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### Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing

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#### Repository Citation

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# SUPREME COURT REVIEW

## FOREWORD: RACE, VAGUENESS, AND THE SOCIAL MEANING OF ORDER- MAINTENANCE POLICING

DOROTHY E. ROBERTS\*

### I. INTRODUCTION

In June, 1992, the Chicago City Council passed a loitering ordinance that gave police officers exceptionally broad power to disperse any group of two or more people standing in public if the police suspect that the group includes a gang member.<sup>1</sup> Any person who does not promptly obey an order to disperse is subject to arrest and six months in prison. The law's language is deliberately expansive to allow the police to clean up the streets based on their suspicions of gang membership rather than waiting for a crime to take place. During the three years the law was in effect, it yielded arrests of more than 40,000 citizens, most of whom were Black or Latino residents of inner-city neighbor-

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\* Professor, Northwestern University School of Law; Faculty Fellow, Institute for Policy Research, Northwestern University. I presented a draft of this Foreword at a faculty workshop at Washington University School of Law and thank the participants for their very helpful comments and suggestions. I owe special thanks to Stephen Schulhofer for his engaging discussion and written comments on an earlier draft. I am also grateful to Paul Butler, Bernardine Dohrn, Steven Drizin, Harvey Grossman, Bernard Harcourt, Maurice Lipson, Jeffrey Sharer, and Benjamin Wolf for generously sharing their insights and information about the *Morales* case, Monica Neuman for her dedicated research assistance, and Lesliediana Jones and Lynn Kincade for expeditious library services.

<sup>1</sup> CHICAGO, ILL., MUNICIPAL CODE § 8-4-015 (1992).

hoods.<sup>2</sup> The arrests were halted when the Illinois Supreme Court ruled in *City of Chicago v. Morales*<sup>3</sup> that the gang-loitering ordinance is unconstitutionally vague. The United States Supreme Court agreed in a six to three decision.<sup>4</sup> The *Morales* case is one of the Court's "most important law-enforcement rulings in decades"<sup>5</sup> because it bears on the legality of policies recently initiated in many of the nation's cities that expand police authority as a means of maintaining order. Around the same time the Chicago ordinance was passed, for example, New York City implemented a quality-of-life initiative that directs police to aggressively make arrests for petty misdemeanor offenses such as turnstile jumping, panhandling, and public drinking.<sup>6</sup> Officials defend both laws with the theory that by keeping order in the streets police will deter more serious crime. The two policies are distinct in an important respect, however. While New York City's quality-of-life initiative involves arrests for clearly defined criminal offenses, Chicago's ordinance gave the police discretion to define permissible public presence.

Local policies that delegate to police greater authority to maintain order are sometimes confused with a related innovation called community policing.<sup>7</sup> According to its advocates,

<sup>2</sup> American Civil Liberties Union of Illinois, Background on Chicago's Anti-Gang Loitering Ordinance (Oct. 17, 1997). Sixty of the sixty-six defendants in *Morales*, whose cases were randomly consolidated by the court, were Black or Latino. Telephone interview with Harvey Grossman, Director, ACLU of Illinois (April 14, 1999). Neighborhood organizations that supported the ordinance conceded that it primarily affected inner-city minority communities. See Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner at 19, *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (No 97-1121).

<sup>3</sup> 687 N.E.2d 53 (Ill. 1997), *aff'd*, 119 S. Ct. 1849 (1999).

<sup>4</sup> *Chicago v. Morales*, 119 S. Ct. 1849 (1999). I capitalize the 'B' in "Black" because I believe that most Black Americans consider themselves to be an ethnic group, whereas I believe that most white Americans do not.

<sup>5</sup> Judy Peres, *City's Loitering Law Gets Last Chance at Top Court*, CHI. TRIB., Dec. 8, 1998, § 1, at 1.

<sup>6</sup> For a description and critique of New York City's quality-of-life initiative, see Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

<sup>7</sup> See, e.g., Dan M. Kahan & Tracey L. Meares, Foreword: *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1160-61 (1998) [hereinafter Kahan & Meares, *The Coming Crisis*] (referring loosely to discretionary policing strategies including anti-loitering

community policing is an "organizational strategy" that integrates police departments into the community to make them more responsive to citizens' demands.<sup>8</sup> Although order-maintenance and community-policing programs sometimes overlap, I prefer to keep the two terms separate. Order-maintenance policing policies do not necessarily involve communities in either their design or implementation. Community policing, on the other hand, need not include laws that expand police discretion to maintain order or encourage arrests for minor offenses. Indeed, some types of community policing limit police power and discourage misdemeanor arrests to facilitate interaction between officers and the community.<sup>9</sup>

Acknowledging the potential for police abuse, the Supreme Court has held in several important decisions that vague loitering laws violate constitutional requirements of due process.<sup>10</sup> Laws that give police a wide net to trap citizens who look dangerous not only fail to give adequate notice to citizens of the nature of offending behavior but also allow police to discriminate against citizens based on personal prejudices. The *Morales* decision re-affirmed the due process limits on statutory grants of expansive police discretion.

For the last several decades, conservative commentators have called for a relaxation of the vagueness doctrine as well as procedural restraints on police discretion to permit bolder law

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laws, warrantless building searches, and New York City's quality-of-life initiative as the "new community policing").

<sup>8</sup> See WESLEY G. SKOGAN & SUSAN M. HARTNETT, COMMUNITY POLICING, CHICAGO STYLE 5 (1997). Community policing "implies a commitment to helping neighborhoods solve crime problems on their own, through community organizations and crime-prevention programs." *Id.*

<sup>9</sup> See Harcourt, *supra* note 6, at 388-89 & n.388 (citing Jonathan Eig, *Eyes on the Street: Community Policing in Chicago*, 19 AM. PROSPECT 60, 63 (Nov.-Dec. 1996)). The Chicago Alliance for Neighborhood Safety vehemently opposed the gang-loitering ordinance because it hindered community policing by breeding suspicion and division among inner-city residents. See CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY, CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY IS FOR THE CONSTITUTION, AGAINST THE ANTI-GANG LOITERING LAW (undated pamphlet, on file with author).

<sup>10</sup> See, e.g., Kolender v. Lawson, 461 U.S. 352 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971). See also John C. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 215-16 (1989) (noting the susceptibility of loitering laws to constitutional challenge on vagueness grounds).

enforcement efforts to investigate, punish, and prevent crime.<sup>11</sup> More recently, legal scholars borrowing from sociological theory have argued that the role of social norms in criminal behavior also suggests that it is time to curtail or abandon certain constitutional checks on police power to maintain order.<sup>12</sup> These proponents of order-maintenance policing rely on the "broken windows" hypothesis, originally advanced by James Q. Wilson and George L. Kelling, which posits that eliminating visible signs of neighborhood disorder deters more serious crime.<sup>13</sup> A virtually unanimous chorus of scholars, politicians, and the media has championed policing strategies based on the broken windows theory and credited these strategies with falling crime rates across the nation.<sup>14</sup> *Morales* invited the Court to reconsider its condemnation of vague loitering laws in light of this trend in law enforcement theory and practice.

The *Morales* case was decided without much attention to race. Race did not play a role in either the Illinois Supreme Court's opinion overturning the Chicago ordinance or the United States Supreme Court's affirmance. Yet issues of race are critical to the constitutionality of the gang-loitering law from

<sup>11</sup> See, e.g., THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING (Richard A. Leo & George C. Thomas III, eds., 1998) (including proposals to abolish the *Miranda* rule); HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE (1995) (advocating the reform of the criminal justice system, including constraints on the exclusionary rule and the right to counsel); H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA (1996) (arguing that the Supreme Court's interpretation of the Fourth, Fifth, and Sixth Amendments excessively hamper law enforcement); William Barr, *A Practical Solution to Crime in Our Communities*, 1 MICH. L. & POL'Y REV. 393, 394 (1996) (advocating pretrial detention power and vagrancy and anti-loitering laws as important legal tools that will enable "the community to take back the streets"); Christo Lassiter, *The Stop and Frisk of Criminal Street Gang Members*, 14 NAT'L BLACK L.J. 1 (1995) (advocating stops and frisks of suspected gang members as a means of addressing "Black-on-Black" crime); James Q. Wilson, *What to Do about Crime*, 98 COMMENTARY 25, 28 (Sept. 1994) (advocating increased police use of stops and frisks).

<sup>12</sup> See, e.g., Kahan & Meares, *The Coming Crisis*, *supra* note 7.

<sup>13</sup> See James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 29.

<sup>14</sup> See Harcourt, *supra* note 6, at 292-93. Harcourt's article is an important departure from the "euphoria of support" for the broken windows approach to crime prevention. Recently, that euphoria began to dissipate as commentators linked New York City's aggressive patrol tactics to cases of police brutality. See *infra* note 140 and accompanying text.

the perspectives of both its supporters and its opponents. The disproportionate number of Blacks and Latinos arrested under the ordinance alone suggests that race mattered in the passage and enforcement of the ordinance. Racism is also one of the motivating concerns underlying constitutional objections to vague loitering laws like the Chicago ordinance. Ironically, race is also at the center of the strongest argument in favor of upholding the ordinance. Some of the law's defenders argue that Black support for the ordinance demonstrates its efficacy at protecting inner-city communities from crime and outweighs concerns about the violations of citizens' civil liberties.<sup>15</sup>

Given the predominance of race in the arguments both for and against the gang-loitering ordinance, the debate about its constitutionality should carefully address the relation between this and similar order-maintenance policing measures and Black Americans' political and social status. Is the disproportionate arrest of people of color under the ordinance evidence of racial discrimination, or evidence that the Chicago Police Department is finally starting to protect the city's minority communities against internal disorder? Does the apparent support of many inner-city residents for new policing techniques trump constitutional arguments based on the racial disparity in the arrests? To borrow the terms of the sociological theorists, are the social norms enforced by order-maintenance policing beneficial or detrimental to African Americans given current political conditions?

In this Foreword, I endorse the new attention paid to the relationship between sociology and criminal law. I argue, however, that some social norm theorists have focused too heavily on questionable evidence that order-maintenance policing has a positive influence on social norms in Black communities while ignoring the disturbing potential for these practices to enforce and magnify racist norms of presumed Black criminality. The Chicago gang-loitering ordinance in particular entrenches the racialized division of Americans into the presumptively lawless whose liberties deserve little protection and the presumptively

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<sup>15</sup> See Brief *Amicus Curiae* of the Chicago Neighborhood Organizations In Support of Petitioner at 5, *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (No. 97-1121).

law-abiding who are entitled to rule over them. This danger is an important reason to preserve the constitutional prohibition against vague delegations of broad police discretion.

Upholding the Chicago ordinance would have legitimated the already prevalent practice of police harassment of Blacks on city streets. More ominously, it would have reinforced the view that Blacks are potential criminals for whom police surveillance and even arrest are mundane occurrences, not warranting constitutional concern. *Morales* gave the Court a timely opportunity to shore up its crucial jurisprudence placing constitutional limits on police power. I expose as well the evidentiary, theoretical, and ethical weakness of arguments that use social norm theory to support free-wheeling police tactics targeted against minorities.

## II. RACE AND THE PROBLEM WITH VAGUENESS

The Supreme Court held that the Chicago gang-loitering ordinance violated the due process clause of the Constitution because it was an excessively vague impairment of citizens' personal liberty to move freely on the streets.<sup>16</sup> Although this constitutional flaw can be explained in race-neutral terms, in Chicago it resulted in a particular racial injury; the gang-loitering law disproportionately violated the rights of Black and Latino citizens.<sup>17</sup> One of the main problems with vague statutes is their capacity to further racial injustice in the criminal justice system. Examining the relationship between racial inequality and the vagueness doctrine in the context of *Morales* helps to illuminate the political basis for this important constitutional shield against police abuse.

Vague statutes pose two problems: when criminal codes fail to clearly define the offense, citizens may not understand what conduct is prohibited and police are likely to enforce the law in an arbitrary and discriminatory manner.<sup>18</sup> The Chicago law's definition of loitering raised both of these problems. The ordinance directed police officers who observe anyone whom they

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<sup>16</sup> *City of Chicago v. Morales*, 119 S. Ct. 1849, 1856 (1999).

<sup>17</sup> See *supra* note 2.

<sup>18</sup> *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

reasonably believe to be a gang member standing in any public place "with no apparent purpose" with one or more other persons to order the entire group to leave the area.<sup>19</sup> Officers were permitted to arrest anyone who fails to promptly obey the dispersal order.<sup>20</sup> The prohibition against remaining in a place without an "apparent purpose" offers no guidance for determining what behavior an officer might consider illegal. How can someone standing on a Chicago sidewalk predict an observing officer's interpretation of her reason for being there?

This confusion arises not because the statute's words themselves are ambiguous, but because they literally encompass so many innocent acts. The Illinois court pointed out, for example, that "a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all of these scenarios; however, that purpose will rarely be apparent to an observer."<sup>21</sup> The Chicago City Council certainly meant to leave these harmless instances outside the law's reach. The United States Supreme Court similarly noted that the ordinance reaches "a substantial amount of innocent conduct."<sup>22</sup> Writing for the majority, Justice John Paul Stevens remarked, "It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark."<sup>23</sup> In either case, an officer must order the couple to move along if their purpose for standing there is not obvious.

On the other hand, the City Council clearly did intend that the gang-loitering ordinance prohibit gang members from congregating in the streets for the apparent purpose of recruiting members or intimidating residents. Yet this behavior would fall outside the literal definition of loitering.<sup>24</sup> These inconsistencies between the ordinance's terms and the legislative intent

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<sup>19</sup> CHICAGO, ILL., MUNICIPAL CODE, § 8-4-015 (1992).

<sup>20</sup> *Id.*

<sup>21</sup> *Morales*, 687 N.E.2d at 61.

<sup>22</sup> *Morales*, 119 S. Ct. at 1861.

<sup>23</sup> *Id.*

<sup>24</sup> See Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 229-30.



suggest that police officers are expected to make subjective judgments, unrelated to the specific language of the ordinance, about which citizens to arrest. Rather than coherently delineate the behavior that the ordinance bans, the City Council left it to the police to distinguish between criminal and legitimate public presence.<sup>25</sup>

For this reason, the law's broad language was also an invitation to police abuse. Giving police officers the authority to determine on the spot the legality of conduct creates the chief evil of vague criminal statutes. As the Court recognized in prior decisions, "the most important aspect of the vagueness doctrine is ' . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'"<sup>26</sup> Without these guidelines, police have a tendency to enforce the law against groups that they despise.<sup>27</sup> The city council deliberately made the law's reach exceptionally wide "so that persons who are undesirable in the eyes of the police and prosecutors can be convicted even though they are not chargeable with any other particular offense."<sup>28</sup> The Chicago Police Department took full advantage of the leeway the ordinance granted. From 1992 until 1995, police issued over 89,000 orders to disperse and arrested over 42,000 people for disobeying their orders.<sup>29</sup> This is the point of vague

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<sup>25</sup> Justice Stephen Breyer explained the virtually standardless discretion the law's terms accorded police officers: "Since one always has some apparent purpose, the so-called limitation invites, in fact requires, the policeman to interpret the words 'no apparent purpose' as meaning 'no apparent purpose except for....' And it is in the ordinance's delegation to the policeman of open-ended discretion to fill in that blank that the problem lies." *Morales*, 119 S. Ct. at 1866 (Breyer, J., concurring).

