Black, White and Gray: A Reply to Alschuler and Schulhofer

Tracey L. Meares[†]
and Dan M. Kahan[††]

The goal of our Article[1] was to expose the anachronistic picture of political reality that informed the Illinois Supreme Court's decision in *Chicago v Morales*.[2] Relying on civil rights era precedents designed to counteract racist policies aimed at locking minorities out of the community's civic life, the *Morales* Court's analysis seems to treat Chicago's gang loitering ordinance as if it were indistinguishable from those earlier policies. The truth, we argue, is that the gang loitering law is representative of a new generation of public order provisions that enjoy the enthusiastic sponsorship of minority communities. As a result of fundamental reforms in American voting law, these citizens now enjoy significant political strength in the nation's inner cities. They're using that strength to rectify centuries' long denials of effective law enforcement in their communities — the vestiges of which, in the form of high crime rates, continue to stifle the social and economic advancement of American Blacks and Latinos. In these circumstances, we suggest that the most constructive role for courts is no longer to enforce tight constraints on discretionary street policing, but to insist that inner-city communities structure law enforcement in a way that doesn't dissipate their own political incentives to police their police. We believe that the Chicago gang loitering law meets this standard.[3]

---

† Assistant Professor of Law, The University of Chicago Law School.
†† Professor of Law, The University of Chicago Law School.

We are grateful to the Russell Baker, Russell J. Parsons and Jerome S. Weiss Faculty Research Funds at the University of Chicago for generous financial support and to Darwin Roberts and Paul Patrow for superb research assistance.

[1] Tracey L. Meares and Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v Morales, 1998 U Chi Legal F 197.

[2] 687 NE2d 53 (Ill 1997), cert granted 118 S Ct 1510 (1998).

[3] Since we drafted our Article, the United States Supreme Court has granted certiorari in *Morales*. We have drafted and filed an *amicus* brief in that case on behalf of a coalition of twenty civic, religious, and business groups from Chicago. See Brief *amicus curiae* of the Chicago Neighborhood Organizations in Support of Petitioner, *Chicago v Morales*, 118 S Ct 1510 (1998) (No 97-1121). Stephen Schulhofer has drafted an *amicus*

Alschuler and Schulhofer critique our account of the politics behind the gang loitering law as well as our general argument about the significance of minority political empowerment for criminal procedure jurisprudence.[4] We respect the questions they raise and the doubts they pose, but we believe, nevertheless, that their conclusions are wrong. We first take up their description of the factual background of the gang loitering ordinance — the part of their response that is easiest to rebut — and then address the admittedly difficult points they raise about the relationship between the political process and constitutional rights.

I. THE POLITICAL BACKGROUND OF THE GANG LOITERING ORDINANCE

Alschuler and Schulhofer tell a disturbing tale of the background of the ordinance. In this story, the law is made out to be the brainchild of white Aldermen and community groups, who constructed it to wall off their communities from the presence of menacing minority gang members.[5] Flexing their political muscle, these groups passed the gang loitering ordinance in the City Council over substantial African American opposition.[6]

But this just isn't right. To be sure, the gang loitering ordinance was controversial among all groups in the City. The simple fact remains, however, that impetus for the law came from crime-ridden, minority communities, whose leaders played a critical role in drafting and implementing it. Alschuler and Schulhofer's conjecture that "the Council probably wanted" the ordinance to facilitate "hassling" of those "'who are undesirable in

---

brief in the case for opposing the constitutionality of Chicago's gang loitering ordinance. See Brief *amicus curiae* in Support of Respondents, *Chicago v Morales*, 118 S Ct 1510 (1998) (No 97-1121).

[4] Albert W. Alschuler and Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Meares and Kahan*, 1998 U Chi Legal F 215.

[5] See, for example, Alschuler and Schulhofer, 1998 U Chi Legal F at 217 (stating that the ordinance derived from efforts of "a community group based in a predominantly white section of Chicago" that was concerned "by the increasing presence of gangs like the 'Spanish Cobras' in their neighborhoods," with the assistance of white council members whose "wards . . . were respectively 78 percent and 85 percent white"); id at 218 ("In sum, white Aldermen and their constituents took the lead in initiating the anti-loitering proposal . . . ."); id at 219 ("African American Aldermen opposed to the ordinance said it was "'drafted to protect the downtown area and white community" at the expense of innocent blacks'") (quoting Fran Spielman, *Loitering Ban Passes: Aldermen Bitterly Split On Anti-Gang Measure*, Chi Sun-Times 1 (June 18, 1992) (quoting Alderman John Steele)).

[6] Id at 218 ("the reaction in much of the black community was emphatically negative").

the eyes of police and prosecutors'"[7] is baseless.

To illustrate, we will address (a) the origins of the law, (b) the positions of City Council Aldermen, and (c) the manner in which the law was enforced.

A. Where the Gang Loitering Ordinance Came From

As numerous newspaper accounts demonstrate, leaders of Chicago's minority communities played an instrumental role in framing the gang loitering ordinance.[8] William Beavers, an African American Alderman who represents a predominantly African American and high-crime neighborhood on Chicago's South side, contributed to drafting the law.[9] Aldermen Ed Smith, Arenda Troutman, and Toni Preckwinkle — all of whom are African American and represent heavily African American wards with

---

[7] Id at 230–31

> (Of course the Chicago anti-loitering ordinance was not meant to be, and never would be, taken so literally. . . . The "law in action" then may be what the City Council probably wanted it to be. In the anti-loitering ordinance, the Council effectively awarded the police a hassling license with teeth. As the Illinois Supreme Court noted, the ordinance was "drafted in an intentionally vague manner so that persons who are undesirable in the eyes of police and prosecutors can be convicted even though they are not chargeable with any particular offense.")

(quoting *Chicago v Morales*, 687 NE2d 53, 64 (Ill 1997) (footnote omitted)).

[8] See, for example, Fran Spielman, *Council panel to seek gang crackdown*, Chi Sun-Times 18 (Feb 26, 1992) (reporting Alderman Beavers's formation of special subcommittee charged with reviewing recently proposed ordinances and drafting constitutionally adequate gang crackdown law with input from residents of West, North and South sides); Editorial, *Anti-gang law isn't the answer*, Chi Trib 16 (May 20, 1992) (noting that "[f]or the last year neighborhood groups have worked with Chicago aldermen to draft a legal battle plan against the city's fearsome, intimidating street gangs"); Robert Davis, *Loitering law clears hurdle despite fears*, Chi Trib 1 (May 19, 1992) (reporting that gang loitering legislation is "sponsored by dozens of other Aldermen" in addition to Alderman Banks); Fran Spielman, *Daley endorses anti-gang law: Rodriguez wary*, Chi Sun-Times 14 (May 20, 1992) ("'It's basically a response from block organizations, churches and community groups'" (quoting Mayor Daley)); John Kass, *Old tactic sought in crime war*, Chi Trib at 1 (May 15, 1992) (noting that gang loitering bill "is welcomed by many residents of crime-ravaged neighborhoods" and identifying Alderman Ed Smith, an African American representing a crime-ridden West Side district, as a key supporter of it).

