requisite purpose or effect, they are subject to civil liability in addition to the exclusion of any evidence derived from the unconstitutional seizure. See, e.g., *Malley v. Briggs*, 475 U.S. 335 (1986). Moreover, injunctive relief is available against systemic police misconduct. See, e.g., *Allee v. Medrano*, 416 U.S. 802, 811-16 (1974).

ful purpose or effect" standard endorsed in *Morales* will require use of officers intimately familiar with their beat, who can supply testimony about the effects that loitering has had in a neighborhood.<sup>209</sup> And under an anti-loitering ordinance like Chicago's—requiring disobedience to a dispersal order before an arrest can be made—the police cannot detain, search, or even touch loiterers, unless they have disobeyed an order to move on.<sup>210</sup> Few laws give the police less discretion when managing an encounter; and few laws give the civilian more ability to terminate an unpleasant encounter with the police.<sup>211</sup> The

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<sup>209</sup> Use of local beat officers to enforce public order laws has its own virtues. Elijah Anderson, in his ethnographic study of a Philadelphia community in transition, observed that African-Americans in the community drew a distinction between "local" and "downtown" police, believing that local police develop greater familiarity with local residents and hence are less likely to abuse their authority. See ANDERSON, *supra* note 118, at 199-206. What is more, after the Supreme Court's adoption of the "harmful purpose or effect" standard in *Morales*, enforcement of anti-loitering laws must necessarily be community based and driven. In order to document the harmful effects of gang loitering, the police will be required, in effect, to map the gang problem. The process of identifying gang "hot spots" necessarily requires the police to develop enforcement strategy jointly with the community.

<sup>210</sup> In my conversations with academics on the anti-gang loitering ordinance, they frequently express concern about some 42,000 arrests made under the original ordinance, see *Morales*, 527 U.S. at 49, believing that a number this high must reflect undifferentiated sweeps of inner-city communities. If one considers, however, that the number of gang members in Chicago is in the six figures, see *supra* note 29 and accompanying text, and that a single individual may have to be arrested for gang loitering many times before he is dissuaded from hanging out at his assigned drug trafficking location, the number of arrests that may prove necessary to enforce such an ordinance is put into its proper context. Even spending 10 or 15 nights in jail is far less onerous than a conviction and mandatory prison sentence on felony drug trafficking charges. In any event, under Chicago's new anti-loitering ordinances, the ratio of arrests to dispersal orders has dropped dramatically, perhaps as a reflection of improved training and tactics.

<sup>211</sup> Indeed, the risk of misidentifying individuals as gang members is likely to be particularly low, since both academic and police sources are in agreement that gang members are generally willing to identify themselves when questioned. See CURRY & DECKER, *supra* note 25, at 6-7. Moreover, one can have some confidence that truly egregious abuse of public order laws can be readily discovered. Unlike station-house interrogations, which take place out of public view, or even stop-and-frisk encounters, in which an officer can claim that he observed something that aroused his suspicion, if officers use anti-loitering ordinances as a vehicle for mere street sweeping, without providing fair warning through orders to disperse, that pattern can be easily discovered. Anyone with a video camera—be it an internal affairs officer, a journalist, a local resident, or a civil rights organization—ought to be able to document this problem. And if officers issue orders to disperse without any reason to believe that persons of color are involved in gang or narcotics investigations, testers might be utilized to discern that type of abuse.



use of the dispersal order is a particularly significant innovation—this approach calls on police to assume an order-maintenance rather than arrest function in the first instance, and accordingly encourages police to view their job in terms other than maximizing the number of searches or arrests that they perform.<sup>212</sup> And in minority communities where there is strong support for greater order on the streetscape coupled with concern about the risk of police abuse, this approach may substantially enhance support for the police, especially if residents conclude that this approach embodies a type of rough justice by authorizing search or arrest *only* of those who have disobeyed a police order—a restraint frequently absent from other types of law enforcement tactics.

In short, for those concerned about police abuse, a policing strategy that directs police to warn loiterers to move on before they are subject to arrest and search fares strikingly well when considered in terms of the magnitude of the authority that it confers on the police. To be sure, groups of loiterers containing no one with a gang or drug affiliation may occasionally be inappropriately or unfairly ordered to disperse, but that inconvenience pales in comparison to being detained, searched, tick-

<sup>212</sup> Professor Livingston has observed:

As is now well understood, police serve an order maintenance role that is distinct from their law enforcement role in two important ways. First, police invoking a public order law in service of order maintenance ends are often less interested in "enforcing the law" than in "maintaining a pattern of public order" – in putting an end to conditions or behaviors that threaten the public peace. As a result, many order maintenance problems are handled on the street and informally, without any need for citation or arrest. Second, order maintenance, properly performed, is generally less adversarial than the ferreting out of serious crime. This is partly because the maintenance of public order is often negotiated and thus does not place officers in frankly confrontational relations with people on the street. In addition, order maintenance does not feed the competitive, "crime fighting" self-image of many patrol officers.