<sup>26</sup> *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

<sup>27</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

<sup>28</sup> *Chicago v. Morales*, 687 N.E.2d 53, 64 (Ill. 1997).

<sup>29</sup> *Morales*, 119 S. Ct. at 1855. Some of these arrests occurred during massive street sweeps in Chicago's inner-city neighborhoods. In 1994, for example, the Chicago Police Department instituted Operation EDGE as part of its campaign to "enforc[e] drug laws and the anti-gang-loitering ordinance." Rob Olmstead, *Cops Taking EDGE in Crime Battles*, CHI. SUN-TIMES, July 5, 1994, at 14. Operation EDGE involved street sweeps by as many as sixty uniformed officers who swooped down on "hot spots" over a several-hour period to make dozens of arrests. One sweep netted one hundred arrests, sixty-nine of which were for gang loitering. *Sweep Nets 100 Arrests*, CHI. SUN-TIMES, Feb. 6, 1995, at 4. George Kelling, one of the authors of *Broken Windows*, explicitly criticizes the Chicago Police Department's practice of "streetsweeping" as a

loitering laws: they permit the police to haul off the streets people who *look* suspicious even though they have committed no criminal conduct. In fighting its gang problem, the courts concluded, "the city cannot empower the police to sweep undesirable persons from the public streets through vague and arbitrary criminal ordinances."<sup>30</sup>

Loitering laws inevitably involve judgments about people's criminal propensity. They embody legislative predictions about the likelihood that people engaged in certain activities, bearing certain characteristics, or belonging to certain groups will engage in criminal activity. This preventive measure is justified as a means of removing crime-prone people from the streets before they have a chance to break the law. Loitering laws, then, give the state an advantage in fighting crime and maintaining public order. The vaguer the law, the greater the benefit it provides as a prophylactic tool.<sup>31</sup> The Supreme Court has determined that vague loitering laws' infringement of liberty outweighs any benefit for law enforcement these laws offer.<sup>32</sup> Why should we fear so much the state's power to identify people with a propensity for crime and to remove them from the streets when this power might help to guarantee safer neighborhoods?

One answer is that expansive and ambiguous allocations of police discretion are likely to unjustly burden members of unpopular or minority groups.<sup>33</sup> *Papachristou v. City of Jacksonville*, perhaps the Supreme Court's most important invalidation of

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misunderstanding of the type of order-maintenance he and Wilson advocated. GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 23 (1996).

<sup>30</sup> *Morales*, 687 N.E.2d at 65.

<sup>31</sup> For a discussion of the state's increasing use of prophylactic measures to fight crime, see Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998).

<sup>32</sup> See, e.g., *Papachristou*, 405 U.S. at 156.

<sup>33</sup> Expansive prosecutorial discretion is also "a major cause of racial inequality in the criminal justice system." Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16-17 (1998) ("[B]ecause prosecutors play such a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound.").

vague loitering laws, suggests this rationale.<sup>34</sup> *Papachristou* involved the convictions of eight defendants for violating a Florida vagrancy ordinance, including two Black men and two white women who were stopped while driving together on the main street in Jacksonville and an organizer for a Black political group who was standing on a downtown street waiting for a friend. *Papachristou* dealt a blow to state vagrancy laws passed by most Southern states during the Jim Crow era as part of a regime of official white supremacy.<sup>35</sup> In striking down the Jacksonville ordinance, the Court emphasized its impact on groups disfavored by the majority:

Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme . . . furnishes a convenient tool for “harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.”<sup>36</sup>

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<sup>34</sup> See generally *Papachristou*. But see Alschuler & Shulhofer, *supra* note 24, at 227 (noting that *Papachristou* “did not invent the ‘void for vagueness’ doctrine, and the purpose of this doctrine was not to combat institutionalized racism or black political disempowerment.”). Benjamin Franklin expressed the principle underlying the condemnation of vague loitering laws in universal terms: “They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.” *People ex. rel. Gallo v. Acuna*, 929 P.2d 596, 623 (Cal. 1997) (Mosk, J., dissenting) (quoting Benjamin Franklin), *cert. denied*, 117 S. Ct. 2513 (1997). By focusing on the racial impact of vague loitering laws, I do not mean to discount the universal constitutional principles embodied in the courts’ condemnation of these laws. These principles predate judicial concern with institutionalized racism and would provide important protections even in a racially homogeneous society. In a society characterized by racial inequality, however, the pernicious features of vague laws are likely to be imposed upon disempowered racial groups, and may not be experienced by privileged groups at all. This racial discrimination, then, is an integral part of the law’s due process violation and a central reason for limiting police discretion.

<sup>35</sup> Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2261-62 (1998).

<sup>36</sup> *Papachristou*, 405 U.S. at 170 (citation omitted).

The state's presumption that individuals who violated the ordinance were potential criminals, the Court concluded, was "too precarious" a basis for violating the even-handed rule of law.<sup>37</sup>

Justice Douglas, the author of the *Papachristou* opinion, had elaborated this minority-protecting rationale of vagueness doctrine in an earlier law review article.<sup>38</sup> Douglas argued that the minority groups who were typically subjected to vague loitering statutes needed strong constitutional safeguards because these groups lacked "the prestige to prevent an easy laying-on of hands by the police."<sup>39</sup> The majority cannot be trusted to balance fairly the liberty interests of devalued minority groups who bear the brunt of vague loitering laws against the majority's interest in law and order.<sup>40</sup>

The disproportionate arrest of minorities in Chicago is typical of the racial breakdown of arrests for this type of misdemeanor offense in cities across the country. In 1995, 46.4% of persons arrested for vagrancy and 58.7% of persons arrested for suspicion in cities in the United States were Black although Blacks made up only 13% of city population.<sup>41</sup> Evidence of racial discrimination buttressed the Ohio Supreme Court's decision to strike down a municipal ordinance that prohibited loitering for drug-related purposes.<sup>42</sup> Noting arrest statistics that showed that police enforced the ordinance "almost exclusively

<sup>37</sup> *Id.* at 171.

<sup>38</sup> See William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

<sup>39</sup> *Id.* at 13.

<sup>40</sup> See Kahan & Meares, *The Coming Crisis*, *supra* note 6, at 1155-60 (asserting a political process theory rationale for Fourth Amendment protections); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 560 (1992) ("[M]ost people probably would approve of greater police authority to keep an eye on 'undesirables' (and to keep them out of 'nice' neighborhoods). That is why old-style loitering and vagrancy laws were politically tolerable, notwithstanding their stunning breadth"). Justice Antonin Scalia is completely oblivious to this danger when he argues in dissent, "[t]he minor limitation upon the free state of nature that this prophylactic arrangement imposed on *all* Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets." *Morales*, 119 S. Ct. at 1867 (Scalia, J., dissenting) (emphasis added). The law's infringement on liberty may have seemed to a majority of Chicagoans a small price to pay precisely because it was imposed on a minority community and not on them.

<sup>41</sup> Harcourt, *supra* note 6, at 299.

<sup>42</sup> *City of Akron v. Rowland*, 618 N.E.2d 138 (Ohio 1993).

against African-Americans," the court concluded that "[t]he inference is clear: police are more likely to believe that a Black person is loitering 'under circumstances manifesting the purpose to engage in drug-related activity' than they are to believe that a white person is."<sup>43</sup>

As I discuss in Part III, the racial disparity in loitering arrests is part of pervasive discrimination by police officers in their decisions to stop, detain, and arrest Black citizens.<sup>44</sup> The discretion police officers have to decide who to stop and whether to make an arrest generally contributes to racial discrimination in police conduct.<sup>45</sup> The practical effect of deference to police judgment of reasonable suspicion "is the assimilation of police officers' subjective beliefs, biases, hunches, and prejudices into law."<sup>46</sup> The discriminatory impact of discretion is magnified tremendously by laws that leave not only the determination of suspicion but the very definition of offending conduct almost entirely to an officer's judgment.

The peculiar scope of the Chicago ordinance made it especially likely that police would target minority youth. The ordinance permits arresting officers to disrupt a gathering based on their suspicion that one person is a gang member. Identification of someone as a gang member is highly associated with his race. Police not only believe that most gang members belong to minority groups; they also believe that many, if not most, inner-city minority youth are gang members. Astonishing proportions of Black youth appear on the police lists of probable gang members in some cities. In Denver and Los Angeles, for exam-

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<sup>43</sup> *Id.* at 147-48 (quoting the Akron, Ohio ordinance at issue in the case). The arrest statistics revealed that the ordinance was enforced in areas that had a disproportionately high percentage of African-American residents and that those arrested were disproportionately African-American compared to the general population of the areas in which arrests occurred. *Id.* At 147. "This means that even in areas where the population is almost evenly racially mixed, the overwhelming number of arrests are of African-Americans." *Id.* at 148.

<sup>44</sup> See notes 107-130 *infra* and accompanying text.

<sup>45</sup> Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 373 & n.176 (1998) (citing sources that show how unrestrained police discretion leads to racist police behavior; "Discretionary police authority may generate discriminatory searches and seizures."); Davis, *supra* note 33, at 27.

<sup>46</sup> Davis, *supra* note 33, at 27.

ple, nearly half of the cities' young Black men have been marked as suspected gang bangers.<sup>47</sup> In these cities, virtually any group of Black teenagers standing on an inner-city street would risk arrest for violating a gang-loitering law.<sup>48</sup>

Regulations implementing the gang-loitering ordinance also tended to single out minority youth for arrest. The General Order providing guidelines to police restricted enforcement to designated areas frequented by gang members and significantly affected by gang presence.<sup>49</sup> Because Chicago is a highly segregated city,<sup>50</sup> applications of the criminal laws to particular neighborhoods in the city are likely to have a racially disparate impact.

Justices Stevens, Souter, and Ginsburg based their opinion invalidating the gang-loitering ordinance on the "freedom to loiter for innocent purposes."<sup>51</sup> This aspect of liberty guaranteed by the due process clause does more than protect the personal enjoyment one experiences when freely strolling the streets. It also prevents the state from interfering in the mobility of subordinated groups within the community and the na-

<sup>47</sup> Sheryl Stolberg, *150,000 Are in Gangs, Report by D.A. Claims*, L.A. TIMES, May 22, 1992, at A1; Dirk Johnson, *2 of 3 Young Black Men in Denver Listed by Police as Suspected Gangsters*, N.Y. TIMES, Dec. 11, 1993, at 8. The Chicago ordinance also directed the police department to maintain "Gang Information Files" containing the names of juveniles and adults the department has probable cause to believe are members of criminal street gangs. CHICAGO, ILL. POLICE DEP'T GENERAL ORDER No. 92-4, § VI (A) (5) (Aug. 8, 1992). Ray Risley, Deputy Chief of Detectives with the Chicago Police Department, identifies 60% of Chicago's street gangs as African-American, 35% as Hispanic, 4% as white, and 1% as Asian. Ray Risley, *A police officer's perspective on gangs, drugs, and guns on the streets of Chicago*, 18 THE COMPILER 4, 4 (Fall 1998).

<sup>48</sup> Brief of Chicago Alliance for Neighborhood Safety et al. as *Amicus Curiae* in Support of Respondents at 20 n.33, *City of Chicago v. Morales* 119 S. Ct. 1849 (1999) (No. 97-1121); Matthew Mickle Wedegar, Note, *Enjoining the Constitution: The Use of Public Nuisance Abatement Injunctions Against Urban Street Gangs*, 51 STAN. L. REV. 409, 423 (1999) (noting that criteria used in California to identify gang members are highly subjective and imprecise; "virtually every young African-American or Latino male living in neighborhoods where gangs are active satisfies one or more of these criteria.").

<sup>49</sup> CHICAGO, ILL. POLICE DEP'T GENERAL ORDER No. 92-4, § VI (A) (1) (Aug. 8, 1992). The Illinois Criminal Justice Authority, which helps the Chicago Police Department identify gang "hot spots," reported that between 1987 and 1994, most gang-related offenses were committed by African-Americans and Latinos. See Daniel Dighton, *The Violence of Street Gangs*, 16 THE COMPILER 4, 6 (Fall 1996).

<sup>50</sup> DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 76 tbl. 3.4 (1993).

<sup>51</sup> *Morales*, 119 S. Ct. at 1857.

tion. Restricting people's freedom of movement can be a form of political subjugation. Vagrancy laws originated in the breakup of the feudal system in England in an attempt by feudal lords to control their serfs.<sup>52</sup> During the seventeenth and eighteenth centuries, these laws served as means of stabilizing the labor force by preventing "masterless" workers from traveling from their homes in search of higher wages, supporting themselves on the streets, and entering unwelcoming communities.<sup>53</sup>

In the United States, vagrancy-type laws served the same function in the regime of white domination of Blacks. The colonies sought to prevent slave rebellions by enacting laws that prohibited slaves from traveling without a pass and permitted slave patrols to arrest slaves on mere suspicion of sedition.<sup>54</sup> After Emancipation, white southerners tied freed Blacks to plantations through Black Codes that punished vagrancy.<sup>55</sup> As the Court described them, "vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery."<sup>56</sup> A more contemporary example of the oppressive restriction of movement is the requirement of the apartheid regime in South Africa that Blacks carry passes while traveling in white districts.<sup>57</sup>

The mandate that police arrest individuals who do not promptly disperse and "remove themselves from the area" exacerbates this constitutional violation. The obligation to leave

<sup>52</sup> See Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209 (1989); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 615-16 (1956).

<sup>53</sup> Foote, *supra* note 52, at 615-16.

<sup>54</sup> A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 276 (1978); Maclin, *supra* note 40, at 335.

<sup>55</sup> THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 98-99 (1965). See also ROBERT CRUDEN, *THE NEGRO IN RECONSTRUCTION* 20 (1969) (describing white Southerners' fear of Negro mobility during Reconstruction).

<sup>56</sup> *Morales*, 119 S. Ct. at 1858 n.20.

<sup>57</sup> See Gabriel Carter, *Remembering Water: Overcoming Historical Amnesia in South Africa*, 8 COLO. J. INT'L ENV'T. L. & POL'Y 359, 369 (1997) (citing KADER ASMAL ET AL., *RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID'S CRIMINAL GOVERNANCE* 131 (2nd ed. 1997)). Cf. *Saenz v. Roe*, 119 S. Ct. 1518 (1999) (declaring unconstitutional California welfare reform measure that ties amount of benefits to durational residency requirements as a violation of citizens' constitutional right to travel from one state to another); Linda Greenhouse, *Newcomers to States Win A Right to Equal Welfare*, N.Y. TIMES, May 18, 1999, at A1.