[9] Personal interview with Alderman Beavers on August 18, 1998. [*Editor's Note*: The *University of Chicago Legal Forum* does not verify personal interviews.] Indeed, a critical stage of the drafting process was Beavers's formation of a special City Council subcommittee charged with refining the language of dozens of previously submitted anti-loitering bills that Beavers himself viewed as unconstitutional. See Fran Spielman, *Council panel to seek gang crackdown*, Chi Sun-Times at 18 (cited in note 6). The subcommittee, formed months before the Police Committee chaired by Beavers reported the gang loitering law to the full Council, was also assigned to obtain input from West, North and South side communities. Id.

severe crime problems — were also centrally involved.[10] So were Lemuel Austin, who represents an African American South side district, and then-Alderman (and now United States Representative) Luis Gutierrez, who represented a crime-plagued Latino neighborhood on the Northwest side.[11]

Moreover, in the words of one Alderman, the drafting process was a "community wide effort" in which the sponsoring Aldermen worked closely with leaders of various civic organizations from minority neighborhoods.[12] Among these groups were South Austin Coalition, a traditional community organization located in a west side African American community concerned with economic development and crime control, and Reach Out and Touch Ministries, which works with troubled youth in the Englewood neighborhood.[13] Both of these organizations are well-known for their efforts against inner-city crime.[14]

As Alschuler and Schulhofer note, the Northwest Neighborhood Federation ("NNF") was also part of this process.[15] Contrary to what they suggest, however, the NNF doesn't represent predominantly white neighborhoods, but is an amalgam of diverse

---

[10] Telephone interview with Alderman William Banks on August 19, 1998. Alderman Banks represents the 36th Ward. Alderman E. Smith represents the 28th Ward; Alderman Troutman represents the 20th Ward; Alderman Preckwinkle represents the 4th Ward. See Figure 1 for racial and ethnic population of Chicago wards.

[11] Alderman Austin represents the 34th Ward; Representative Gutierrez represented the 26th Ward. See Figure 1 for racial and ethnic population of Chicago wards.

[12] Telephone interview with Alderman Banks (cited in note 10); see also Editorial, *Anti-gang law isn't the answer*, Chi Trib at 16 (cited in note 8) ("For the last year neighborhood groups have worked with Chicago aldermen to draft a legal battle plan against the city's fearsome, intimidating street gangs."). Police researcher Wesley Skogan describes the vocal multi-racial coalition support for the City's innovative CAPS program in his recent book. Wesley G. Skogan and Susan M. Hartnett, *Community Policing Chicago Style* 20–38 (Oxford 1997). This program developed around the same time as the gang loitering ordinance and responded to some of the same political currents we identify.

[13] Telephone Interview with Alderman Banks (cited in note 10).

[14] For examples of Reverend Jeffrey Haynes of Reach Out and Touch Ministries, see Lorraine Forte, *Young workers can taste success in community job-training program*, Chi Sun-Times 7 (Dec 23, 1996); Graeme Zielinski, *Call To Brown's Gets Dream Cookin'*, Chi Trib Metro 1 (Nov 5, 1996); John W. Fountain, *CHA Violence Just City's Tip Of The Iceberg; Gang Rivalries, Drug Wars Spill Into Many Areas*, Chi Trib 1 (Apr 14, 1994); John W. Fountain and George Papajohn, *Gang War Paralyzes South Side*, Chi Trib 1 (Mar 30, 1994). For examples of the South Austin Coalition's work see Regina M. Roberts, *South Austin neighbors get action on demolition*, Chi Sun-Times 15 (Aug 8, 1996); Maudlyne Ihejirika, *Coalition Says Housing Fines Can Help Halt Abandonment*, Chi Sun-Times 16 (Apr 5, 1993); Charles Kouri, *Uniting for change: How forming a community group can improve your lot in life*, Chi Trib Your Place 3 (Jan 24, 1992).

[15] Alschuler and Schulhofer, 1998 U Chi Legal F at 217 (cited in note 4) ("Concerned by the increasing presence of gangs like the 'Spanish Cobras' in their neighborhoods, the Northwest Neighborhood Federation, a community group based in a predominantly white section of Chicago, formed an Anti-Gang Task Force.").

groups, many of which come from the predominantly Latino communities in the City's Northwest.[16] Indeed, Representative Gutierrez has appeared with NNF as *amici curiae* in defense of the gang loitering ordinance.[17]

As for the Daley Administration's involvement, it is true that the Daley Administration supported the gang loitering ordinance and lobbied for it. However, the Mayor did not take a strong public stance in favor of the law until *after* it was clear that the law had significant support from leaders in the African American and Latino neighborhoods that have the largest gang problems.[18] "In sum," Alschuler and Schulhofer's claim that "white Aldermen and their constituents took the lead in initiating the anti-loitering proposal, with strong backing and drafting assistance from the Daley administration"[19] is "incorrect [and] seriously misleading," as it fails to acknowledge the critical role played by minority communities and minority leaders in the genesis of the gang loitering ordinance.[20]

B. What the Aldermen Did

The 1992 City Council vote adopting the gang loitering ordinance confirms that critical support came from high-crime mi-

---

[16] NNF's work boundaries are just shy of Alderman Banks's predominantly white ward. NNF does the bulk of its work in the 26th, 31st, 32d, and 35th wards, all of which are predominantly or majority Latino wards. Interview with Ricardo Contreras, Area 5 Services Coordinator, CAPS Implementation Project on August 26, 1998. See also Figure 1 for racial and ethnic population of Chicago wards.

[17] Brief *amicus curiae* of the Washington Legal Foundation, US Representatives Henry Hyde and Luis V. Gutierrez, Allied Educational Foundation, Northwest Neighborhood Federation, and West Avalon Civic Group, Inc, in Support of Petitioner, *Chicago v Morales*, 118 S Ct 1510 (June 19, 1998) (No 97-1211).

[18] Telephone interview with Alderman Banks (cited in note 10); see also Fran Spielman, *Daley endorses anti-gang law: Rodriguez wary*, Chi Sun-Times 14 (May 20, 1992) (reporting Daley's public endorsement of law, after its approval by Police Committee, based on its grounding in support of "'block organizations, churches and community groups'").

[19] Alschuler and Schulhofer, 1998 U Chi Legal F at 218 (cited in note 4).