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Because police at least generally expect their commands to be followed, however, limiting police authority in the first instance to the issuance of a "move along" order lessens the temptation on the part of police to employ a low-level public order law simply to gain the authority to search. This is a significant advantage. The ferreting out of serious crime is an intensely competitive enterprise that poses a substantial risk of excessive police zeal. Order maintenance, properly performed, is altogether different. By partially disentangling police measures that are principally directed at promoting and maintaining public order from the more adversarial business of investigating serious crime, then, the Chicago ordinance's "move along" feature at least reduced the risk of arbitrary and capricious enforcement.

See Livingston, *supra* note 18, at 186-87 (footnotes omitted).

eted, or even arrested.<sup>213</sup> Even more important, to the extent that the police devote their limited resources to dispersal of loiterers, the use of much harsher sanctions will decrease. And for those who agree that inner-city drug trafficking is itself one of the legacies of racism, it should be critical to develop strategies that can revitalize inner-city communities without imposing the enormous costs that drug-law enforcement all too often impose.

All that said, I cannot deny that the potential for abuse of public order laws exists.<sup>214</sup> My point here is not that public or-

<sup>213</sup> Professor Stuntz has made just this point, writing before the Supreme Court's decision in *Morales*:

The essence of the attack, both in *Morales* and in the many lower court cases that have preceded it, is vagueness coupled with a fear (always somewhere near the surface in vagueness doctrine) that the statutes will be used to discriminate against young black men. The attack gets it backwards. Street stops under anti-gang statutes are best seen as a substitute for street-level drug stops and arrests, and drug enforcement is already targeted disproportionately toward young men in poor black neighborhoods. That targeting will not disappear if the anti-gang statutes are struck down. And targeted drug enforcement may be much worse than enforcement of anti-gang laws and the like, both because drug enforcement tends by its nature to be discriminatory in a way that public order policing need not be, and because drug enforcement is more likely attended by long prison sentences. Statutes and ordinances like Chicago's may be one of the best ways for the system to reduce the bias in drug law enforcement—and the huge racial tilt in the prison population—while maintaining or increasing the overall level of police protection in poor neighborhoods.

See Stuntz, *supra* note 184, at 1837 (footnote omitted).

<sup>214</sup> That is not to suggest that police officers enjoy anything approaching unfettered discretion when enforcing an anti-gang loitering ordinance. Enforcement standards can also be utilized that meaningfully circumscribe an officer's ability to determine that a loiterer is engaged in gang-related activity. The internal directive of the Chicago Police Department that governed enforcement of the original gang loitering ordinance, for example, provided:

Probable cause to establish membership in a criminal street gang must be substantiated by the arresting officer's experience and knowledge of the alleged offenders and corroborated by specific, documented and reliable information, such as:

- A. The individual's admission of membership.
- B. The wearing of distinctive emblems, tattoos, or similar markings indicative of a specific criminal street gang, but only when such emblems, tattoos, or similar markings would not reasonably be expected to be displayed by any individual except a member of that specific criminal street gang, and membership may not be established solely because an individual is wearing clothing available for sale to the general public.
- C. The use of signals or symbols distinctive of a specific criminal street gang.
- D. The identification of the individual as a member of a specific criminal street gang by an individual who:
  - i. has provided reliable information to the Department in the past or whose information can be independently corroborated; and
  - ii. alleges that the individual in question is a member of a specific criminal street gang.

der laws are immune to abuse, but rather that their critics have failed to consider the alternative. Equally important, they have failed to consider why aggressive policing is so frequently undertaken in inner-city minority communities. The explanation is a good deal more complicated than many of these critics acknowledge. An evaluation of inner-city policing would be at best incomplete without consideration of the political realities that confront urban police.

One fundamental reason that aggressive policing in the inner city is here to stay is that its residents want criminality in their midst to be suppressed. The point that I made earlier about the demand for greater law enforcement within the minority community cannot be overstressed.<sup>215</sup> The claim that law-enforcement strategy in this country reflects an effort by a white majority to subordinate persons of color simply does not reflect the reality of urban law enforcement. Most residents of inner-city neighborhoods, no different in this respect from anyone else, do not want to live in crime-ridden neighborhoods.<sup>216</sup> And that provides a useful context in which to evaluate the racial critique of inner-city policing.