“the area” gives police officers additional discretion to decide whether someone has complied with their orders by moving far enough away.<sup>58</sup> It also magnifies the racist nature of the law’s control over movement in the city. The ordinance’s leave-the-area requirement might be interpreted as an order to leave the neighborhood, a site delineated in Chicago by race and ethnicity.<sup>59</sup> As *amici* noted, “[a] law authorizing police to order strangers back to their own neighborhood would make all-too-real the concerns of Chicago aldermen who compared this ordinance to South Africa’s pass laws.”<sup>60</sup>

The arrest of the named plaintiff, Jesus Morales, illustrates the law’s potential for racial bias. Morales was arrested when he stood on a street corner with five other Latino teenagers in a predominantly white neighborhood. The arresting officer testified that he initially approached the group “[b]ecause we wanted to know if they lived in the neighborhood.”<sup>61</sup> He concluded that Morales was a gang member because Morales wore blue and black clothes, the colors of the Gangster Disciples street gang.<sup>62</sup> It appears that Morales became the subject of suspicion because of his ethnicity: being Latino made his presence in a white neighborhood alarming; it also made it seem likely that his clothing signified gang membership. Vague loitering laws give license to police officers to arrest people purely on the basis of race-based suspicions like these.

### III. RACE, SOCIAL NORM THEORY, AND THE ARGUMENT FOR POLICE DISCRETION

The preceding discussion of vagueness doctrine shows that race plays a key role in the long-standing constitutional objec-

<sup>58</sup> Alshuler & Schulhofer, *supra* note 24, at 233-37 (arguing that the ordinance’s most problematic grant of discretion “lies in the almost unfettered power of an arresting officer to determine whether a suspect has adequately complied with a police order to disperse.”).

<sup>59</sup> Brief of Chicago Alliance for Neighborhood Safety et al., as *Amicus Curiae* in Support of Respondents at 23, *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (No. 97-1121).

<sup>60</sup> *Id.*

<sup>61</sup> *City of Chicago v. Morales*, 687 N.E.2d 53, 64 n. 21 (Ill. 1997).

<sup>62</sup> *Id.*



tions to expansive police discretion authorized by vague laws such as the gang-loitering ordinance. More recent arguments about criminal law's impact on social norms have also begun to focus on issues of race. Leading social norm theorists contend that order-maintenance policing benefits communities, particularly Black inner-city neighborhoods, because promoting norms of orderliness deters crime. I argue, however, that the identity of "visibly lawless" people at the heart of vague loitering laws incorporates racist notions of criminality and legitimates police harassment of Black citizens.

#### A. THE BROKEN WINDOWS HYPOTHESIS AND SOCIAL NORM THEORY

The city argued that the gang-loitering ordinance protects community residents in two ways. First, it prevents the harms created by gang loitering itself. Hanging out on the street is part of a strategy to stake out the gang's own territory and to intimidate residents or antagonize rival gangs who enter it.<sup>65</sup> Gang loitering makes law-abiding residents fearful to venture into the street and creates a danger that violent clashes that imperil innocent passersby might erupt in public. Thus, the city claimed, the very presence of gang members on the streets creates a menace independent of any additional criminal activity they might be engaging in. Second, disrupting gang loitering helps to prevent future offenses by gang members. Gang members who congregate in the street are often engaged in crimes such as drug dealing or conspiring to break the law that are difficult for police officers to intercept. Membership in a criminal enterprise also makes it likely that gang bangers will commit crimes in the future.

The city defended the crime prevention function of the gang-loitering ordinance by relying on the broken windows thesis. In an *Atlantic Monthly* article, "Broken Windows," criminologists James Q. Wilson and George L. Kelling criticized law enforcement strategies focused on investigating the most serious crimes on the grounds that they overlooked the important function of maintaining public order. According to Wilson and

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<sup>65</sup> Brief for the Petitioner at 3, 14, *Morales*, (No 97-1121).

Kelling, visible signs of community disorder such as vagrancy and vandalism encourage lawless residents to commit crimes:

Social psychologists and police officers tend to agree that if a window in a building is broken *and is left unrepaired*, all the rest of the windows will soon be broken. . . . [O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing. . . . We suggest that 'untended' behavior also leads to the breakdown of community controls.<sup>64</sup>

They argued that governments can reduce crime more effectively by addressing visible signs of disorder that influence criminal behavior. The city cited this theory to support its claim that the gang-loitering ordinance achieved a prophylactic objective "because when police officers can order gang members to move along, they can prevent crime before it occurs."<sup>65</sup>

Legal scholars interested in the relationship between crime and social norms have embraced the broken windows theory as part of their explanation of deterrence and prescription for criminal law.<sup>66</sup> Social norm theory augments the traditional economic conception of deterrence by recognizing that the decisions of individuals to commit crimes are influenced by their social context as well as by the price of crime. Criminal behavior is shaped by individuals' perceptions of others' values, beliefs, and conduct. Perceptions of community norms of orderliness in particular have an impact on residents' willingness to commit crimes. As Kahan explains, "[d]isorder is . . . pregnant with meaning: Public drunkenness, prostitution, aggressive panhandling and similar behavior signal . . . that the community is unable or unwilling to enforce basic norms."<sup>67</sup>

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<sup>64</sup> Wilson & Kelling, *supra* note 13, at 31.

<sup>65</sup> Brief for the Petitioner at 10, *Morales*, (No 97-1121).

<sup>66</sup> See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996); Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) [hereinafter Kahan, *Social Influence*]; Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998) [hereinafter Meares, *Social Organization*].

<sup>67</sup> Kahan, *Social Influence*, *supra* note 66, at 370.

Adopting the broken windows thesis, these social norm theorists assert that community disorder frightens law abiders from using the streets and cooperating with police while leading law breakers to conclude that crime is not risky or morally repugnant. Thus, the social meaning of disorder can influence the behavior of both committed law-abiders and law-breakers in a way that is likely to increase crime.<sup>68</sup>

Social norm theorists also point to the role the law plays in shaping these social influences. The state can discourage crime by producing the right kind of social meaning through the regulation of social norms. "Norms of order are critical to keeping social influence pointed away from, rather than toward, criminality," writes Kahan.<sup>69</sup> When government authorities enforce norms of orderliness they signal to residents that the community values basic norms and is in control of the environment, thereby influencing citizens to refrain from committing serious crimes. Some social norm theorists rely on the social influence conception of deterrence to advocate law enforcement strategies that maintain visible order, such as New York City's quality-of-life initiative and Chicago's gang-loitering ordinance. Rejecting tough criminal penalties for gang membership as counterproductive, Kahan argues:

A more effective approach is to attack the public signs and cues that inform juveniles' (mis)perception that their peers value gang criminality. That's what gang-loitering laws attempt to do. By preventing gangs from openly displaying their authority, such laws counteract the perception that gang members enjoy a high status in the community. As that perception recedes, so does the perceived reputational pressure to join them.<sup>70</sup>

By counteracting the harmful social meaning that gangs control the community, and thereby deterring more dangerous gang activity, gang-loitering laws reduce crime more effectively than costly imprisonment for violent offenses.

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<sup>68</sup> *Id.* at 370-71.

<sup>69</sup> *Id.* at 391.

<sup>70</sup> *Id.* at 375-76.

Social norm theory also has implications for existing constitutional limits on police power. Advocates of order-maintenance policing argue that courts should relax restraints on police discretion to enable police to remove signs of chronic disorder on the streets.<sup>71</sup> Some social norm theorists endorse this view because of the way due process rights undermine deterrence.<sup>72</sup> Rights that constrain police authority to suppress disorder move social influence in a negative direction by inhibiting the community's power to enforce norms of orderliness. This negative effect on social meaning, which cannot be offset by increasing the severity of punishment, makes rights more costly than current constitutional rules contemplate. Social norm theory, utilizing the broken windows hypothesis, provides an influential defense for weakening the constitutional shield against racially biased detention and arrest. Is this proposed shift in the balance between liberty and state power justified?

#### B. THE FLAWED EMPIRICAL CASE FOR LOITERING LAWS

Before examining the political grounds for the constitutional retrenchment proposed by social norm theorists, we should test the strength of their empirical assertions. The broken windows hypothesis makes an empirical claim of deterrence: eliminating visible signs of disorder deters serious crime. Social norm theorists contend that falling crime rates in cities that have implemented order-maintenance policing initiatives prove the broken windows hypothesis. Tracey Meares defends

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<sup>71</sup> See *supra* note 9. In *Fixing Broken Windows*, on the other hand, Kelling and Coles declare the constitutional limits of the broken windows approach to crime prevention: "Clearly, all police actions involved in order maintenance would have to be grounded in law and subject to clear constitutional constraints against infringement of individual liberties." KELLING & COLES, *supra* note 29, at 23. (Kelling and Coles wrote this admonition in connection with their criticism of the Chicago Police Department's practice of "streetsweeping.") Kelling and Coles devote considerable attention to the question "whether police can be trusted to maintain order equitably, justly, and in ways that preserve public peace." *Id.* at 164. They acknowledge that the police discretion inevitably involved in order-maintenance "can enforce a tyranny of the majority, a repression of minority or marginal elements within the community." *Id.*

<sup>72</sup> See Kahan & Meares, *The Coming Crisis*, *supra* note 7, at 1182-85; Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197 [hereinafter Meares & Kahan, *The Wages of Antiquated Procedural Thinking*].

the Chicago gang-loitering ordinance by pointing to “the positive results correlated with its enforcement,” noting purported decreases in city crime during the years the law was in effect.<sup>73</sup> Kahan likewise cites statistics showing the plummeting New York City crime rate to support that city’s quality-of-life initiative, and states that “[c]ity officials and at least some criminologists credit the larger reduction in crime rates to [the] recent emphasis on ‘order maintenance.’”<sup>74</sup>

In the *Morales* case, the city also presented crime statistics as evidence that the loitering ordinance “had a substantial effect on the level of gang-related violence in Chicago.”<sup>75</sup> The city argued that a five-year report on gang violence prepared by the Police Department revealed a pattern of substantial decline in gang-related crime after the ordinance was passed, followed by an increase after police stopped enforcing the law.<sup>76</sup>

The statistics showing fluctuations in the rate of gang violence, however, simply do not support the city’s claim. The very report the city cites shows precisely the opposite relationship between enforcement of the ordinance and rates of violent crime. In 1994, while the ordinance was in place, gang-related homicides *increased* faster than other homicides (27% compared to 3%); and in 1997, the second post-enforcement year, gang-related homicides *decreased* by 19% at a time when non-gang related homicides went up slightly.<sup>77</sup> Chicago’s crime record during the early 1990s, therefore, offers no proof that the gang-loitering ordinance reduced gang violence in the city.

The city, moreover, posited a relationship between sweeping gang members from the streets and crime reduction that is far more direct than the broken windows theory suggests: “Per-

<sup>73</sup> Meares, *Social Organization*, *supra* note 60, at 225. As I discuss below, this claim is not supported by city crime statistics. See *infra* note 77 and accompanying text.

<sup>74</sup> Kahan, *Social Influence*, *supra* note 66, at 368-69.

<sup>75</sup> Brief for Petitioner at 16, *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (No. 97-1121).

<sup>76</sup> In 1995, the last year the ordinance was enforced, gang-related homicide in the city dropped faster than other homicides (26% compared to 9%), while the rate jumped by 7% the following year when the rate of other homicides continued to decrease. Brief for Petitioner at 16, *Morales*, (No. 97-1121) (citing *CITY OF CHICAGO, GANG AND NARCOTIC-RELATED CRIME: 1993-1997* (1998)).

<sup>77</sup> *CITY OF CHICAGO*, *supra* note 76.

haps it is just this simple: if fewer gang members are loitering in public where they constitute an inviting target for their rivals, fewer of them—and innocent people nearby—will be shot to death.”<sup>78</sup> This argument drastically short circuits social norm theory, eliminating the process by which the social meaning of order reinstated by the police influences the attitudes of community residents. Given the complexity of social norm theory, it would be surprising if the gang-loitering ordinance really had such an immediate impact on the attitudes and behavior of residents.

To the extent crime did drop during this period, Chicago’s experience mirrors a decrease in the commission of serious offenses in other large American cities, and may be related to yet unexplained national trends.<sup>79</sup> A recent report evaluating Chicago’s community policing program, CAPS, notes that the downward trend began before CAPS was implemented and attributes the decline to a variety of factors including high incarceration rates, gun seizures, and decreases in drug use, without even mentioning the loitering ordinance as a cause.<sup>80</sup> “Given the myriad factors that influence levels of violence,” the Supreme Court concluded in *Morales*, “it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance’s efficacy.”<sup>81</sup>

The suggested factors contributing to the decrease in serious crime in New York City are equally legion.<sup>82</sup> One prominent explanation is the shift in drug use from crack cocaine to heroin

<sup>78</sup> Brief for Petitioner at 16-17, *Morales*, (No. 97-1121).

<sup>79</sup> See Geoffrey A. Campbell, *Putting a Crimp in Crime: Experts Differ Over Reasons for Falling Rates of Serious Offenses*, 83 A.B.A. J., May 1997, at 24; Alexis Chiu, *Crime Rate at 29-year Low in City*, BOSTON GLOBE Aug. 28, 1997, at A1; Gordon Witkin, *The Crime Bust*, U.S. NEWS & WORLD REP., May 25, 1998, at 28, 30-37 (conceding that “the national causes of the improvement remain mysterious,” but attributing the decline in national crime rates primarily to decreased crack use). Recent economic growth and relatively low rates of unemployment are under-explored possible reasons for the drop in crime.

<sup>80</sup> CHICAGO COMMUNITY POLICING EVALUATION CONSORTIUM, COMMUNITY POLICING IN CHICAGO, YEAR FOUR: AN INTERIM REPORT 9 (1998).

<sup>81</sup> *Morales*, 119 S. Ct. at 1855 n.7.

<sup>82</sup> Fox Butterfield, *Reason for Dramatic Drop in Crime Puzzles the Experts*, N.Y. TIMES, Mar. 29, 1998, at 16.

during the 1990s, along with the maturation of the crack market. Because a large portion of New York City's homicides in the late 1980s were related to the crack trade, these changes may have resulted in less drug-related violence.<sup>83</sup> Ironically, New York City Police Commissioner Howard Safir recently attributed the city's plummeting crime rates to "the department's move *away from* the community-policing strategies of the early 1990's, which called for more neighborhood officers on the beat."<sup>84</sup> Safir pointed instead to the use of computer maps to chart crime and assigning officers to major antidrug initiatives across the city as the causes of crime reduction. Explaining the recent decline in crime rates across the country remains a hotly contested topic.

Recent scrutiny of the broken windows theory has more directly shaken the empirical undergirding of order-maintenance policing. The strongest empirical support for the broken windows thesis comes from a study conducted by Wesley Skogan, a political scientist at Northwestern University.<sup>85</sup> In *Disorder and Decline*, Skogan tested the disorder-causes-crime hypothesis by aggregating data from previously published studies that interviewed residents of forty neighborhoods in six large cities. Skogan then regressed the rate of robbery victimization on the level of disorder. Skogan finds that there is a causal relationship between these measures of crime and disorder, and concludes:

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<sup>83</sup> See Richard Curtis, *The Improbable Transformation of Inner-City Neighborhoods: Crime, Violence, Drugs, and Youth in the 1990s*, 88 J. CRIM. L. & CRIMINOLOGY 1233 (1999) (providing an ethnographic study of reduction in Brooklyn, New York). Curtis rejects the claim that crime reduction stemmed from the police department's policy: "While aggressive policing certainly resulted in a reluctance by many people to linger in public places, . . . it can hardly account for the profound changes which occurred in the daily lives of inner city residents." *Id.* at 1275.