[20] Id at 216. In fact, the gang loitering ordinance was not drafted by anyone from scratch but was rather self-consciously patterned on a gang loitering provision enacted by Los Angeles. See Robert Davis and William Recktenwald, *Angry aldermen target gangs: Daley backs City Council call for extra police powers*, Chi Trib 1 (Oct 24, 1991). The City legal department did play a role in adapting the provision to Chicago's situation, but that is hardly a surprise given the keen interest of South and West side Aldermen, including Beavers, in drafting an ordinance that would survive constitutional review. See Spielman, *Council panel to seek crackdown*, Chi Sun-Times at 18 (cited in note 8) (noting Beavers's dissatisfaction with wording of previously introduced versions of gang loitering law); Fran Spielman, *Council panel OKs loitering ban to fight gangs*, Chi Sun-Times 1 (May 19, 1992) (noting role of City attorneys in drafting law after "sift[ing] through dozens of anti-crime proposals introduced in the last year by crime-weary aldermen").

nority neighborhoods. Aldermen from the 4th, 7th, 8th, 28th, 34th, and 37th districts — *all* of which are predominantly African American and *all* of which are located within the top ten police precincts for violent crime — voted in favor of the gang loitering ordinance.[21] Aldermen representing Latino neighborhoods that overlap the City's top crime police districts — including the 1st, 10th, 12th, 26th, 31st, 32d, and 35th — also voted for the law.[22]

Together, these districts cover much of the high-crime neighborhoods in the City. Had these Aldermen opposed the gang loitering ordinance, it wouldn't have passed by an overwhelming margin (as it did), but rather would have gone down to a 24-18 defeat in the Council.

To ground their claim that minority opinion toward the gang loitering ordinance was "emphatically negative,"[23] Alschuler and Schulhofer note that "most of the African American Aldermen who voted on the issue" — eight of fourteen — cast negative votes. This form of accounting understates support for the gang loitering ordinance among high-crime minority neighborhoods. Alschuler and Schulhofer make no reference, for example, to the votes of Aldermen representing high-crime Latino neighborhoods. They make no attempt to connect the votes of African American Aldermen to the crime rates in their districts. And they mention only in a footnote the most recent City Council vote in May of 1998, in which a majority of voting African American Alderman (and every voting Latino Aldermen) voted in *favor* of a resolution of support of the gang loitering ordinance![24]

The even more critical point, however, is that a simple head count of African American Aldermen misconceives the issue at hand. We argue that the premise of the Illinois Supreme Court's decision in *Morales* was that the gang loitering law is indistinguishable from an older generation of loitering laws, the clear aim and function of which were to reinforce the exclusion of mi-

---

[21] See Figure 1 for racial and ethnic population of Chicago wards. Compare Figure 2 showing votes on the ordinance. See also Figure 4 indicating ten police districts with highest murder rates and assault rates for 1993–95.

[22] Id.

[23] Alschuler and Schulhofer, 1998 U Chi Legal F at 218 (cited in note 4).

[24] Alschuler and Schulhofer note that only thirteen out of nineteen African American Aldermen were present at the Resolution vote. Id at 220 n 35. The six Aldermen who were not present had previously voted on the measure in 1992. Two of the non-voters were Aldermen Ed Smith and Toni Preckwinkle — key supporters of the gang loitering ordinance. If we assume that these six aldermen would not have changed their votes, then there would have been four more votes in favor of the gang loitering ordinance and two votes against it bringing the total votes from African American Aldermen to twelve against seven.

norities from the nation's political and economic life. *That* interpretation of political reality is *impossible* to sustain in light of the key role that Aldermen from high-crime, minority neighborhoods played in the enactment of the gang loitering ordinance.

It is true that some African American Aldermen opposed the gang loitering law at the same time that African American Aldermen from surrounding minority neighborhoods voted for it. That shows, unsurprisingly, that there were differences of opinion among African Americans — as there were among Latinos and whites — about whether the gang loitering law was a good idea. But the very fact that such disagreement occurred *within* and *across* ethnic and racial communities and not simply *between* them — the very fact that the gang loitering law put into play issues of policy and judgment that were vexingly gray, and not starkly black and white — proves that the gang loitering ordinance cannot be depicted as a weapon of a " 'white community' " bent on dominating and oppressing "innocent blacks"[25] — hyperbolic rhetoric to the contrary notwithstanding.[26]

Of course, the fact that *some* high-crime, minority neighborhoods favored the gang loitering ordinance doesn't show that the law embodies a fair balance of liberty and order for *all* minorities. We don't take such a position. Rather, our claim is that courts should defer to the balance struck by a community's political process when the burdens of a democratically approved law are being meaningfully felt by the average member of the community and not externalized to a disempowered or despised minority. To show why we believe the gang loitering ordinance passes this standard, we consider not only the origins of its political support, but also the practical constraints on its enforcement, a matter to which we now return.

C. How the Gang Loitering Ordinance Was Enforced

Alschuler and Schulhofer's speculation that the gang loitering ordinance was "'in action'" what "the Council probably wanted" it to be[27] — namely, a "license" to "hassl[e]" those "'who are unde-

---

[25] Spielman, *Loitering Ban Passes*, Chi Sun-Times 1 (cited in note 5) (quoting Alderman John Steele).

[26] See, for example, id; *Chicago v Youkhana*, 660 NE2d 34, 38 (Ill App 1995) (describing ordinance enforcement as a "police-state" tactic); Robyn Blumner, *When the Law is Based on Looks*, Rocky Mountain News 5B (May 10, 1998) (comparing enforcement of Chicago's law to the law enforced decades ago in Jacksonville, Florida, and claiming that its enforcement was more reminiscent of Iraq than America).

[27] Alschuler and Schulhofer, 1998 U Chi Legal F at 230 (cited in note 4).

sirable in the eyes of police and prosecutors,'"[28] — is also flatly inconsistent with the manner in which the gang loitering ordinance was implemented. Mechanisms of political oversight that attended enforcement of the gang loitering ordinance were drafted to assure that it wouldn't be used to exclude minority youth from commercial areas or white residential neighborhoods, and that the law would be applied within minority, high-crime neighborhoods only in a manner consistent with the desires of those neighborhoods' residents.

Consistent with the expectations of the Aldermen who voted for the gang loitering ordinance, the Police Department delayed enforcement until it had promulgated specific enforcement regulations.[29] These regulations defined key terms with greater precision, and specified which officers in the Department could enforce the gang loitering ordinance.[30] But even more important, the regulations provided that the gang loitering ordinance could be enforced only in those neighborhoods "frequented by members of criminal street gangs."[31]

Actual enforcement of the gang loitering ordinance was consistent with this design. Records compiled by the Police Department confirm that enforcement was overwhelmingly concentrated on the City's high-crime neighborhoods — the very ones whose representatives and leaders were instrumental to passage of the law in the first place.[32] Consequently, there was neither any prospect nor any subsequent evidence of the gang loitering ordinance being used to reinforce exclusion of African American

---

[28] Id at 230–31 (quoting *Chicago v Morales*, 687 NE2d 53, 64 (Ill 1997).