Critics of inner-city policing should ponder what it is that they would have the police do. Consider, for example, the critical race theorists who argue that the criminal justice system ought to be forbidden to direct its efforts disproportionately against minorities.<sup>217</sup> There is little reason to believe this view is widely shared in the inner city; I am unaware of any evidence suggesting that the minority community itself seeks only a proportionate commitment of law enforcement resources to inner-city communities that experience a disproportionate share of crime. To the contrary, as I suggested earlier, polling evidence consistently indicates that African-Americans are more con-

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See Pet. for Cert., at 67a-68a, *Morales* (setting forth Chicago Police Department General Order 92-4, Part V).

<sup>215</sup> See *supra* notes 59-61 and accompanying text.

<sup>216</sup> Indeed, Professors Bursik and Grasmick argue that a basic element of community dynamics is the community's effort to protect itself from crime. See BURSİK & GRASMICK, *supra* note 61, at 15.

<sup>217</sup> For example, Paul Butler has advocated a variety of measures making it more difficult to incarcerate African-Americans, especially for drug crimes. See Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997). He has also advocated jury nullification. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

cerned about crime than nonminorities.<sup>218</sup> Whatever qualms minorities have about law enforcement—and there are qualms aplenty<sup>219</sup>—there is little evidence that they have translated into a view that the police should reduce their efforts to curb inner-city lawlessness.<sup>220</sup> Residents of gang-ridden communities know that withdrawing the police from their midst will not revitalize their communities but would instead make lawbreaking more profitable and attractive, enhancing its lure for inner-city youth.<sup>221</sup>

And when inner-city minority communities demand an end to drug and gang activity in their midst, public officials are left with little choice but to engage in increasingly aggressive polic-

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<sup>218</sup> See *supra* note 60.

<sup>219</sup> For example, polls have consistently shown that concern among African-Americans about police misconduct is significantly higher than among whites. See 1999 SOURCEBOOK, *supra* note 60, at 108 tbl. 2.26, 110 tpls. 2.30 & 2.31, 111 tpls. 2.32, 2.33, 2.34 & 2.35. Polls also show that African-Americans are somewhat more likely than whites to think that the courts in their communities are too harsh with criminals. See *id.* at 130-31 tbl. 2.56. Yet in this regard, one of the few studies to examine the effect of race on community residents' perceptions of the police concluded that negative perceptions of the police were more strongly correlated with a neighborhood's crime rate than its race. See Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129 (2000).

<sup>220</sup> Especially pertinent to this point is the racial breakdown of the NORC polls on legalization of marijuana. In the 1998 poll, 34 percent of whites but only 22 percent of African-Americans supported legalization of marijuana, while 60 percent of whites and 71 percent of African-Americans opposed legalization. See 1999 SOURCEBOOK, *supra* note 60, at 150-51 tbl. 2.82. African-Americans have opposed legalization of marijuana at greater rates than whites in every one of these annual polls since 1987. See *id.* If African-Americans were as troubled by the use of the criminal law to address supposedly "victimless" drug crimes as some critics suggest, one would expect to see greater support for drug legalization in the African-American community. See generally Tracey L. Mearns, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137 (1997).

<sup>221</sup> Professors Bursick and Grasmick have observed:

[A]s many urban analysts have noted, it is very difficult to significantly affect the nature of neighborhood life through the efforts of local community organizations alone. Rather, these groups must be able to negotiate effectively with those agencies that make decisions relating to the investment of resources in the area that may foster the kinds of control that we have been discussing . . . [C]onsideration of the public bases of systemic control is crucial to a full understanding of the relationship between neighborhood dynamics and crime.

BURSICK & GRASMICK, *supra* note 61, at 38 (citations omitted); see also *supra* note 134 and accompanying text.

ing, even though it is likely to target persons of color.<sup>222</sup> That, in turn, means that the police will necessarily measure their success by arrest and incarceration rates, and will continue to push the boundaries of the Fourth Amendment, at least if the only tools at their disposal are conventional criminal laws. Public order laws, accordingly, should be welcomed by those who care about racial justice—they provide the police with a strategy that does not depend on increasingly aggressive search and seizure, as well as mass incarceration, in order to disrupt entrenched criminal networks. And if anti-loitering laws succeed in making drug trafficking become more covert and less profitable, then the political pressure that leads to massive undercover operations and equally massive incarceration should abate concomitantly.

Finally, Chicago-style public order laws carry with them a greater measure of political legitimacy than many of the conventional law enforcement tactics now used in their stead. Conventional drug laws are enacted by state and federal governments far removed from and at best only marginally accountable to the inner city; and the minority community can rightly complain that it never consented to a program of anti-drug enforcement that falls so heavily and disproportionately upon it.<sup>223</sup> A post-*Morales* anti-loitering law, in contrast, must be adopted through open debate in the local political process. That, in turn, enhances the likelihood that the minority com-

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<sup>222</sup> This may well be an example of Gary Sykes' influential theory that policing is resistant to reform because the community itself demands that the police keep the peace, and this peacekeeping function requires the police to exercise considerable discretion in a manner that resists efforts to rationalize, bureaucratize or control police discretion. See Gary Sykes, *The Functional Nature of Police Reform: The 'Myth' of Controlling the Police*, 2 JUSTICE Q. 51 (1985).