<sup>84</sup> Michael Cooper, *Homicides Decline Below 1964 Level in New York City*, N.Y. TIMES, Dec. 24, 1998, at A1. Mayor Guiliani's quality-of-life initiative may create an impediment to law enforcement as the criminal courts are unable to handle the surge of minor cases inundating the system. See David Rohde, *A Glut of Minor Cases Swamps City's Courts*, N.Y. TIMES, Feb. 2, 1999, at A19.

<sup>85</sup> WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990). *Disorder and Decline* concerns the broader relationship between disorder and neighborhood decline, and its reanalysis of existing data on victimization is only a small part of Skogan's study. I focus on Skogan's conclusions about a disorder/crime nexus because they are cited as proof of the broken windows hypothesis. See *infra* notes 87-88, and accompanying text.

“These data support the proposition that disorder needs to be taken seriously in research on neighborhood crime, and that both directly and through crime it plays an important role in neighborhood decline.”<sup>86</sup> Skogan relied on his finding of a crime/disorder nexus to endorse Wilson and Kelling’s hypothesis, asserting “‘Broken windows’ do need to be repaired quickly.”<sup>87</sup> Kelling, in turn, claims that Skogan’s study “established the causal links between disorder and serious crime—empirically verifying the ‘Broken Windows’ hypotheses.”<sup>88</sup>

After examining the data, law professor Bernard Harcourt concludes that Skogan’s study “does not support the claim that reducing disorder deters more serious crime.”<sup>89</sup> Skogan selected only one crime—robbery—as the dependent variable even though the data contained a number of other crimes, including purse-snatching, physical assault, burglary, and sexual assault. When Harcourt replicated Skogan’s study to include these other crimes, he discovered that robbery was the *only* crime victimization variable that remained significantly related to disorder when neighborhood poverty, stability, and race are held constant.<sup>90</sup> Sexual assault and purse-snatching are not significantly related to disorder, and the statistical relationship between physical assault and burglary disappears when socioeconomic factors are taken into account.<sup>91</sup> In short, Sko-

<sup>86</sup> See Skogan, *supra* note 85, at 75.

<sup>87</sup> *Id.*

<sup>88</sup> KELLING & COLES, *supra* note 29, at 24.

<sup>89</sup> Harcourt, *supra* note 6, at 295. Harcourt first identifies several problems with Skogan’s data and design decisions. He points out, for example, that a number of the underlying surveys are missing values for most of the main variables in Skogan’s index of physical and social disorder. *Id.* at 315-17. Moreover, the independent variable called “disorder” includes elements such as drug trafficking and gang activity which overlap with the dependent variable—the level of serious criminal activity. *Id.* at 317-19. Analyzing whether disorder is causally related to serious crime becomes tautological if respondents considered these disorderly activities to be major crimes in themselves.

<sup>90</sup> *Id.* at 320.

<sup>91</sup> *Id.* at 320-21. Skogan justifies relying on robbery victimization alone because these data are more reliable than data on the other crimes. Skogan, *supra* note 85, at 195 n.1. The small size of neighborhood samples for purse snatching (16 neighborhoods) and rape (24 neighborhoods), and problems with the survey questions for assault victimization were reasons to exclude these crimes. Harcourt points out, however, that the data on burglary victimization are *more* reliable than the robbery



gan's study fails to prove any statistically significant relationship between disorder and any crime except for robbery.

Harcourt goes on to demonstrate, however, that even the relationship between disorder and robbery is questionable. It turns out that a cluster of five Newark neighborhoods exert excessive influence on the statistical findings. Harcourt reports, "[h]olding constant the same three explanatory variables (poverty, stability, and race), *there is no significant relationship between disorder and robbery victimization when the five Newark neighborhoods are excluded.*"<sup>92</sup> This "Newark Effect" suggests that the neighborhoods in Newark are for some reason skewing the disorder/crime results, and should therefore be left out of the study. In the final step, Harcourt engages in his own disorder-crime regression analysis, using Skogan's data, that corrects the data and design problems he identified. Finding no statistically significant relationship between disorder and crime, he concludes that "the data do not support the broken windows hypothesis."<sup>93</sup> It appears that the broken windows hypothesis, used by conservative commentators, criminal law theorists, and city officials to defend a radical expansion of police authority, lacks the empirical footing its adherents claim.

The confusion over declining crime rates and the nexus between disorder and crime should undermine the current confidence in the effectiveness of order-maintenance policing.

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surveys: there are 10 more neighborhoods for burglary (40 neighborhoods) than for robbery (30 neighborhoods). Harcourt, *supra* note 6, at 322; memo from Bernard Harcourt to Dorothy Roberts (July 5, 1999) (on file with author). Moreover, the typical question for burglary victimization is by definition neighborhood specific (i.e., burglaries necessarily take place in the victim's neighborhood because they occur in the home), whereas the questions about robbery victimization were *not* neighborhood specific. Harcourt, *supra* note 6, at 322. By replicating Skogan's study, Harcourt's aim is not to confirm that the victimization data are reliable, but to show that they cannot be used to prove a causal connection between disorder and serious crime. I am indebted to both Bernard Harcourt and Wesley Skogan for correspondence clarifying their analyses.

<sup>92</sup> *Id.* at 323 (emphasis in original). Harcourt's exclusion of the five Newark neighborhoods may be criticized for reducing the sample to an unreliable size (from 30 neighborhoods to 25). Harcourt argues that, given the small data set, it is fairer to exclude these neighborhoods than to include them because they distort the relationship between disorder and crime.

<sup>93</sup> *Id.* at 329.

Certainly there is insufficient *empirical* basis for discarding the well-established constitutional objections to the Chicago loitering ordinance. Nevertheless, there are other reasons to take seriously the application of social norm theory to criminal law. The public does not endorse new law enforcement strategies simply because they are effective. We evaluate various approaches to criminal justice according to moral and political judgments as much as their impact on crime rates.<sup>94</sup> Whether or not the broken windows thesis is proven to deter crime, we should examine how law enforcement policies reinforce or contest harmful social norms. The central error that social norm theorists make is their misjudgment of the social influence of order-maintenance policing, as well as their misreading of the empirical data about crime and disorder.

#### C. THE RACIAL MEANING OF ORDER-MAINTENANCE POLICING

In the middle of writing this Foreword, I had a revealing conversation with my sixteen-year-old son about police and loitering. I told my son that I was discussing the constitutionality of a city ordinance that allowed the police to disperse people talking on the sidewalk if any one of them looked as if he belonged to a gang. My son responded apathetically, "What's new about that? The police do it all the time, anyway. They don't like Black kids standing around stores where white people shop, so they tell us to move." He then casually recounted a couple instances when he and his friends were ordered by officers to move along when they gathered after school to shoot the breeze on the streets of our integrated community in New Jersey. He seemed resigned to this treatment as a fact of life, just another indignity of growing up Black in America. He was used to being viewed with suspicion: being hassled by police was similar to the way store owners followed him with hawk eyes as he walked

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<sup>94</sup> Conversely, even airtight proof that order-maintenance policing reduces serious crime would not resolve the issue of its justice or morality. While empirical research can assist us in deciding what justice requires, it cannot replace our concern for justice.

through the aisles of neighborhood stores or women clutched their purses as he approached them on the street.<sup>95</sup>

Even my relatively privileged son had become acculturated to one of the salient social norms of contemporary America: Black children, as well as adults, are presumed to be lawless and that status is enforced by the police.<sup>96</sup> He has learned that as a Black person he cannot expect to be treated with the same dignity and respect accorded his white classmates. Of course, Black teens in inner-city communities are subjected to more routine and brutal forms of police harassment. Along with commanding them to move along, police officers often make derogatory comments, push them around, or throw them against the patrol car.<sup>97</sup> As my son quickly noted, the Chicago ordinance simply

<sup>95</sup> See *McGowan v. Ward Parking Shopping Center Co.*, No. 98-0836-CV-W-9 (W.D. Mo., filed July 28, 1998) (alleging security guards at shopping mall ejected African American teenagers and had them arrested for trespass because of their race). I am grateful to Beth Colgan for bringing this lawsuit to my attention.

<sup>96</sup> Columnist Bob Herbert reports that increased police abuse of Black New Yorkers as a result of the city's aggressive policing initiative has influenced the survival lessons Black children learn:

Some parents and civic leaders are teaching black and Hispanic children to quickly display their hands during any encounter with the police, like little criminals. This is to show that the youngsters are not armed and therefore should not be blown into eternity at age 10 or 15 or 20 by a trigger-happy stranger in a blue uniform.

Bob Herbert, *A Brewing Storm*, N.Y. TIMES, Feb. 11, 1999, at A31. See also Jodi Wilgoren & Ginger Thompson, *After Shooting, An Eroding Trust in Police*, N.Y. TIMES, Feb. 19, 1999, at A1 (quoting African-American captain in Department of Corrections as saying young people in his Bronx neighborhood view the police as "thugs with guns in blue uniforms").

<sup>97</sup> See CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY, *supra* note 7, at 4 (stating that 71% of respondents in a survey of 968 Chicago public high school students conducted by CANS reported that they had been stopped by police and many were "subjected to 'racial slurs, name calling, being sworn at, told to shut-up, being threatened and shoved.' Many described feeling they had been treated like 'a piece of trash,' 'like dirt,' 'like an animal,' 'like a slave.'"). Sometimes police abuse of teens turns deadly. In December, police officers in Riverside, California, shot Tyisha Miller, a Black 19-year-old girl, 12 times as she sat in her car at a gas station, waiting for assistance with a flat tire. Lisa O'Neill Hill, *State DA Invited To Review of Police in Miller Shooting*, THE PRESS-ENTERPRISE (Riverside, CA), Jan. 16, 1999, at B5. Police officers' claim that Miller reached for a gun when an officer broke the car window is disputed by her relatives. See *300 Protest Police Shooting*, HOUSTON CHRONICLE, Jan. 5, 1999, at 4. See also, *Jager v. Woodland Park*, 543 F. Supp. 282 (D. Colo. 1982) (attributing police killing of teen to negligent training and supervision).

codifies a police practice that is already prevalent in Black communities across America.<sup>98</sup> But the city council's imprimatur and the power of the police to enforce their orders with arrest, conviction, and incarceration powerfully validate the harmful message of presumed Black criminality. If the United States Supreme Court had upheld the gang-loitering ordinance, what used to be criticized as police harassment might have been applauded as an innovative policing strategy.

### 1. *The Law-Abiding/Lawless Dichotomy*

To understand the social influence of order-maintenance policing, we must uncover the implicit assumptions it makes about people's criminal propensity. The theory underpinning the gang-loitering ordinance relies on a dichotomy between two kinds of inner-city residents—those who are lawless and those who are law-abiding. By clearing the streets of gang members and people who congregate with them, the theory goes, the police deter lawless residents from committing future crimes and make neighborhoods safer for law-abiding residents. This distinction eliminates the need for a criminal conviction before the state may punish or incapacitate lawless people. As the city argued before the Supreme Court, "surely it is no answer to law-abiding residents, who no longer feel safe when they go outdoors, to wait for someone to eventually be incarcerated as a result of a conviction on a serious felony charge."<sup>99</sup> The state may deprive lawless citizens of their liberties immediately to protect the freedom of law-abiding citizens.

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<sup>98</sup> See Alshuler & Schulhofer, *supra* note 24, at 230 ("In the anti-gang loitering ordinance, the council effectively awarded the police a hassling license with teeth."). In the early 1980's the Chicago Police Department implemented another racially-biased strategy for removing disorderly people from the streets. Police officers arrested hundreds of thousands of Blacks and Latinos for disorderly conduct with no intention of prosecuting the charges. Barbara Brotman, *ACLU lawsuit seeks to halt 'harassment' arrests of minorities*, CHI. TRIB., Feb. 18, 1983, § 2, at 3. People who were picked up routinely spent a night in jail and were released the following day when the arresting officer failed to appear in court. *Id.* A federal lawsuit filed by the ACLU challenging the practice ended in a settlement that provided for the city to pay damages to the plaintiffs and required police to appear in court on disorderly conduct arrests. "*Street Sweep*" Suit Settled, CHI. SUN-TIMES, Aug. 7, 1990, at 10.

<sup>99</sup> Brief for the Petitioner at 14, *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (No. 97-1121).

This categorization of citizens is an inherent feature of the social influence conception of deterrence. Social norm theorists borrow from the broken windows theory both its explanation of how disorder influences criminal behavior and its categorical distinction between orderly and disorderly people.<sup>100</sup> According to Kahan, signs of disorder encourage "individuals who are otherwise inclined to engage in crime" to do so, while pressuring "committed law-abiders" to leave the neighborhood.<sup>101</sup> As Bernard Harcourt helpfully elucidates, this explanation for crime assumes two types of people who respond to disorder in opposite ways:

Running through the social influence explanation and the broken windows theory is a recurrent and pervasive dichotomy between, what we could call in vulgar terms, honest people and the disorderly; between "committed law-abiders" and "individuals who are otherwise inclined to engage in crime;" between "families who care for their homes, mind each other's children, and confidently frown on unwanted intruders" and "disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed."<sup>102</sup>

According to social influence theory, neighborhood disorder frightens honest, law-abiding citizens into remaining at home or moving out of the community altogether. The same neighborhood disorder, on the other hand, attracts lawless people to move in and encourages them to commit serious crimes. The public presence of gangs, the city of Chicago argued, caused orderly residents to refrain from venturing on to the streets while fomenting shootouts and drug dealing by disorderly residents.

The Chicago ordinance takes this dichotomy between orderly and disorderly people, law-abiders and law-breakers one dangerous step further. The ordinance not only divides the world into two distinct categories of people based on their pro-

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<sup>100</sup> Harcourt, *supra* note 6, at 305.

<sup>101</sup> Kahan, *Social Influence*, *supra* note 66, at 370-71.

<sup>102</sup> Harcourt, *supra* note 6, at 297 (citations omitted) (quoting Kahan, *Social Influence*, *supra* note 66 and Wilson & Kelling, *supra* note 13).

pensity to commit crimes; it also assumes that the police can distinguish between these types of people *independent of any criminal conduct*. The city's brief in the Supreme Court refers over and over again to the citizens the ordinance subjects to arrest as "*visibly lawless*" people. The lawlessness of these people is visible in two senses. First, their criminality is evidenced by visible characteristics other than their criminal behavior. *They look like criminals* even when they are doing no more than standing still. Second, lawless people themselves are visible signs of disorder. *Their very presence* on the streets is considered harmful and must be eradicated. In short, the police can identify "visibly lawless" residents on sight and are justified in excluding them from public to deter the commission of serious crimes.

## 2. Identifying "Visibly Lawless" People

The efficacy of the gang-loitering ordinance, then, is premised on the ability of Chicago police officers to identify "visibly lawless" people and to distinguish them from law-abiding citizens. How do police make these distinctions? How does one tell a disorderly from an orderly individual? The categories employed by social norm theorists when they defend aggressive policing are not natural groupings with fixed and uncontested delineation.<sup>103</sup> Rather, they derive from two main sources that social norm theorists leave surprisingly unexamined—the policing strategy itself and pernicious social norms already in place when the policing strategy is implemented. Evaluating the sociological defense of the gang-loitering law must include a careful examination of the category of "visibly lawless" people who the law is designed to remove from the streets. The following examination of the law's dichotomy shows that it incorporates racist social norms that help to perpetuate stereotypes of Black criminality. This negative social influence refutes the claim that the order privileged by order-maintenance policing upholds only positive community norms.