[29] When the City Council approved the gang loitering ordinance, it was understood that the police department would issue regulations specifically geared to prevent harassment of minorities. See Robert Davis, *Loitering law clears hurdle despite fears*, Chi Trib 1 (May 19, 1992) (reporting testimony of deputy corporation counsel that implementing regulations would assure that proposed law would "be used surgically and not like a blunderbuss"); Fran Spielman, *Daley endorses anti-gang law: Rodriguez wary*, Chi Sun-Times 14 (May 20, 1992) (reporting support of Matt Rodriguez, then-acting Police Superintendent, subject to adoption of implementing regulations aimed at assuring public that police are not engaged in harassing minorities).

[30] Chicago Police Department, General Order No 92-4, §§ III–V (1992). Alschuler and Schulhofer maintain that the regulations do nothing to narrow the concept of "loitering." See Alschuler and Schulhofer, 1998 U Chi Legal F at 227 n 73 (cited in note 4). In fact, the regulations provide that the ordinance is aimed at "[t]he presence of criminal street gang members in certain public and private places [that] creates fear for the safety of persons and property . . . ." Id at § II.

[31] Chicago Police Department, General Order No 92-4 at § VI(A).

[32] Compare Figure 2 showing votes on the ordinance with Figure 4 showing areas of enforcement and the ten police districts with the highest murder rates and assault rates for 1993–95.

youth from commercial neighborhoods — an anxiety noted by Alschuler and Schulhofer.[33]

Enforcement within gang-infested neighborhoods was also subject to meaningful political oversight. Under the regulations, the Police Department was obliged to consult with community residents and leaders. In addition, Mayor Daley suggested that enforcement of the gang loitering ordinance within any given ward could be contingent on the assent of that ward's Alderman.[34] There is no evidence that any Aldermen — including those who opposed the gang loitering ordinance in the initial Council vote — attempted to exercise this opt-out, indicating that the gang loitering ordinance was indeed enforced in a manner consistent with the preferences of neighborhood residents.

Thus, there can be no serious contention that the gang loitering ordinance lacked deep-seated community support in the City's high-crime, minority neighborhoods. Otherwise, it wouldn't have been enacted in the first place and wouldn't have been enforced. The only important question is whether courts should regard this support as probative evidence that the law reasonably balances order and liberty for constitutional purposes. What Alschuler and Schulhofer have to say about this is, in our view, the most interesting part of their response.

II. BURDEN SHARING AND CONSTITUTIONAL CRIMINAL PROCEDURE

Alschuler and Schulhofer bombard our alternative constitutional principles with a host of challenges. Some of the points they make are formal and doctrinal: the idea of community burden sharing, they argue, is alien to the conception of individual rights embodied in the Constitution.[35] Other points are conceptual: "groups do not come predetermined," they note, so how can courts be expected to identify the relevant community for purposes of applying our community burden sharing test?[36] Still other of their points are factual or interpretive in nature: they

---

[33] See Alschuler and Schulhofer, 1998 U Chi Legal F at 230–31 (cited in note 4) (quoting *Chicago v Morales*, 687 NE2d 53, 64 (Ill 1997).

[34] See Robert Davis, *Special units to police loiterers: City wants to make new anti-gang law hold up in court*, Chi Trib 3 (June 19, 1992) ("Mayor Richard Daley sarcastically suggested Thursday that the Police Department might not enforce the new law in the wards of those aldermen who voted against it, telling ward residents that their elected representatives did not want increased police protection.").

[35] See Alschuler and Schulhofer, 1998 U Chi Legal F at 240, 243–44 (cited in note 4).

[36] Id at 240.

maintain, for example, that continued instances of police brutality demonstrate the folly of relaxing judicial oversight of discretionary policing.[37] And finally, some of their points are purely polemical: because "majority support for many of the guarantees of the Bill of Rights seems ephemeral, [ ]the Meares-Kahan conception of rights could make many familiar freedoms disappear."[38]

We will do our best in the limited space we have here to address these arguments. For additional responses, we refer readers to our piece in the *Georgetown Law Journal*.[39]

A. Burden Sharing and Individual Rights

Start with the assertion that "Our Constitution does not permit a majority to limit individual rights simply by offering to share the burden."[40] This is true, but off point. The question is whether the willingness of majorities to share in burdens is relevant to determining *whether* a law limits individual rights. The familiar *political process theory* of judicial review confirms that the answer is yes.

It is commonplace to describe constitutional rights — particularly those that relate to criminal justice — as guaranteeing a reasonable "balance between liberty and order."[41] The political process theory, as articulated in the famous "*Carolene Products* footnote"[42] and developed primarily by John Hart Ely,[43] determines how courts should assess whether the balance struck by any particular policy is reasonable. If the coercive incidence of a particular policy is being visited on a powerless minority, the theory requires courts to make an independent assessment of whether the order benefits outweigh the liberty costs. This explains why courts strictly scrutinize policies that discriminate on the basis of race, restrict "dangerous" speech, or impose special obligations on account of religion.[44]

But when a community can be seen as *internalizing* the coercive incidence of a particular policy, courts are much less likely to

---

[37] Id at 223–24, 238–39.

[38] Id at 240.

[39] See Dan M. Kahan and Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 Georgetown L J 1153 (1998).

[40] Alschuler and Schulhofer, 1998 U Chi Legal F at 240 (cited in note 4).

[41] See, for example, *Medina v California*, 505 US 437, 443 (1992).

[42] See *United States v Carolene Products Co*, 304 US 144, 152 n 4 (1938).

[43] See John Hart Ely, *Democracy and Distrust* (Harvard 1980).

[44] See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va L Rev 747, 754–55, 760–61 (1991).

second-guess political institutions on whether the tradeoff between liberty and order is worthwhile. This explains the deference courts afford to *generally applicable* laws under the Privileges and Immunities Clause,[45] the dormant Commerce Clause,[46] and even the Free Exercise Clause.[47] When courts defer to the political process in those contexts, they aren't saying that the majority gets to decide what rights minorities have, but rather that the willingness of the majority to bear a particular burden suggests that the policy in question doesn't embody the political undervaluation of liberty that constitutional rights are meant to prevent.

This theory explains much of established criminal procedure doctrine.[48] Normally, the police must obtain a warrant, supported by probable cause, before they can conduct a search. This requirement recognizes that law enforcement officials cannot be trusted to attach sufficient value to the liberty of individual criminal suspects, whose interests are generally a matter of indifference to the general public.[49] Law enforcement officials needn't obtain a warrant or even have probable cause, however, to stop motorists at sobriety checkpoints[50] or to search all individuals entering airports or government buildings.[51] This, too, is best explained under a political process theory: insofar as these policies *do* burden average members of the community, there is much less reason for courts to doubt the determination of politically accountable officials that these policies strike a fair balance between liberty and order.[52]

If the burden of a law enforcement policy falls on someone other than the average citizen, the Court's cases can be read as requiring deference in cases where the political process can be seen as sufficiently attentive to the regulated party's interests.

---

[45] See Ely, *Democracy and Distrust* at 83 (cited in note 43).