<sup>223</sup> New York City's public order policing initiative may well reflect a similar problem. To the extent that it is premised on a desire to maximize the number of searches the police conduct regardless of compliance with the Fourth Amendment—as Professor Harcourt argues it is, see Harcourt, *supra* note 5, at 339-42—that too is an unacknowledged policy never expressly offered for public scrutiny. When the police execute a policy that was never sanctioned through open political debate, the legitimacy of that tactic is fairly subject to question, even apart from its legality. Indeed, Professor Harcourt launches an attack on New York City's approach along these lines, suggesting that the police have endeavored to impose their own norms of orderliness on the community. See *id.* at 297, 353-77. See generally Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1108 (2000); Sarah E. Waldeck, *Cops, Community Policing, and the Social Norms Approach To Crime Control: Should One Make Us More Comfortable With the Others?*, 34 GA. L. REV. 1253, 1282-88 (2000).

munity will be an active partner in the adoption of these policies. Indeed, given the political influence that the minority community has come to wield in most urban areas, there is little reason to believe that its views can be safely ignored by elected officials in those areas.<sup>224</sup> Utilizing the local political process in this fashion not only adds to legitimacy, but for that reason may also enhance the efficacy of anti-loitering laws. It is well-accepted that the extent to which laws are seen as legitimate has a critical impact on the willingness of people to obey those laws.<sup>225</sup> Employing laws that are both less harsh and adopted through a process more directly accountable to the minority community can therefore only enhance legitimacy.

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The enormous commitment of public resources directed at so-called "victimless" drug crimes in minority neighborhoods should make plain that something more complicated than simply racial subjugation is going on in urban policing—there is in fact a considerable commitment of law enforcement resources to the prosecution of crime in the minority community that does not affect whites in any direct way. The explanation, I have argued, is a function of urban politics—the inner-city minority community rightly demands that overt gang and drug criminality in its midst be curbed. In my view, without public order laws, the best we can realistically hope for is the enormously racially skewed status quo that conventional drug-law enforcement provides. It would be ironic if those who criticize public order laws on grounds of racial justice carried the day, only to find that they have left the police with nothing to offer high-crime, inner-city neighborhoods but the prospect of yet more mass incarceration—or more gang-related crime in those neighborhoods.

Inquiry into the ecology of the inner city, in my view, can teach much about inner-city crime and inner-city policing. Urban sociology tells us that gang criminality is not a figment of the overactive imaginations of racist police officers. Nor is it reflective of some sort of underclass pathology. It is instead an

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<sup>224</sup> In that connection, it is worth noting that of Chicago's nineteen African-American aldermen, 14 voted in favor of the newly revised anti-gang and anti-drug loitering ordinance. See Fran Spielman, *New Anti-Gang Law Passes; 4 Rip Measure As Racist*, CHI. SUN-TIMES, Feb. 17, 2000, at 3.

<sup>225</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19-68 (1990). And legitimacy, in turn, is in significant part a function of whether those who must obey the law feel that their voice is heard by the authorities. See *id.* at 125-57.

understandable, even rational response when coherent groups are given good reason to believe that legitimate opportunities for advancement are denied them. It is naive to think that the problems of the minority underclass can be solved without suppressing gang crime, which mightily contributes to the profound social isolation that Wilson and others have found afflicts the inner-city underclass. Critics of inner-city policing are right to claim that law enforcement tactics that are used disproportionately against minorities imperil the legitimacy of the criminal justice system—especially in the eyes of minorities—but surely a criminal justice system that is unable to suppress overt lawlessness in poor, disproportionately minority neighborhoods, while maintaining far greater security and stability in whiter, more affluent areas, is vulnerable to the same attack. Indeed, when the police are seen as content to let gangs run poor, disproportionately minority neighborhoods, a truly fundamental crisis of legitimacy is the inevitable result. But without public order laws, there is little one can expect but adherence to the harsh and punitive regime that the critics of public order laws must acknowledge we already have imposed in the inner city in an effort to combat the serious crime problems it confronts. Public order laws constitute the best opportunity we are likely to have to break the power of gangs with something short of mass incarceration. For that reason, they may well be the only credible alternative to the “get-tough” policies increasingly ascendant in the criminal justice arena, policies that only exacerbate our racial divide. To reject that alternative, leaving in place a harshly punitive and racially skewed regime, is the counsel of despair. And surely there has been quite enough of that when it comes to the plight of the inner cities.