Harcourt persuasively demonstrates the relationship between the New York quality-of-life initiative and the definition of

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<sup>103</sup> Harcourt, *supra* note 6, at 354.

the disorderly people it regulates. Relying on the work of Michel Foucault, Harcourt argues that the categories underlying the broken windows theory of crime prevention do not exist independently of the law enforcement policies supported by the theory.<sup>104</sup> "To the contrary," Harcourt asserts, "the category of the disorderly is itself a reality produced by the method of policing."<sup>105</sup> It is the technique of order-maintenance policing—aggressively arresting people for minor infractions such as panhandling and littering—that creates the profile of the disorderly person who must be watched, controlled, and relocated. Social norm theorists, then, are wrong to use an assumed distinction between orderly and disorderly people to justify order-maintenance policing because no such categorical distinction pre-dates the policing strategy itself. Instead of merely influencing these categories of individuals, order-maintenance policing actually helps shape or create these categories. Instead of simply influencing community norms, it imposes norms on the community.<sup>106</sup>

Harcourt's explication of the category-creating function of order-maintenance policing reveals a devastating fallacy in the social influence theory of deterrence. Social norm theorists are amazingly uncritical of the categories they employ, failing to acknowledge that these identities do not have a natural and fixed reality. These categories, however, are not created by policing strategies alone. While aggressive policing techniques impose norms on the community, they also reinforce pre-existing notions of criminality, disorder, and lawlessness. This is particu-

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<sup>104</sup> *Id.* at 354-77.

<sup>105</sup> *Id.* at 297.

<sup>106</sup> *Id.* at 353. For a similar critique of a "prostitution free zone" ordinance, which uses trespass law to permit the police to eject women identified as prostitutes from public places, see Lisa E. Sanchez, *Enclosure Acts and Exclusionary Practices: Neighborhood Associations, Community Police and the Expulsion of the Sexual Outlaw as Other*, in *BETWEEN LAW AND CULTURE: THE IDENTITIES CRISIS IN SOCIO-LEGAL SCHOLARSHIP* (Lisa Bower et al. eds., forthcoming 1999). Professor Sanchez, a sociologist, describes the ordinance as "a spatial form of governance that seeks to enclose a boundary around the lifespaces of privileged, propertied residents by excluding the visibly sexual/sexualized body of the prostitute." *Id.* at 6. Sanchez notes that the anti-prostitution ordinance, like vagrancy laws, imposes an outlaw identity on women subjected to the law and then uses that identity as a basis for geographic exclusion. *Id.* at 23.

larly true of loitering laws like the Chicago ordinance that rely on characteristics other than criminal conduct to identify offenders. Standing on a street corner is a sign of disorder only when it is engaged in by "visibly lawless" people. When "law-abiding" neighbors gather to chat in front of their homes or businesses it is seen as a sign of a vibrant community. Defining visibly lawless people adopts America's longstanding association between blackness and criminality.

One of the main tests in American culture for distinguishing law-abiding from lawless people is their race. Many, if not most, Americans believe that Black people are "prone to violence" and make race-based assessments of the danger posed by strangers they encounter.<sup>107</sup> The myth of Black criminality is part of a belief system deeply embedded in American culture that is premised on the superiority of whites and inferiority of Blacks.<sup>108</sup> Stereotypes that originated in slavery are perpetuated today by the media<sup>109</sup> and reinforced by the huge numbers of Blacks under criminal justice supervision.<sup>110</sup> As Jody Armour puts it, "it is unrealistic to dispute the depressing conclusion that, for many Americans, crime has a black face."<sup>111</sup>

One of the most telling reflections of the association of Blacks with crime is the biased reporting of crime by white victims and eyewitnesses. Psychological studies show a substantially greater rate of error in cross-racial identifications when the wit-

<sup>107</sup> Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994). A 1990 University of Chicago study found that "over 56 percent of Americans consciously believe that blacks tend to be 'violence prone.'" *Id.* (citing Tom W. Smith, *Ethnic Images* 9, 16 (Dec. 1990) (General Social Survey Topical Report No. 19)).

<sup>108</sup> See GEORGE FREDRICKSON, *THE BLACK IMAGE IN THE WHITE MIND* 256-82 (1971); JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 111-21 (1984).

<sup>109</sup> See Ishmael Reed, *Tuning Out Network Bias*, N.Y. TIMES, Apr. 9, 1991, at A25.

<sup>110</sup> See Tracey Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669, 678 (1998) ("It appears fairly clear that the disproportionate involvement of minorities (African Americans in particular) in the criminal justice system generally stigmatizes all minorities, whether they are categorized as law breakers or law abiders.").

<sup>111</sup> Armour, *supra* note 107, at 787; see also ELIJAH ANDERSON, *STREETWISE: RACE, CLASS AND CHANGE IN AN URBAN COMMUNITY* 208 (1990) ("The public awareness is color-coded: white skin denotes civility, law-abidingness, and trustworthiness, while African-American skin is strongly associated with poverty, crime, incivility, and distrust.").



ness is white and the suspect is Black.<sup>112</sup> White witnesses disproportionately misidentify Blacks because they expect to see Black criminals. According to Sheri Lynn Johnson, “[t]his expectation is so strong that whites may observe an interracial scene in which a white person is the aggressor, yet remember the black person as the aggressor.”<sup>113</sup> The unconscious association between Blacks and crime is so powerful that it supersedes reality: it predisposes whites to literally see Black people as criminals. Their skin color marks Blacks as visibly lawless.

Race helped to make the Blacks and Latinos arrested under the Chicago ordinance appear lawless. 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. A group of Black or Latino teenagers simply standing on an inner-city street corner is far more likely to be considered disorderly than a group of white teenagers similarly congregating in their community. A “law-abiding” Black Chicagoan had a far greater chance of being mistakenly ordered to move than his white counterparts. My point goes beyond the observation that the loitering law happened to result in the arrest of a disproportionate number of minorities. By necessarily assuming a distinction between law-abiding and lawless people that can be detected apart from criminal conduct, the gang-loitering ordinance incorporates and reinforces pernicious stereotypes about Black criminality.

Police officers are particularly notorious for using race as a proxy for criminal propensity. Police routinely consider an in-

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<sup>112</sup> See Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 949 (1984).

<sup>113</sup> *Id.* at 950-51. See also Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739 (1993) (describing the manipulation of racial fears and stereotypes in criminal trials). White defendants in self-defense cases “exploit the racial prejudices of jurors in asserting the reasonableness of their fear of supposed assailants who are black.” Armour, *supra* note 107, at 783. The disturbing acceptance of race-based evidence and arguments in self-defense cases is illustrated by the acquittal of Bernhard Goetz for the attempted murder of four Black teenagers who approached him for money on a New York subway. See *People v. Goetz*, 497 N.E.2d 41, (N.Y. 1986); GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 206-08 (1988) (describing defense attorney’s trial tactics that emphasized the racial identity of the teenagers shot by Goetz).

dividual's race in their decision to stop and detain him.<sup>114</sup> Police become suspicious of Blacks present both in a predominantly white neighborhood and in a Black neighborhood with a high crime rate.<sup>115</sup> As Tracey Meares acknowledges, "[i]n the minds of some law-enforcement agents, Black skin is considered a factor to use to decide whether an individual should be considered a criminal suspect."<sup>116</sup> Courts have approved officers' use of race in their determination that there is reasonable cause to suspect an individual is involved in crime.<sup>117</sup>

Police officers defend racial profiling as a useful crime detection tool that is based on the disproportionate commission of certain crimes by members of minority groups.<sup>118</sup> Gary McLhinney, the president of the Baltimore Fraternal Order of Police, explains: "Of course we do racial profiling at the train station. . . . If 20 people get off a train and 19 are white guys in suits and one is a black female, guess who gets followed? If racial profiling is intuition and experience, I guess we all racial-profile."<sup>119</sup>

This rationale fails to acknowledge, however, that most Blacks do not commit crimes. Moreover, police apply racial profiling

<sup>114</sup> DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 16-62 (1998) (discussing racial bias in consent searches, pretext stops, quality-of-life policing, and drug courier profiles); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 136-67 (1997) (criticizing racially discrimination in investigative policing); Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES, June 20, 1999, § 6 (Magazine), at 51; Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214, 214 (1983); see also Wilgoren & Thompson, *supra* note 96 ("Among African-Americans, the experience of having unwarranted run-ins with the police seems universal.")

<sup>115</sup> MICHAEL K. BROWN, *WORKING THE STREET: POLICE DISCRETION AND THE DILEMMAS OF REFORM* 170 (1981); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 INDIANA L.J. 659 (1994). See *United States v. Williams*, 714 F.2d 777, 780 (8th Cir. 1983) (upholding officer's decision to detain two Black women during an investigation of a bank robbery based on the observation that "it was 'rare' for black persons to be in the predominantly white neighborhood where the robbery occurred").

<sup>116</sup> Meares, *Social Organization*, *supra* note 66, at 681.

<sup>117</sup> See, e.g., *United States v. Weaver*, 966 F.2d 391, 391 (8th Cir. 1992) (including among factors that created reasonable suspicion the fact that defendant was a "roughly dressed" young black male"); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1661 n.5 (1996) (book review) (citing cases in which courts approved of race as a factor in police decisions).

<sup>118</sup> Goldberg, *supra* note 114, at 56-57.

<sup>119</sup> *Id.* at 57.

only to members of minority groups, and not to whites for the crimes they commit in disproportionate numbers. In McLhinney's example, the disproportionate conviction of Blacks for drug offenses is not a basis for suspecting that the Black woman on the train is a drug dealer, any more than the disproportionate conviction of whites for securities fraud is a basis for suspecting that the nineteen white businessmen are crooks. While the white passengers enjoy the presumption of innocence, the Black passenger is presumed to be lawless on account of her race.

The racial basis for suspicion is translated into the disproportionate arrest of Black men and women for many crimes.<sup>120</sup> Two of the most glaring examples are pretextual traffic stops and arrests for drug offenses.<sup>121</sup> There is overwhelming evidence that police officers stop motorists on the basis of race for minor traffic violations.<sup>122</sup> A 1992 *Orlando Sentinel* study of police videotapes, for example, discovered that although Blacks and Latinos represented only 5% of drivers on the Florida interstate highway, they made up nearly 70% of drivers stopped by police and more than 80% of those drivers whose cars were searched.<sup>123</sup>

<sup>120</sup> See *Racial Discrimination on the Beat: Extending the Racial Critique to Police Conduct*, 101 HARV. L. REV. 1494, 1508 (1988).

<sup>121</sup> Davis, *supra* note 33, at 28-30.

<sup>122</sup> See Maclin, *supra* note 45, at 344-54; COLE, *supra* note 114, at 34-41.

<sup>123</sup> See Jeff Brazil & Steve Berry, *Color of Driver is Key to Stops in I-95 Videos*, ORLANDO SENTINEL, Aug., 23, 1992, at A1; Henry Pierson Curtis, *Statistics Show Pattern of Discrimination*, ORLANDO SENTINEL, Aug. 23, 1992, at A11. For other studies showing racial bias in traffic stops, see John Lamberth, *Driving While Black*, WASH. POST, Aug. 16, 1998, at C1; Paul W. Valentine, *Md. State Police Still Target Black Motorists*, ACLU Says, WASH. POST, Nov. 15, 1996, at A1. New Jersey Governor Christine Todd Whitman recently conceded that "some state troopers singled out black and Hispanic motorists on the highway, and that once they were pulled over, they were more than three times as likely as whites to be subjected to searches." Iver Peterson, *Whitman Concedes Troopers Used Race In Stopping Drivers*, N.Y. TIMES, April 21, 1999, at A1. See also David Kocieniewski *Trenton Charges 2 Troopers with Faking Drivers' Race; Case Is Seen as Evidence of Racial Profiling*, N.Y. TIMES, April 20, 1999, at A23 (reporting indictments of two New Jersey state troopers accused of common practice of "falsifying documents to make it appear that some of the black motorists they stopped were white" and noting that the officers shot three unarmed men, two Black and one Hispanic, during a traffic stop); David Kocieniewski, *Drivers Tell of Racial Profiling by Troopers*, N.Y. TIMES, April 14, 1999, at A24 (describing hearing held by Black and Latino Caucus of New Jersey Legislature on allegations of racial profiling by state police and noting 1996 court decision finding "evidence of systemic discrimination by troopers against black motorists").

These race-based stops may amount to an inconvenience or a citation, or they may be an excuse to search for evidence of a more serious crime.<sup>124</sup> The experience of being stopped by police on account of race is so common that it is widely known in the Black community as “DWB”—driving while Black.<sup>125</sup> District Court Judge Nancy Gertner recently acknowledged this pattern by reducing a Black defendant’s sentence on the grounds that his lengthy prior record was probably skewed by discriminatory traffic stops.<sup>126</sup> Despite the evidence of racial bias, the Supreme Court unanimously upheld the constitutionality of pretextual traffic stops.<sup>127</sup>

Police officers also enforce the drug laws in a racially biased manner. Although whites use drugs in far greater numbers than Blacks, Blacks are far more likely to be arrested for drug offenses. Blacks represent only 13% of the nation’s drug users, but make up 74% of those imprisoned for drug possession.<sup>128</sup> This gross racial disparity results in part from the conscious decision of police departments to target their drug enforcement efforts on urban and inner-city neighborhoods where people of color live.<sup>129</sup> As journalist Jeffrey Goldberg notes, “[c]ommon

<sup>124</sup> Davis, *supra* note 33, at 28-30.

<sup>125</sup> See David A. Harris, “Driving While Black” and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); David Cole, “Driving While Black,” *Curbing Race-Based Traffic Stops*, WASH. POST, Dec. 28, 1998, at A25.

<sup>126</sup> See *United States v. Leviner*, 31 F. Supp. 2d 23 (D. Mass. 1998); Fox Butterfield, *Bias Cited in Reducing Sentence of Black Man*, N.Y. TIMES, Dec. 17, 1998, at A22. Judge Gertner reasoned that by taking racially-biased traffic convictions into account, the federal sentencing guidelines overestimate the defendant’s culpability and perpetuate racial disparities in the state system. *Leviner*, 31 F. Supp. 2d at 33. Black motorists have filed numerous individual and class-action lawsuits against city and county officials charging racial bias in police traffic stops. Several have resulted in out-of-court settlements agreeing to judicial monitoring of stops. Cole, *supra* note 125; KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* 40-43 (1998).

<sup>127</sup> See *Whren v. United States*, 517 U.S. 806, 819 (1996). For criticism of *Whren* for failing to give African Americans a legal remedy for discriminatory police stops, see Harris, *supra* note 125; Maclin, *supra* note 45; Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997).

<sup>128</sup> MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 12 (1995).

<sup>129</sup> Davis, *supra* note 33, at 30.

sense, then, dictates that if the police conducted pretext stops on the campus of U.C.L.A. with the same frequency as they do in South Central, a lot of whites would be arrested for drug possession."<sup>150</sup> This blatant and persistent pattern of race-based arrests—the expression of police officers' association of Blacks with crime—is replicated in the enforcement of order.