[46] See *South Carolina State Highway Department v Barnwell Brothers Inc*, 303 US 177, 184 n 2 (1938).

[47] See *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872 (1990).

[48] See Kahan and Meares, 86 Georgetown L J at 1171–76 (cited in note 39).

[49] See, for example, *Coolidge v New Hampshire*, 403 US 443, 449–50 (1971).

[50] See *Michigan Department of State Police v Sitz*, 496 US 444 (1980) (upholding sobriety checkpoints where uniformly administered to all passing motorists); with *Delaware v Prouse*, 440 US 648, 659–60 (1978) (invalidating random vehicle stops because they involved "standardless and unconstrained discretion").

[51] See generally *National Treasury Employees Union v Von Raab*, 489 US 656, 675 n 3 (1989).

[52] See Silas J. Wasserstrom and Louis Michael Seidman, *The Fourth Amendment As Constitutional Theory*, 77 Georgetown L J 19, 95–96 (1988).

Thus, random drug-testing of student athletes[53] is best seen as exempted from the warrant requirement not because student athletes exercise significant influence in the political process, but because their parents, who naturally take their children's interests to heart, do. Likewise, searches of regulated commercial enterprises, which exercise considerable influence in the political process, and which pass the cost of regulation on to consumers, are sometimes exempt from the warrant requirement under the "administrative search" doctrine.[54]

Our emphasis on burden sharing was designed to show that the Due Process constraints on discretionary policing can and should be assimilated to this framework. *Papachristou* and *Shuttlesworth* — the primary precedents relied on by the Illinois Supreme Court — reflect the exacting degree of statutory precision that courts do and should demand when the burdens of community policing are being concentrated on politically disadvantaged minorities. But in a setting in which a public order provision is supported by those same groups, in large part because they see it as an appropriately moderate form of law enforcement for their children and their neighbors' children, courts ought to show considerably more deference to the political process.[55]

B. Racist Police

Contrary to what Alschuler and Schulhofer imply, one does not have to believe that racially motivated police brutality "has vanished" to conclude that courts should now be more willing to trust inner-city communities to police their own police than they were during the era in which *Papachristou* and *Shuttlesworth* were decided.[56] Indeed, only someone who "does not read the

---

[53] See *Vernonia School Dist v Acton*, 515 US 646 (1995).

[54] See, for example, *New York v Burger*, 482 US 691 (1987) (upholding warrantless searches of automobile salvaging businesses); *Donovan v Dewey*, 452 US 594 (1981). See generally Wasserstrom and Seidman, 77 Georgetown L J at 96; William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 Mich L Rev 1016, 1044–45 (1995).

[55] For an analysis of Fourth Amendment law which makes analogous arguments with regards to practical community needs, see Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U Chi Legal F 261.

[56] Alschuler and Schulhofer, 1998 U Chi Legal F at 238 (cited in note 4):

> Part II of this article showed that the argument Meares and Kahan offer for abandoning the 1972 (and the 1939 and the 1926) conception of rights rests on a nonsequitur. Whether African Americans have made more than symbolic progress in the political arena since 1972 is debatable. But even if the gains of recent decades are properly characterized as substantial, these gains have left African Americans far short of parity. Anyone

newspapers"[57] could form a belief that foolish. At the same time, only someone who reads the papers with astonishing selectivity could believe that the problem of police racism today is indistinguishable from what it was thirty years ago. In 1968, Frank Rizzo emerged as a national political figure because of his orchestration of racial terrorism as Police Commissioner (and later Mayor) of Philadelphia.[58] In 1998, ambitious urban mayors like Rudolph Giuliani make a public point of energetically disciplining racists cops;[59] urban police chiefs such as Daryl Gates, who oversee racist forces, find themselves unceremoniously forced out of their jobs and relegated to the cultural and political fringe.[60]

This welcome change is a consequence of the same political dynamics that account for inner-city minorities' growing support for effective community policing. Along with more effective law enforcement, African American political leaders have demanded and obtained more effective bureaucratic procedures for punishing police brutality.[61]

These procedures do not completely eliminate the risk of harassment associated with the new community policing. But the willingness of inner-city residents to support this form of law enforcement nevertheless reflects their judgment that in *today's* political and social context, the continued victimization of minorities at the hands of criminals poses a much more significant threat to the well-being of minorities than does the risk of arbitrary mistreatment at the hands of the police.[62]

---

who contends that the "institutionalized racism" of American police departments has vanished does not read the newspapers.

[57] Id.

[58] See S. A. Paolantonio, *Frank Rizzo: The Last Big Man in Big City America* 97–98, 142–54 (1993) (describing wooing of Rizzo by Richard Nixon in 1968 and 1972 presidential campaigns); Hunter S. Thompson, *Fear and Loathing on the Campaign Trail '72*, 125 (Straight Arrow 1973) (describing "super-cop Mayor" Rizzo as part of the "gang of senile leeches" in the Democratic party who offered only "a bogus alternative to the politics of Nixon").

[59] See Dennis Cauchon, *Giuliani holding cops accountable in sex assault*, USA Today 3A (Aug 15, 1997) (noting quick and forceful [election-year] response of Giuliani to racially motivated police assault).

[60] See Claudia Puig, *Daryl Gates On Show's End: "I Have Real Mixed Emotions"*, LA Times F2 (Dec 30, 1993) (reporting Gates's short tenure as reactionary radio talk show host).

[61] See Richard H. Pildes, *The Politics of Race: Quiet Revolution in the South*, 108 Harv L Rev 1359, 1377 (1995) (Book Review).

[62] As Randall Kennedy has written:

> [T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws. Whereas mistreatment of suspects, defendants, and criminals has often

C. Which Community?

As Alschuler and Schulhofer recognize, whether the political process or community burden sharing approach generates plausible results depends on how the community is specified. A court wouldn't accept the claim, for example, that a community has internalized the burden associated with a ban on subversive speech merely because all members of the community were subject to it. The average voter clearly doesn't value such speech and likely despises citizens who do.[63]

What this shows is that the burden-internalization test ultimately turns on normative criteria rather than factual ones. A court can conclude that a law or policing technique passes the political process test, then, only if the average citizen is affected by that law or policy in a way that entitles her judgment to moral respect. That doesn't mean that a court has to conclude that the average citizen is right on the merits before it defers. But it does mean that it has to be convinced, based on a complete understanding of her capacities and her situation, that the average voter is the one entitled to balance the relevant interests and values.

As we argued in our Article, we think the residents of Chicago's high-crime, minority neighborhoods — the ones in which

---

been used as an instrument of racial oppression, more burdensome now in the day-to-day lives of African-Americans are private, violent criminals (typically black) who attack those most vulnerable without regard to racial identity. Like many activities in America, crime tends to be racially segmented; fourth-fifths of violent crimes are committed by persons of the same races as their victims. Hence, behind high rates of blacks perpetrating violent crimes are high rates of black victimization. Black teenagers are nine times more likely to be murdered than their white counterparts. While young black men were murdered at the rate of about 45 per 100,000 in 1960, by 1990 the rate was 140 per 100,000. By contrast, in 1990 for young white men the rate was 20 murder victims per 100,0000. One out of every twenty-one black men can expect to be murdered, a death rate double that of American servicemen in World War II. Such figures place the now-mythic beating of Rodney Kind in a somewhat different light than it is typically put. . . . In terms of misery inflicted by direct criminal violence, blacks (and other people of color) suffer more from the criminal acts of [other blacks] than they do from the racist misconduct of white police officers."

Randall Kennedy, *Race, Crime, and the Law* 19–20 (Pantheon 1997) (footnotes omitted).

[63] Compare *Church of the Lukumi Babalu Aye, Inc v Hialeah*, 508 US 520, 545–46 (1993) (invalidating facially general bar on animal sacrifice on ground that burden is felt only by worshipers of particular sect and thus "ha[s] every appearance of a prohibition that society is prepared to impose upon [members of the sect] but not upon itself.' This precise evil is what the requirement of general applicability is designed to prevent."), quoting *Florida Star v B.J.F.*, 491 US 524, 542 (Scalia concurring in part and concurring in judgment).

support for the gang loitering ordinance originated and in which it was enforced — *are* the citizens entitled to determine whether the gang loitering law reasonably balances liberty and order. They are the ones who daily face a heightened risk of criminal victimization from gang criminality, and who experience first-hand the destructive impact of gangs on the economic and social lives of their communities. In addition, they are the mothers and fathers, the sisters and brothers, and the neighbors of the youths subject to the law. They are thus vitally concerned not only with reducing crime, but with *avoiding* the devastating consequences that conventional law enforcement, particularly long terms of imprisonment, can inflict on offenders and their communities. They support the gang loitering ordinance because they see it as a form of policing that effectively secures order *without* destroying the lives of community youth who find themselves enmeshed in the complex economic and social forces that fuel gang criminality.

It is important to note, moreover, that anyone who would dispute the moral qualifications of inner-city residents to judge is obliged to defend the superior qualifications of those who they would have do the judging instead. There is no perspective-free way to figure out what rights people have. Rights are designed to assure a reasonable balance between liberty and order. But someone has to exercise moral judgment and *decide* whether the balance struck by any particular policy is reasonable. When commentators like Alschuler and Schulhofer argue that the median inner-city voter is incompetent to make that decision, they are necessarily saying that judges who are *not* inner-city stakeholders are in the best position to assess what is best.[64] Yet they never explain why that is so.

The tough issues surrounding the new community policing obviously aren't a game for the average inner-city voter. A morally responsible criminal procedure doctrine would recognize that her judgment on these matters is entitled to profound respect.

---

[64] See Kahan and Meares, 86 Georgetown L J at 1176–82 (cited in note 39).

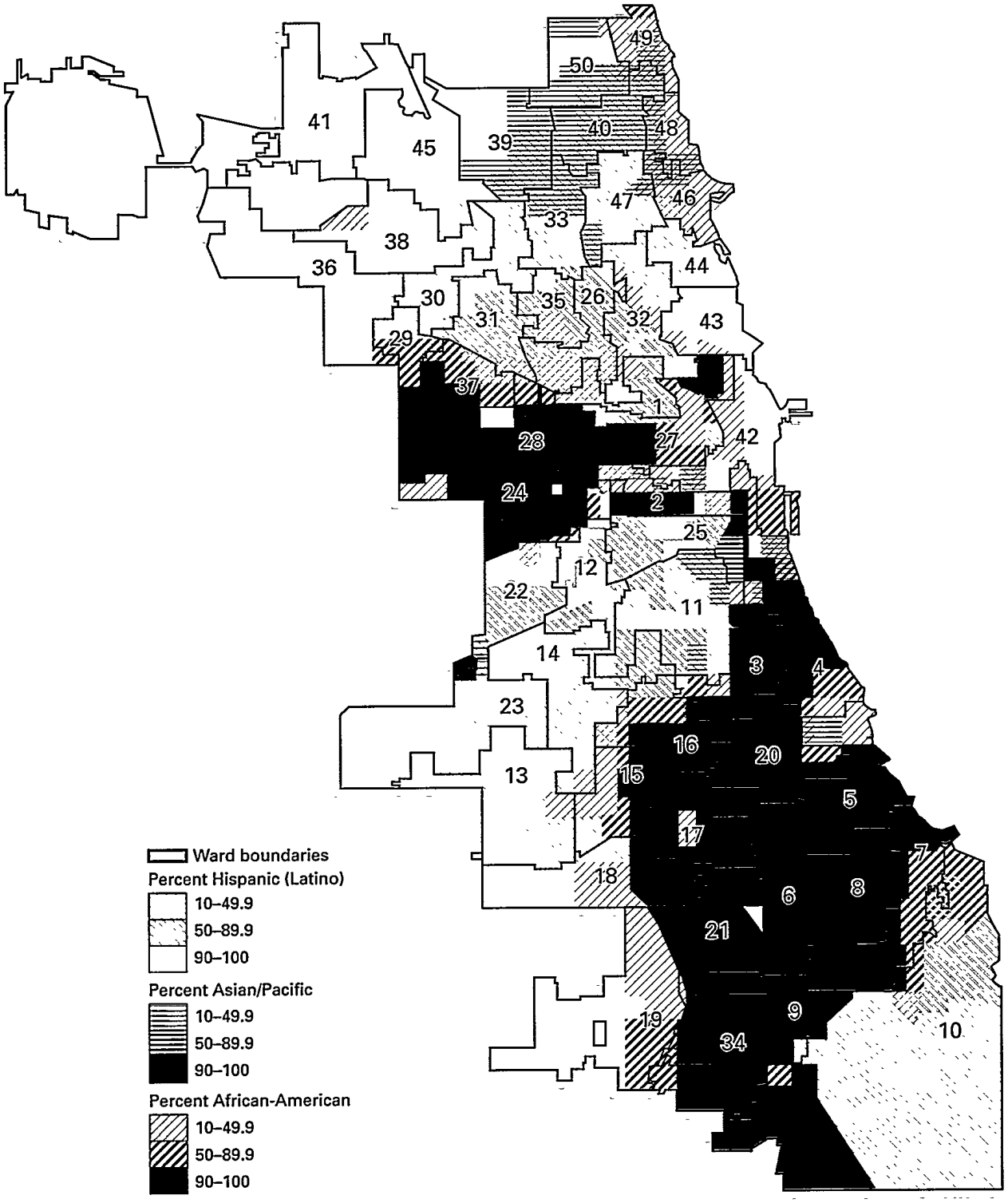

Figure 1
African-American, Latino and Asian-Pacific Population by Aldermanic Ward
Source: United States Census Bureau, 1990