### 3. *The Ordinance's Social Influence*

While exaggerating or misrepresenting the impact of disorder on crime rates, social norm theorists ignore the harm of discriminatory government campaigns to eliminate disorder. We can apply social norm theorizing to explain the negative social influence of race-based police harassment. Just as visible disorder "tells" residents that the community is not enforcing norms of orderliness, race-based policing tells the community that Blacks are presumed to be lawless and are entitled to fewer liberties. Order has social meaning, but so does order *enforced in this way*.

Social norm theory is very useful in explaining how seemingly trivial behavior can have huge social consequences. Because of its social meaning, conduct with little immediate practical impact can have a significant effect on people's attitudes about social norms. Social norms, in turn, have a powerful influence on individuals' behavior and community welfare.

The following figure depicts the argument asserting the positive social influence of maintaining order.<sup>151</sup>

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<sup>150</sup> Goldberg, *supra*, note 114, at 87. Police also impose a racial double standard in the way they treat drug offenders whom they catch—"the way in which white drug users know with near 100-percent certainty that they will never go to jail for marijuana possession. How they know that they will never be jacked up during a pretext stop. How white cops cut white kids a break." *Id.*

<sup>151</sup> Bernard Harcourt also provides a helpful figure to illustrate the social influence conception of deterrence. See Harcourt, *supra* note 6, at 308.

**FIGURE 1:**  
**THE POSITIVE SOCIAL INFLUENCE OF ORDER-**  
**MAINTENANCE POLICING**

<i>Police Conduct</i> →	<i>Social meaning</i> →	<i>Social Norm</i> →	<i>Impact on Community</i>
Police remove visible signs of disorder	Community cares & criminals are no longer in control	Orderliness	Law-abiders feel safe & criminals stop committing crimes

In the same way that minor infractions of order, such as loitering, vandalism, or panhandling, can allegedly lead to serious crime, minor infringements of citizens' liberties can cause serious damage to the relationship between government and the governed and among citizens. This explains why seemingly trivial police harassment, such as ordering someone to move along, can be a significant infringement of liberty. Race-based harassment helps to reinforce the second-class citizenship of Blacks and other people of color.

In addition to reinforcing racist norms of presumed criminality, order-maintenance policing intensifies racial inequalities in the protection of civil liberties. Distinguishing between citizens on the basis of presumed criminality permits the state to minimize the rights of presumably lawless citizens while expanding the authority of presumably law-abiding ones. Once people are categorized as lawless it becomes easy to strip them of their liberties. As the city argued before the Supreme Court, "In organized society, the 'amenities' of some must sometimes be regulated for the benefit of the community as a whole."<sup>132</sup> The

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<sup>132</sup> Brief for the Petitioner at 42, *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (No. 97-1121). See also Reply Brief for the Petitioner at 31, *Morales*, (No. 97-1121) (referring to police orders to disperse as a "minor inconvenience").

constitutional freedoms of lawless people become mere “amenities” that may be sacrificed to protect law-abiding people.

The willingness to abrogate the rights of disorderly residents was especially evident in the city’s nonchalant dismissal of their freedom to travel: “If gang members and their associates only obey orders to move along when issued—exercising the very right to travel the Illinois Supreme Court supposed was infringed by the ordinance—they will not be subject to arrest.”<sup>133</sup> This ludicrous convolution of the concept of rights applies only to citizens deemed visibly lawless. Most Americans no doubt would be offended by police orders to move along; they certainly would find it hard to see their compliance with such orders as an exercise of liberty. We expect to find this kind of Orwellian double think, confusing obedience to authority with liberty, in totalitarian regimes. It is only the categorical separation of law-abiding and lawless citizens that permits the simultaneous commitment to liberal and totalitarian concepts of freedom.<sup>134</sup> Law-abiding citizens can continue to frequent public forums free from police interference, while lawless people are justifiably subject to increasingly aggressive police surveillance.

Because the distinction between law-abiding and lawless people is racialized, the depreciation of liberty it legitimates is equally racialized. As I discussed earlier, stereotypes of Black criminality result in an ugly pattern of racist police abuse and arrest. Social norm theory helps to explain why this pattern strikes most Americans as benign. According to social norm theorists, when social understandings are so uncontested that they become invisible, the social meanings that arise from them appear natural. “The more they appear natural, or necessary, or uncontested, or invisible,” Lawrence Lessig notes, “the more powerful or unavoidable or natural social meanings drawn from

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<sup>133</sup> Brief for the Petitioner at 40, *Morales*, (No. 97-1121).

<sup>134</sup> Scientific racism similarly accounted for the anomaly of slavery existing in a republic founded on a radical commitment to liberty, equality, and natural rights. This contradiction necessitated the strict dichotomy between slaves and free men based on the belief in the natural inferiority of Blacks and superiority of whites. Barbara Jeanne Fields, *Slavery, Race, and Ideology in the United States of America*, 181 *NEW LEFT REV.* 95 (1990).

them appear to be.”<sup>135</sup> Myths of Black criminality are so embedded in the white psyche that it seems perfectly natural to many Americans that Blacks are disproportionately stopped for traffic infractions, arrested for drug offenses, swept off the streets for loitering, and sent to prison.

It is helpful, then, to use social influence theory to elucidate the pernicious impact of order-maintenance policing. Borrowing the relationship between social meaning, social influence, and social norms, we can see how social norm theory is just as effective at critiquing order-maintenance policing as it is at supporting it. My hypothesis, however, diverges from the broken windows theory by recognizing that the categories of order and disorder have a pre-existing meaning that associates Blacks with disorder and lawlessness. The following figure depicts the social influence of order-maintenance policing that incorporates these racialized categories.

**FIGURE 2:**  
THE NEGATIVE SOCIAL INFLUENCE OF ORDER-  
MAINTENANCE POLICING

<i>Police Conduct</i> →	<i>Social Meaning</i> →	<i>Social Norm</i> →	<i>Impact on Community</i>
Racially-biased arrests of loiterers	Blacks are suspect, require police supervision, & are entitled to fewer liberties	Presumed Black criminality	Blacks are perceived as criminals and experience more discrimination

Recent events in New York City suggest that its order-maintenance policy had precisely this racist social meaning,

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<sup>135</sup> Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 960-61 (1995).



which reinforced pernicious norms within the police department. While officials boasted of falling crime rates, civilian complaints of police abuse rose almost 40% since 1993 and the amount the city paid to settle these claims doubled.<sup>136</sup> The Street Crime Unit stopped and frisked 45,000 people in 1997 and 1998, but made only 9,500 arrests.<sup>137</sup> This means that police detained more than 35,000 people—the vast majority Black and Latino—who apparently had committed no crime.<sup>138</sup> Shocking cases of police brutality against innocent Black citizens heightened resentment toward the police and concerns about the city's policing policy. The two most egregious were the beating and torture of a Haitian immigrant, Abner Louima, in 1997 by two officers in a station house and the fatal shooting of a Guinean immigrant, Amadou Diallo, in 1999 by four plainclothes officers from the Street Crime Unit, who fired forty-one times at the unarmed man with no criminal record.<sup>139</sup>

Numerous observers hold New York City's order-maintenance policy responsible for the escalation of police abuse.<sup>140</sup> The mandate to aggressively control disorderly behavior created an attitude of impunity and disrespect for Black lives among police officers that ultimately led to these violations. The level of daily harassment, capped by the barbarity of the Louima and Diallo cases, dramatically eroded support for New

<sup>136</sup> Matt Bai & Gregory Beals, *A Mayor Under Siege*, NEWSWEEK, April 5, 1999, at 40, 41.

<sup>137</sup> Michael Cooper, *Safir May Use Police Data to Back Unit*, N.Y. TIMES, April 19, 1999, at A23.

<sup>138</sup> *Id.* These figures reflect an intensified version of the common practice of police, dating back to the 1960's, to arbitrarily stop and frisk Black men. See Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1272-75 (1998).

<sup>139</sup> Bai & Beals, *supra* note 136, at 41; Joseph P. Fried & Blaine Harden, *Officer Guilty of Helping Torture Immigrant*, N.Y. TIMES, June 9, 1999, at A1.

<sup>140</sup> See, e.g., Joel Berger, *The Police Misconduct We Never See*, N.Y. TIMES, Feb. 9, 1999, at A23; Dan Berry, *Leaders of Precinct Are Swept Out in Torture Inquiry*, N.Y. TIMES, Aug. 15, 1997, at A1; Bob Herbert, *Beyond the Diallo Case*, N.Y. TIMES, April 4, 1999, § 4, at 11; Bob Herbert, *Pushing People Around*, N.Y. TIMES, Feb. 25, 1999, at A27. See also Jodi Wilgoren, *Police Profiling Debate: Acting on Experience, or on Bias*, N.Y. TIMES, April 9, 1999, at A21 (linking New York City's aggressive policing policy, racial profiling, and police abuse; "[A] growing chorus of community leaders see a presumptive linking of minorities to crime that has caused intolerable humiliation and physical abuse of innocent citizens—even Mr. Diallo's death.").

York City's quality-of-life initiative, especially among African Americans, and sparked demands for tough oversight of police conduct.<sup>141</sup>

In the same way that proponents of the broken windows hypothesis measure the benefits of order-maintenance policing in terms of falling crime rates, we can measure the harms of order-maintenance policing in terms of the concrete impact of the racial stereotypes it perpetuates.<sup>142</sup> I suspect, however, that the damage inflicted by the social norm of presumed Black criminality is immeasurable.

While high rates of incarceration for felonies have devastating repercussions on Black communities,<sup>143</sup> widespread convic-

<sup>141</sup> Bai & Beals, *supra* note 136, at 40 (describing demonstration at New York City Hall following Diallo killing in which 1,000 protestors were arrested); Jodi Wilgoren, *Thousands Rally in Diallo's Memory for Strong Oversight of Police*, N.Y. TIMES, April 16, 1999, at A21 (reporting four-hour rally at the Federal Plaza in New York City demanding 10-point plan for police reform, including federal monitoring of police conduct). As Joseph D. McNamara, a former police chief, writes, "When Amadeo Diallo died, so did quality-of-life policing." Joseph D. McNamara, *Giuliani Cop System Doesn't Work*, Newsday, April 15, 1999, (available at <<http://www.openair.org/alerts/artist/nycmcnam.html>>). McNamara argues that the Diallo killing occurred because

[T]he four policemen indicted on murder charges, and their fellow officers, have been conditioned to believe that quality of life policing—cracking down on minor violations by aggressively confronting people walking the streets of New York—is the way to reduce crime, . . . [which] reinforces a growing view among police officers that the public is teeming with predatory criminals . . .

*Id.*

<sup>142</sup> See RUSSELL, *supra* note 126, at 138-48. Russell describes the harms created by racial discrimination in the criminal justice system as "alienation, violence, community unrest, negative health consequences, and greater adherence to genocidal theories." *Id.* at 148.

<sup>143</sup> See Tracey L. Meares, *Social Organization*, *supra* note 66, at 205 (noting that tough sentences produce negative consequences for community social organization in poor, minority neighborhoods, including family disruption, unemployment, and low economic status.) David Cole summarizes the alarming statistics regarding Black imprisonment:

The per capita incarceration rate among blacks is seven times that among whites. African Americans make up about 12 percent of the general population, but more than half of the prison population. They serve longer sentences, have higher arrest and conviction rates, face higher bail amounts, and are more often the victims of police use of deadly force than white citizens. In 1995, one in three young blacks between the ages of twenty and twenty-nine was imprisoned or on parole or probation. If incarceration rates continue their current trends, one in four young black males born today will serve time

tions for petty offenses also have a degrading impact. Criminal conviction even for a misdemeanor places an individual more definitively in the category of lawbreakers. Being arrested and sent to jail is no picnic.<sup>144</sup> Many of the thousands of citizens arrested under the Chicago ordinance were sentenced to a day or more in Cook County Jail. Some were sent to jail for several weeks.<sup>145</sup> To diminish the seriousness of criminal arrest, prosecution, and incarceration for any amount of time reinforces the view that these experiences should be considered routine for Blacks. The arrests of more than 42,000 people in Chicago for loitering “lower[s] at least the threshold of tolerance to penalty” and “tends to efface what may be exorbitant in the exercise of punishment.”<sup>146</sup> No doubt the formerly law-abiding citizens among those harassed and arrested are less likely ever “to engage positively” with the police. Although some social norm theorists advocate order-maintenance policing as a gentler alternative to draconian punishments and high incarceration rates of young Black men,<sup>147</sup> both policies have the effect of reinforcing stereotypes of Black criminality.

Tracey Meares and Dan Kahan are willing to tolerate arrests for loitering because they assume that “[t]he kids whom the police cannot order off the streets today . . . are the same ones they will be taking off to jail tomorrow.”<sup>148</sup> We should resist this assumption. Not everyone the police suspect is a gang member or everyone who associates with a suspected gang member is a

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in prison during his lifetime (meaning that he will be convicted and sentenced to more than one year of incarceration). Nationally, for every one black man who graduates from college, 100 are arrested.

COLE, *supra* note 114, at 4-5.

<sup>144</sup> See Harcourt, *supra* note 6, at 381-82 (describing the ordeal of arrest for minor offenses).

<sup>145</sup> See, e.g., Robyn Blumner, *When the Law is Based on Looks*, ROCKY MOUNTAIN NEWS, May 10, 1998, at 5B (describing arrest of Gregorio Gutierrez who was sentenced to 27 days in jail).

<sup>146</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 301 (1977).

<sup>147</sup> See Kahan, *Social Influence*, *supra* note 66; Kahan & Meares, *The Coming Crisis*, *supra* note 7; Meares & Kahan, *The Wages of Antiquated Procedural Thinking*, *supra* note 77, at 213 (“Chicago’s gang loitering ordinance is an example of a policy tool that is a tolerably moderate way to steer children away from criminality.”).

<sup>148</sup> Meares & Kahan, *The Wages of Antiquated Procedural Thinking*, *supra* note 72, at 213.

criminal. Meares and Kahan also assume that “[w]hen courts strike down crime-preventive measures such as the ordinance, legislatures inevitably attempt to compensate, with even more severe prison terms.”<sup>149</sup> There is evidence, however, that order-maintenance policing initiatives foster increased police brutality without any corresponding leniency in sentencing.<sup>150</sup> While crime rates have declined across the country, incarceration rates have continued to soar.<sup>151</sup> Far from promoting community cooperation with the police, moreover, New York City’s aggressive patrol tactics made many law-abiding citizens fearful of the police.<sup>152</sup>

Meares elaborates why tough sentencing for drug offenses is ultimately counterproductive:

Unfortunately, by promoting stigmatization of all African Americans and being insensitive to the dynamics of linked fate, and given the reality of the difficulty of drawing lines between law abiders and law breakers in many impoverished communities, it is likely that the racial asymmetry in drug incarcerations that is the inevitable consequence of the current drug law enforcement strategy *undermines* rather than enhances the deterrent potential of long sentences.<sup>153</sup>

Meares recognizes that all Blacks are stigmatized as law breakers by a law enforcement strategy that produces prisons in which half the inmates are Black.<sup>154</sup> The disproportionate incarceration of Blacks reinforces the stereotypical association between Blacks and criminality. But the gang-loitering ordinance has precisely the same stigmatizing effect. Although its penalties are far less severe than those for drug dealing, the ordinance permits police to remove and arrest perfectly law-abiding citizens because their race makes them appear lawless. Thus, the “difficulty of drawing lines between law abiders and law breakers” in

<sup>149</sup> *Id.*

<sup>150</sup> See *supra* note 140 and accompanying text.