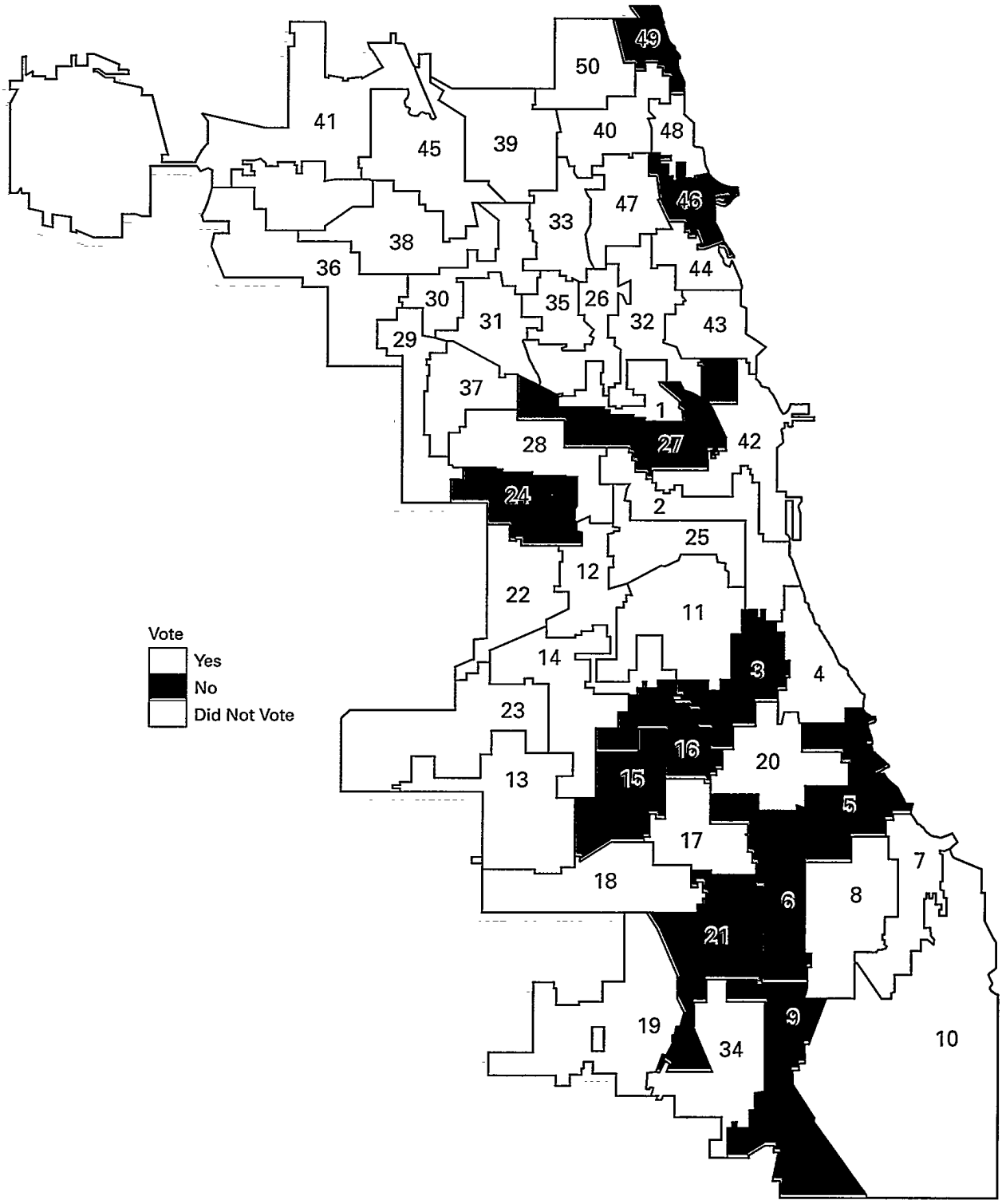

Figure 2
1992 Gang Loitering Ordinance Vote
Source: Chicago City Council Journal of Proceedings

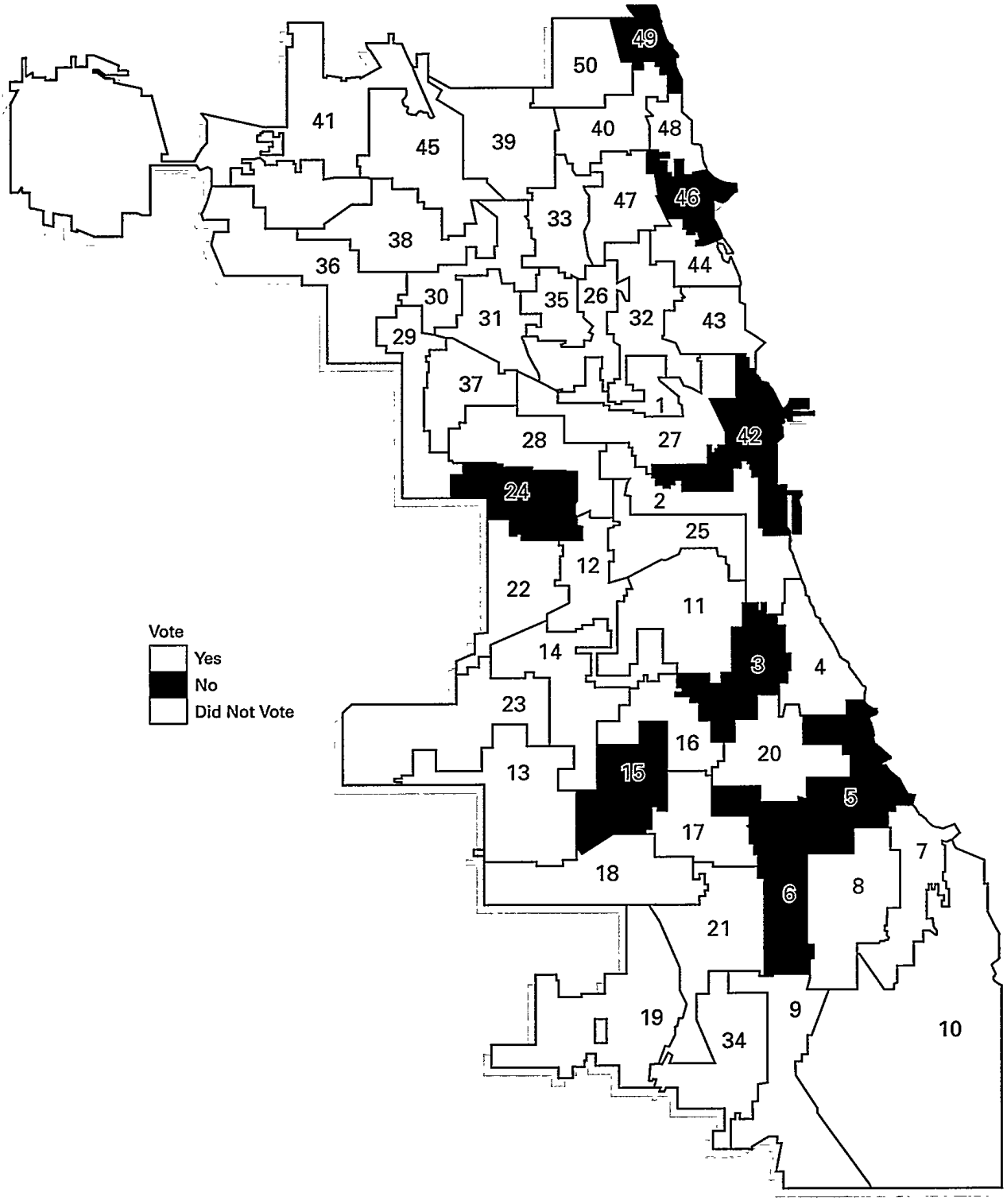

Figure 3
1998 City Council Resolution
Source: Chicago City Council Journal of Proceedings