<sup>151</sup> Timothy Egan, *Less Crime, More Criminals*, N.Y. TIMES, March 7, 1999, § 4, at 1; Fox Butterfield, *Number of Inmates Reaches Record 1.8 Million; Data Show Crime Rate Continues to Decline*, N.Y. TIMES, March 15, 1999, at A14.

<sup>152</sup> See Herbert, *supra* note 96.

<sup>153</sup> Meares, *Social Organization*, *supra* note 66, at 213.

<sup>154</sup> *Id.*

Black communities becomes especially pernicious when police are armed with a vague license to hassle and arrest. I submit that the gang-loitering ordinance stigmatizes Blacks more directly than tough drug laws because it practically invites the police to intervene based on stereotypes of Black criminality and disorderliness rather than any criminal conduct. The routine and public display of this racist exercise of police power compounds its negative impact.

Order-maintenance policing is connected to lengthy imprisonment in a more practical way, as well. Giving the police broad authority to arrest based on mere suspicion increases the likelihood that they will find evidence of more serious crimes. When this authority is exercised in a racially biased manner, it increases the racial disparity in convictions for other offenses. Racial profiling becomes a self-fulfilling prophecy: targeting Blacks for police surveillance results in higher rates of arrests, reinforcing the presumption of Black criminality. If police stopped and frisked whites as frequently as they do Blacks, white arrest rates would increase. Arrests for petty infractions such as loitering, moreover, create a criminal record, which can enhance the penalty for more serious crimes. Order-maintenance policing, then, is not a new regime that spares young Black men from imprisonment. It is part and parcel of the old regime that marks young Black men as criminals destined for prison.

In sum, social norm scholarship supporting order-maintenance policing dramatically underestimates the cost of giving the state leeway to restrain "visibly lawless" people. It overlooks the dangers inherent in identifying a class of citizens as "lawless" apart from their criminal conduct and it discounts the harm of race-based enforcement. While focusing on the negative social influence of community disorder, the broken windows approach to crime prevention fails to see the negative social influence of police strategies that rely on myths of Black criminality.

#### IV. BLACK EMPOWERMENT AND THE CONSTITUTIONAL BALANCE

I have argued that taking into account the race of the communities affected most by Chicago's ordinance helps to explain

the law's constitutional harm. The potential for racially-biased law enforcement is one of the chief dangers addressed by vagueness doctrine. Moreover, in deciding the constitutionality of aggressive policing strategies we must be careful to calculate accurately the costs of sacrificing liberty for the sake of order. Social norm theory helps to explain the cost to Black Americans of policing strategies that incorporate racialized categories of orderly and disorderly people. But what if Black Americans are willing to bear this burden as the price for keeping their neighborhoods safe? Would Black endorsement of expanded police discretion change the constitutional balance between liberty and order?

#### A. LAW ENFORCEMENT AS BLACK LIBERATION

A growing branch of scholarship on race and the criminal justice system emphasizes the benefit to Black communities of tougher law enforcement. The decline in brutal police repression of Blacks in the wake of the civil rights movement combined with the increase in Black-on-Black violence complicates the unidimensional racial criticism of excessive law enforcement. An alternative racial argument asserts that victimization by criminals poses a greater threat to the well-being of Black communities than does the risk of police abuse.<sup>155</sup> The most influential articulation of this thesis is Randall Kennedy's book *Race, Crime, and the Law*. Kennedy contends that "the principal injury suffered by African Americans in relation to criminal matters is not overenforcement but underenforcement of the laws."<sup>156</sup> According to this view, order-maintenance policing corrects the under-enforcement of the criminal laws in Black neighborhoods and protects their residents from the greater internal danger caused by the high rates of crime.<sup>157</sup>

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<sup>155</sup> KENNEDY, *supra* note 114, at 19; Kahan & Meares, *The Coming Crisis*, *supra* note 7, at 1166.

<sup>156</sup> KENNEDY, *supra* note 114, at 19.

<sup>157</sup> Kahan & Meares, *The Coming Crisis*, *supra* note 7, at 1166. It is interesting to note, however, that Kennedy co-authored an amicus brief *opposing* the Chicago ordinance. See Brief of Chicago Alliance for Neighborhood Safety et al. as *Amicus Curiae* in Support of Respondents, *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (No. 97-1121). See also Randall Kennedy, *Guilty by Association*, THE AM. PROSPECT 66 (May-

Dan Kahan and Tracey Meares combined this thesis with social norm and political process theory to launch an attack on current criminal procedure doctrine.<sup>158</sup> Reversing the critical version of the dynamic between Blacks and police authority, they present order-imposing laws like the Chicago gang-loitering ordinance as a reflection of Black political strength. Kahan and Meares argue that the constitutional standards used to evaluate these laws have outlived their utility and should be replaced by a new criminal procedure regime that is less hostile to police discretion.

The need for this doctrinal shift stems from changes in racial politics. According to Kahan and Meares, the current constitutional rules that curb discretionary policing were part of the civil rights revolution that sought to prevent the use of law enforcement as an instrument of racial repression. They allege that today, however, more powerful Black communities are demanding law enforcement strategies such as anti-loitering laws and curfews to eliminate visible signs of disorder from their streets. When courts apply criminal procedure rules adopted in the 1960s to thwart contemporary inner-city crime initiatives, they supposedly are hurting Black citizens. Thus, Kahan and Meares assert that “[a] body of doctrine designed to assure racial equality in law enforcement has now become an impediment to minority communities’ own efforts to liberate themselves from rampant crime.”<sup>159</sup> Rules restricting police dis-

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June, 1997) (criticizing California Supreme Court’s decision in *People ex rel. Gallo v. Acuna* upholding injunction against 38 individuals deemed to be members of a criminal street gang).

<sup>158</sup> Kahan & Meares, *The Coming Crisis*, *supra* note 7; Meares & Kahan, *The Wages of Antiquated Procedural Thinking*, *supra* note 72; Tracey L. Meares & Dan M. Kahan, *When Rights Are Wrong: Chicago’s Paradox of Unwanted Rights*, 24 BOSTON REV. 4 (April/May 1999). Kahan and Meares reiterate their argument in an amicus brief they filed in *Morales* on behalf of twenty neighborhood organizations which backed the gang-loitering ordinance. See Brief *Amicus Curiae* of Chicago Neighborhood Organizations in support of Petitioners, *Morales* (No. 97-1121).

<sup>159</sup> See Kahan & Meares, *The Coming Crisis*, *supra* note 7, at 1154. Justice Clarence Thomas dissented in *Morales* on similar grounds: “Today, the Court focuses extensively on the ‘rights’ of gang members and their companions. It can safely do so—the people who live with the consequences of today’s opinion do not live in our neighborhoods.” *Morales*, 119 U.S. at 1887 (Thomas, J., dissenting). A Chicago columnist retorted, “True—and Clarence Thomas, ensconced in well-to-do Fairfax County, Va., will never be ordered to leave his front sidewalk for chatting with someone who, un-

cretion used to protect Black citizens from racist law enforcement practices, they contend; now these rules prevent Black citizens from protecting themselves from gang violence.

The argument for order-maintenance policing grounded in Black political empowerment must be taken seriously. It presents a significant challenge to my claim that vagueness doctrine continues to serve a crucial function in curbing police abuse of African Americans and the perpetuation of damaging stereotypes of Black criminality. Implementing more pluralistic interpretations of constitutional norms is a worthy project. Black citizens' control of the political, cultural, and economic life of their communities, moreover, is essential to Black liberation.<sup>160</sup> An important part of this liberation project is to increase Black citizens' participation in constructing responses to crime.

Kahan and Meares also correctly observe that racial politics are more complicated today than at the time liberal criminal procedure doctrines were instituted. But the increase in Black political participation and shift from de jure discrimination to other forms of institutional inequality does not erase the need for these constitutional protections. To the contrary, the changed conditions of American social and political life require a constitutional jurisprudence that recognizes how seemingly color blind laws continue to produce glaring racial inequities in the criminal justice system. An important mechanism of this racial inequality is the social influence of police conduct that perpetuates stereotypes of Black criminality.

Support by some Black inner-city residents for the gang-loitering ordinance, moreover, does not determine its constitutionality. As the next Part demonstrates, the claim that most inner-city residents endorse the ordinance is itself hotly disputed. Moreover, there is no democratic process in place empowering Black communities to determine for themselves the content of criminal procedure rights. Finally, the argument for a weak-

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known to him, is a gang member." Steve Chapman, *Court Upholds America's Right to Hang Out*, CHI. TRIB., June 13, 1999, § 1, at 19.

<sup>160</sup> See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L. J. 1563, 1597-1602 (1996) (book review) (citing ROBERT ALLEN, *BLACK AWAKENING IN CAPITALIST AMERICA* (2d ed. 1970)).



ened standard of protection from police abuse that applies particularly to Blacks reinforces the racial bias that taints the criminal justice system.

#### B. BLACK COMMUNITY OPINION ON THE GANG-LOITERING ORDINANCE

The Black empowerment argument in favor of the ordinance depends on the empirical claim that Black citizens who are subject to the law support it. Kahan and Meares contend that inner-city communities are willing to internalize the law's deprivation of liberty in exchange for the increase in order, and predicted reduction in crime, the law provides. Before proceeding to the political and constitutional significance of Black community preference, we should investigate the empirical claim that the gang-loitering ordinance had "the overwhelming support of inner-city residents."<sup>161</sup> In fact, a review of the legislative history reveals a complicated and diverse picture of Black people's opinions on the matter. The *Chicago Tribune* described the city council proceedings as "one of the most heated and emotional council debates in recent memory."<sup>162</sup> Casting that debate as a conflict between white liberals who opposed the ordinance on civil liberties grounds and Black residents who demanded the ordinance to safeguard their neighborhoods, as Meares and Kahan do, seriously mischaracterizes the range of arguments expressed.<sup>163</sup> There were academics, activists, and residents of all backgrounds on both sides of the issue.

Some witnesses at the hearings on the proposed ordinance supported the law because they believed it would eliminate the intimidating presence of gang members in their neighbor-

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<sup>161</sup> See Kahan & Meares, *The Coming Crisis*, *supra* note 7, at 1182 (asserting "the overwhelming support of inner-city residents for the elements of the new community policing"), see also Brief *Amicus Curiae* of the Chicago Neighborhood Organizations in Support of the Petitioner at 14, *Morales* (No. 97-1121) (stating that the gang-loitering ordinance was "enacted at the behest of" minorities in Chicago).

<sup>162</sup> Robert Davis, *New Police Arrest Power Lights City Council Fuse*, *CHI. TRIB.*, June 18, 1992, § 1, at 1.

<sup>163</sup> Kahan and Meares castigate the Illinois ACLU for opposing the gang-loitering ordinance without taking into account the experiences of black inner-city residents. Kahan & Meares, *The Coming Crisis*, *supra* note 7, at 1159-60.

hoods.<sup>164</sup> Others, however, seemed more concerned about the impact that the public proximity of various types of socially undesirable people had on property values and business revenues.<sup>165</sup> Several residents testified that they were frustrated by the lack of police responsiveness to their complaints about illegal activity on the part of gangs.<sup>166</sup> One witness stated, for example, that when she complained about gang members blowing whistles in her alley at night, a police officer responded that “until they break in and stab you, we aren’t going to do anything.”<sup>167</sup> But community outrage about gang criminality and the police department’s failure to combat it did not necessarily translate into endorsement of the anti-loitering measure. Another witness, for example, noted that “people have to gather” and expressed concern that the ordinance might be unfairly applied to “young people on our block . . . going to school” and people “going shopping in the area . . . even going to the bus stop.”<sup>168</sup>

Any claim of Black community consensus begs the questions, what defines the community?, who represents the community?, and how are residents’ voices counted? Because the ordinance was proposed and passed by the Chicago City Council, one relevant form of representation were the aldermen representing the city’s Black neighborhoods. This inquiry suggests

<sup>164</sup> For example, Jim Fields, Director of the Northwest Federation Coalition of Community Groups, testified that “[G]ang loitering is very intimidating. It prohibits . . . people from using the park. It prohibits seniors from walking outside their door.” Chicago City Council Committee on Police and Fire, Transcription of Proceedings 139 (May 15, 1992).

<sup>165</sup> George Kyros, who represented the United Business Association of Woodlawn, testified that he supported the ordinance to combat “[c]orners loaded with either gangs, professional gangs or to a lesser extent and probably to a more pitiful extent the bottle gangs, which create just as bad a sight, just as bad on destroying our community as sophisticated street gangs.” *Id.* at 65. Another witness complained that “you can’t cut through the alley because it’s so many women with they babies out there.” *Id.* at 122.

<sup>166</sup> *See id.* at 95, 101, 108.

<sup>167</sup> Chicago City Council Committee on Police and Fire, Transcription of Proceedings 36 (May 18, 1992).

<sup>168</sup> Chicago City Council Committee on Police and Fire, Transcription of Proceedings 97-98 (May 15, 1992) (testimony of Velma Jetton). Ms. Jetton stated that she supported the ordinance, but wanted its language changed to avoid this potential unfairness. *Id.*

that most of the Black community was *opposed* to the ordinance: only six out the city's eighteen Black aldermen voted to pass the gang-loitering law.<sup>169</sup> Several of the Black aldermen argued passionately that the ordinance hurt the interests of their constituents. Alderman John Steele declared that the law was "drafted to protect the downtown area and the white community' at the expense of innocent blacks."<sup>170</sup> Alderman Dorothy Tillman called the law "anti-American and anti-African American," claiming that it would "restrict the movement of young blacks in a manner similar to the pass laws of South Africa."<sup>171</sup> One Black alderman noted that there were already laws "dealing with drugs, recruitment [and] intimidation" that were not being enforced, while another stated that the ordinance reminded him of discriminatory "street sweeps" conducted by Chicago police in the early 1980s.<sup>172</sup>

There was also a split in opinion among the grass-roots organizations that represent inner-city residents and that regularly confront gang violence in Chicago. Kahan and Meares filed an amicus brief in *Morales* on behalf of twenty civic, religious, and other community groups throughout Chicago defending the ordinance's constitutionality.<sup>173</sup> They argued that these organizations were in the best possible position to address the law's practical impact because their members "are the ones who daily face a heightened risk of criminal victimization from gang criminality, and . . . experience first-hand the destructive impact of gangs—and more severe means of abating gangs—on the lives of their communities."<sup>174</sup>

Another group of organizations representing Black and Latino residents, however, filed an amicus brief challenging the

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<sup>169</sup> Brief of Chicago Alliance for Neighborhood Safety et al. as *Amicus Curiae* in Support of Respondents at 5, *Chicago v. Morales*, 119 S. Ct. 1849 (1999) (No. 97-1121).

<sup>170</sup> Fran Spielman, *Loitering Ban Passes*, CHI. SUN-TIMES, June 18, 1992, at 16.