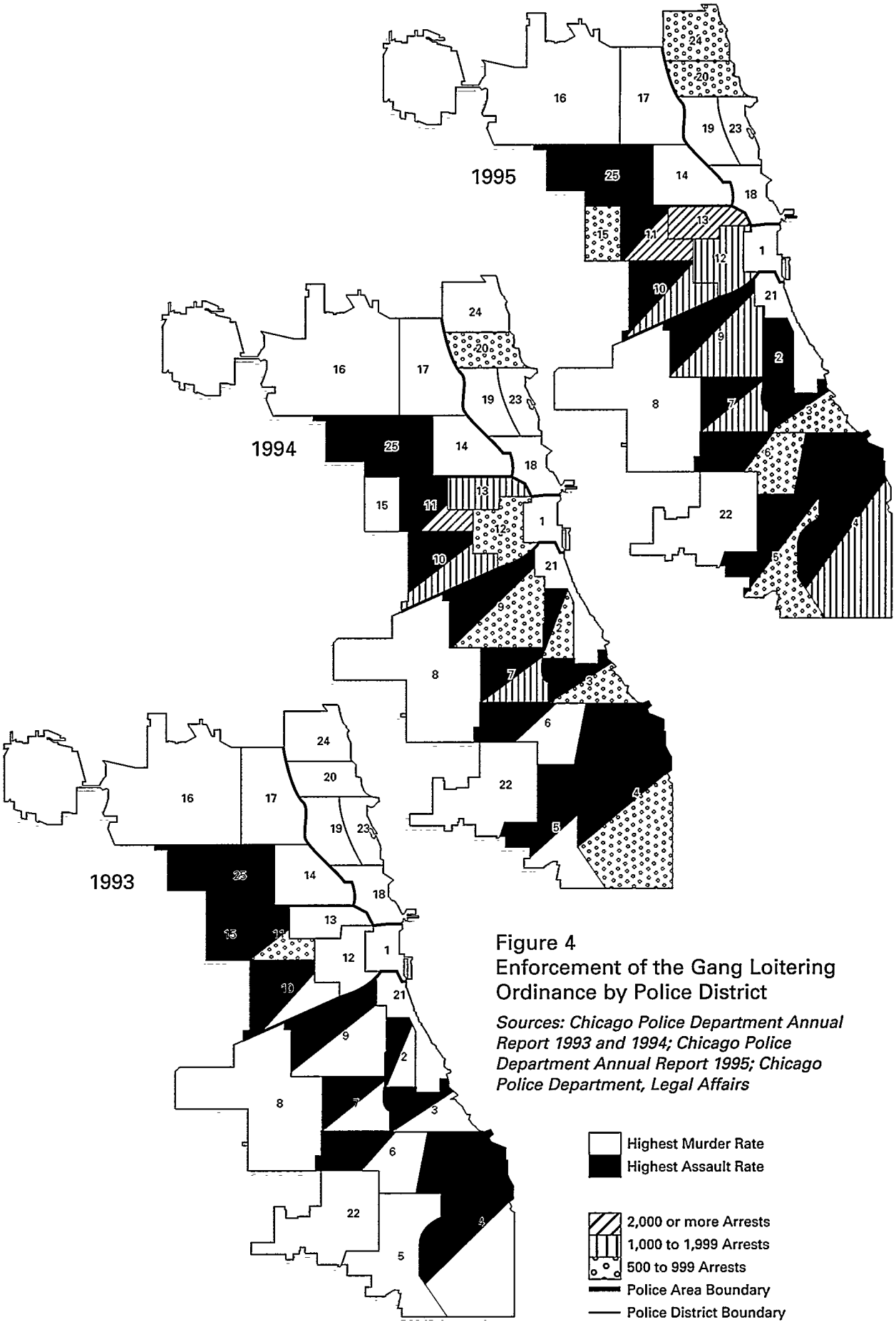

Figure 4
Enforcement of the Gang Loitering Ordinance by Police District

Sources: Chicago Police Department Annual Report 1993 and 1994; Chicago Police Department Annual Report 1995; Chicago Police Department, Legal Affairs

Police, Community Caretaking, and the Fourth Amendment

Debra Livingston†

The local police have multiple responsibilities, only one of which is the enforcement of criminal law. Police gather eyewitness accounts in the aftermath of a shooting, but they also assist lost children in locating their parents. Police identify and arrest those who have committed felonies, but they also respond to heart attack victims and help inebriates find their way home. Sometimes police check on the well-being of elderly citizens. As Professor Goldstein said some twenty years ago, "The total range of police responsibilities is extraordinarily broad . . . . Anyone attempting to construct a workable definition of the police role will typically come away with old images shattered and with a new-found appreciation for the intricacies of police work."[1]

In the typical Fourth Amendment case, police have intruded on privacy in service of law enforcement objectives. Fourth Amendment intrusions by local police, however, are in no way limited to contexts implicating their law enforcement role. Thus, when police enter an apartment to render aid to a woman who is having a baby, they seek neither evidence nor suspects. Such intrusions instead involve what the Supreme Court in *Cady v Dombrowski* termed the "community caretaking functions" of local police — functions "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."[2] Of course, sometimes community caretaking and law enforcement are intertwined. When police respond to a burglary alarm late at night and arrive to find shattered glass around a broken window in an apparently violated home, officers may well go inside. They enter in order to apprehend a burglar

---

† Associate Professor, Columbia University School of Law. I am grateful to Miguel Estrada, John Manning, John McEnany, John Monaghan, Richard Pildes, Bill Stuntz, and especially Richard Uviller for many helpful comments. I also especially appreciate the research help of Lara Ballard and Deirdre McEvoy, as well as the substantial assistance provided by Adam Long, my editor at The *University of Chicago Legal Forum*.

1 Herman Goldstein, *Policing a Free Society* 21 (Ballinger 1977).

2 413 US 433, 441 (1973).