<sup>171</sup> *Id.*

<sup>172</sup> Brief of Respondents at 3, *Morales*, (No. 97-1121).

<sup>173</sup> Brief *Amicus Curiae* of the Chicago Neighborhood Organizations in Support of Petitioner, *Morales*, (No. 97-1121).

<sup>174</sup> *Id.* at 2.

constitutionality of the ordinance.<sup>175</sup> One of the organizations, The Chicago Alliance for Neighborhood Safety (CANS), is at the forefront of efforts to implement community policing in Chicago at the grass-roots level. CANS asserted that the ordinance is "destructive of genuine community policing and ultimately likely to make Chicago neighborhoods less safe."<sup>176</sup> CANS' opposition to the loitering ordinance reflects the position of many of Chicago's major neighborhood-safety organizations, whose representatives sit on CANS' board of directors.<sup>177</sup> This amicus brief contended, moreover, that the ordinance had "evoked substantial community opposition"<sup>178</sup> and that this opposition "was especially intense in the African-American community."<sup>179</sup> It also disputed the claim that the ordinance was enacted "at the behest of" minority residents:<sup>180</sup> a neighborhood federation based in a predominantly white section of the city initiated the proposal, which was then drafted by several white aldermen and endorsed by the mayor.<sup>181</sup>

At any rate, there is no systematic way of ensuring that the predominantly Black neighborhood organizations that ratified the ordinance represent a majority of inner-city residents. No one polled these citizens to determine their sentiments about

<sup>175</sup> Brief of Chicago Alliance for Neighborhood Safety et al. as *Amicus Curiae* in Support of Respondents, *Morales*, (No. 97-1121).

<sup>176</sup> *Id.* at 1.

<sup>177</sup> *Id.* at 1 n.4. Only one of these organizations dissented.

<sup>178</sup> *Id.* at 3.

<sup>179</sup> *Id.* at 4.

<sup>180</sup> Brief *Amicus Curiae* of the Chicago Neighborhood Organizations in Support of Petitioner at 14, *Morales*, (No. 97-1121).

<sup>181</sup> Brief of Chicago Alliance for Neighborhood Safety et al. at 9-10, *Morales* (No. 97-1121). See also Chicago City Council Committee on Police and Fire, Transcription of Proceedings 55-56 (May 15, 1992) (describing the role of the U.S. Department of Justice, Chicago Corporation Counsel, Chicago Police Department, and Illinois States' Attorney in drafting the ordinance. *But see* Meares & Kahan, *The Wages of Antiquated Procedural Thinking*, *supra* note 72, at 199 (stating that the representative of a predominantly Black ward, Alderman Beavers, sought to introduce the ordinance). Albert Alschuler and Stephen Schulhofer strenuously dispute Meares and Kahan's portrayal of community support for the ordinance. See Alschuler & Schulhofer, *supra* note 24, at 217-20. They point out that Alderman Beavers forwarded the draft ordinance to the full council only after it had been introduced six months earlier by white aldermen. Alschuler and Schulhofer conclude that Meares and Kahan's claim that inner-city residents favor the ordinance is "oversimplified and misleading." *Id.* at 220.

the law, nor would such a poll necessarily provide a reliable indication of community opinion.<sup>182</sup> Without a mechanism for fair representation, there is a grave danger that neighborhood groups holding a minority view will become the self-proclaimed voice of the community. Indeed, it seems likely that the neighborhood associations that supported the ordinance gained legitimacy and visibility precisely because of their alliance with the police and city officials. Using their support of the ordinance as an independent ground to defend deprivations of other residents' rights, therefore, is especially problematic.

Finally, the Black media, another vehicle for expressing Black residents' views, appeared generally to oppose the law. Chicago's leading Black newspaper, the *Chicago Defender*, condemned the ordinance in an editorial that boldly declared "Supreme Court Should Squash Anti-Gang Ordinance."<sup>183</sup> One of Chicago's most popular Black radio hosts also regularly spoke out against the ordinance.<sup>184</sup>

The conflicting opinions among Blacks about the wisdom of the gang-loitering ordinance reflect a deeper ambivalence among Blacks about law enforcement strategies. My sense, confirmed by survey research, is that despite their opposition to neighborhood crime, most African Americans believe that the criminal justice system is profoundly biased against them and do not trust the police to fairly enforce the laws.<sup>185</sup>

<sup>182</sup> See David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Value of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 2016 (1993) (stating that "there is no way to poll the black community to determine their true desires"). See also Alschuler & Schulhofer, *supra* note 24, at 240-43 (noting difficulties in defining that relevant community).

<sup>183</sup> Editorial, *Supreme Court Should Squash Anti-Gang Ordinance*, CHI. DEFENDER, April 23, 1998, at 11.

<sup>184</sup> *Cliff Kelly Radio Show* (WVON Chicago radio broadcasts, various dates).

<sup>185</sup> See RUSSELL, *supra* note 126, at 35 (discussing surveys that demonstrate most Blacks believe the police and criminal justice systems are racially biased against them); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U.L. REV. 243, 243-45 (1991). See also Maclin, *supra* note 138, at 1279-87 (discussing history of resentment stop and frisk tactics caused in Black neighborhoods). New York Times reporters who interviewed more than 100 New York City residents following the police shooting of an unarmed West African immigrant found "anger and fear mixed with sadness and suspicion as people drew links between the shooting and their own lives." Wilgoren & Thompson,

## C. THE CONSTITUTIONAL IMPLICATIONS OF BLACK EMPOWERMENT

Even if it could be proven that a majority of Black inner-city residents endorse the loitering law, what relevance would that support have to the law's constitutionality? The racial argument for relaxing procedural protections against police abuse hinges on a controversial assessment of Black political empowerment. According to Kahan and Meares, the implementation of aggressive policing techniques in urban centers results from Blacks "[f]lexing their newfound political muscle."<sup>186</sup> Increased Black political strength after the civil rights movement, they argue, means that inner-city residents are now involved in deciding police policy and in curbing police abuses. Close judicial monitoring of police, based on the outdated assumption that white majorities were imposing order on powerless minorities, is therefore no longer necessary in today's political context. Political process theory suggests that less judicial scrutiny is needed when average members of a community whose political representatives passed an order-enforcing law bear the burden the law imposes on individual freedom.

The application of political process theory to criminal procedure doctrine merits serious consideration. As I discussed in Part II, the constitutional prohibition against vague allocations of police authority stems partly from the fear that this discretion will be used to repress minority groups. But political process theory does not support relaxing constitutional scrutiny of the gang-loitering ordinance or other order-maintenance policing strategies. To the contrary, the racial divide between those who enacted the law in Chicago and those who were burdened by it calls for heightened judicial skepticism. The gang-loitering ordinance was passed by the predominantly white Chicago City Council, not an inner-city political body. Elected officials of white districts enacted the ordinance while minority communities were disproportionately subjected to the violations of liberty it imposed. Most of the political representatives of the Black

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*supra* note 96. A 20-year-old Black construction worker from Brooklyn told the reporters "he feels safer at night passing the projects than the local police station." *Id.*

<sup>186</sup> Kahan & Meares, *The Coming Crisis*, *supra* note 7, at 1154.

communities affected by the ordinance opposed it. Relatively few white Chicagoans, on the other hand, risked being arrested for standing on the streets of their neighborhoods: by centering on suspected gang members and their companions, the very terms of the law applied virtually to minorities only. Although Black citizens certainly influence politics in cities like Chicago, they do not (yet) determine, design, or implement the law enforcement policies that govern their communities.<sup>187</sup>

A more realistic view of the political process suggests that white support for tougher police supervision of Blacks helped to guarantee the law's passage, despite vehement opposition by many Black representatives. The jurisprudence of racial realism posits that white Americans have repeatedly sacrificed Black people's rights to maintain their privileged position; legal measures that improve Black people's status are implemented only if they also further the interests of the white majority.<sup>188</sup> Whites embrace law enforcement strategies to crack down on Black criminals that converge with white interests in reducing crime while preserving their own individual freedoms. Proposals for increased Black control over criminal justice decision making that threaten white supremacy, on the other hand, are soundly condemned as radical nonsense. The enthusiasm whites have for order-maintenance policing is not extended to, for example, Paul Butler's recommendations that Black jurors engage in race-based nullification<sup>189</sup> or that Black criminal de-

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<sup>187</sup> See Alschuler & Schulhofer, *supra* note 24, at 221-22 (describing control of Chicago's city government by whites, despite election of African American mayor in 1983).

<sup>188</sup> See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>189</sup> Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). For a critique of Butler's jury nullification proposal and Butler's reply, see Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109 (1996), and Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143 (1996) [hereinafter Butler, *The Evil of American Criminal Justice*]. Butler's response to Leipold's fear of a white backlash to Black jury nullification is particularly relevant to this discussion: "If African Americans adapted their political and self-help strategies so as not to raise the possibility of white backlash, they would scarcely advance at all." Butler, *The Evil of Ameri-*

fendants have the right to majority Black juries that are authorized to sentence them.<sup>190</sup> There is a dramatically different response to Black self-help strategies that would escalate arrests of Blacks and suspend their civil liberties versus those that might result in greater leniency toward Black offenders. I would venture that most white Americans find the notion of putting law enforcement in the hands of Black communities downright terrifying. Witness the angry reaction of many white Americans to the acquittal of O.J. Simpson of murder by a predominantly Black jury.<sup>191</sup>

Moreover, recent events refute Meares and Kahan's sanguine view of "the competence of inner-city communities to protect themselves from abusive police behavior."<sup>192</sup> Cases of horrible police mistreatment of Blacks have dominated Chicago's political landscape over the last few years.<sup>193</sup> Human Rights Watch recently highlighted police brutality in Chicago in a report on excessive force in U.S. cities in the 1980s and 1990s, citing the 1997 beating of Jeremiah Mearday, who is Black, by

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*can Criminal Justice, supra*, at 155. Butler contends that many Black Americans side with him. *Id.* at 147.

<sup>190</sup> See Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 877, 880-82 (1997). Butler advocates an affirmative action program for Black criminal defendants that also provides that Black people not be sentenced to death for interracial homicide; that Blacks be arrested and sentenced to prison for drug offenses only in proportion to their actual commission of those crimes (no more than 12% of the total); and that a goal for 2000 should be a prison population that more accurately reflects the proportion of Blacks in the general population. See *id.* at 877.

<sup>191</sup> See RUSSELL, *supra* note 126, at 47-55; Henry L. Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 56.

<sup>192</sup> See Kahan & Meares, *The Coming Crisis, supra* note 7, at 1154.

<sup>193</sup> See Steve Mills, *One Step to Reform: 2 Steps Back Corruption, Brutality Charges still Tarnish Police*, CHI. TRIB., Feb. 11, 1999, § 1, at 1 (describing recent incidents of police misconduct in Chicago and asserting that "community trust in the police is eroding in some of the city's most troubled neighborhoods, threatening to undercut the department's community policing program."). As noted above, New York City is experiencing a similar epidemic of race-based police abuse—"killings, the torturing of Abner Louima, the invasions of rampaging cops of the apartments of innocent families, the routine beatings and harassment of young men and boys, the curses and the racial slurs, the arrests on phony charges of individuals who dare to object to abusive treatment and more." Herbert, *supra* note 96, at A31. See also Deborah Sontag & Dan Barry, *Challenge to Authority: A Special Report; Disrespect as Catalyst for Brutality*, N.Y. TIMES, Nov. 19, 1997, at A1 (describing numerous cases of police abuse of New Yorkers who challenged police authority).



two white police officers.<sup>194</sup> Lawsuits have confirmed numerous complaints about the systematic torture of suspects at an inner-city police station from 1973 to 1986.<sup>195</sup> Perhaps most emblematic of the police department's willingness to assume Black criminality was the arrest of two Black little boys, ages seven and eight, for the brutal sexual assault and murder of an eleven-year-old Black girl in July 1998.<sup>196</sup> Despite community protest over officers' unethical means of extracting "confessions" from the children, charges were dropped only after tests revealed the boys were too young to commit the crime.<sup>197</sup> A year later, in separate incidents in June 1999, Chicago police officers fatally shot two unarmed Black motorists, La Tanya Haggerty, a 26-year-old computer analyst, and Robert Russ, a Northwestern University senior.<sup>198</sup>

<sup>194</sup> Lynn Sweet, *Rights Group Notes City's Police Abuse*, CHI. SUN-TIMES, July 8, 1998, at 22. The Human Rights Watch report notes that between 1992 and 1997, the city paid more than \$29 million in settlements stemming from 1,657 lawsuits alleging excessive force, false arrest, and improper search. *Id.*

<sup>195</sup> See Robert Blau & David Jackson, *Police Study Turns Up Heat on Brutality*, CHI. TRIB., Feb. 9, 1992, § 1, at 1. See also *People v. Cannon*, 688 N.E. 2d 693 (Ill. App. Ct. 1997) (vacating denial of motion to suppress evidence of confession based on newly discovered evidence showing 28 suspects were tortured at Chicago police station where defendant was interrogated).

<sup>196</sup> See Jonathan Eig, *Making Them Talk*, CHI. MAG., Jan. 1, 1999, at 50. The family of the eight-year-old filed a lawsuit against the City of Chicago, the Chicago Police Department, and two officers who interrogated the boys alleging false arrest and imprisonment, malicious prosecution, and intentional infliction of emotional distress. Matt O'Connor & Teresa Puente, *8-Year-Old's Family Sues Over Arrest for Murder*, CHI. TRIB., Feb. 18, 1999, § 2, at 1.

<sup>197</sup> Tests revealed semen on the victim's underwear, which the boys were incapable of producing. O'Connor & Puente, *supra* note 196.

<sup>198</sup> Todd Lighty & Gary Marx, *Questions, Protest Cloud Cop Shootings*, CHI. TRIB., June 8, 1999, § 2, at 1. That same month, the U.S. attorney's office initiated an inquiry into the 1996 killing of another unarmed Black motorist, Emmett Blanton, Jr., by Chicago police officers, and the Cook County medical examiner ruled the death of a suspected drug dealer, Gregory Ryan, during a struggle with police a homicide. Steve Mills & Todd Lighty, *Cop-Linked Death Ruled a Homicide*, CHI. TRIB., June 19, 1999, § 1, at 1; Todd Lighty & Liam T.A. Ford, *Police Face New Probe for 1996 Killing*, CHI. TRIB., June 11, 1999, § 2, at 1. As I completed this Foreword in the spring and summer of 1999, I recorded an alarming explosion of police brutality against Blacks across the country, including several killings of unarmed individuals in New York City, Chicago, and Los Angeles. See *supra*, sources cited *supra* note 139; Todd S. Purdum, *A Police Shooting Death, a Study in Contrasts*, N.Y. TIMES, June 5, 1999, at A9 (reporting the fatal shooting in Los Angeles of Margaret Laverne Mitchell, a 55-year-old homeless

Unfortunately, law enforcement continues to play "a central role in maintaining the exclusion of African-Americans and other minorities from the Nation's political life."<sup>199</sup> Political process theory and democratic ideals mandate attention to Black residents' views about criminal justice in inner-city communities. They do not justify, however, the dilution of constitutional protections against police departments that still enforce the criminal laws in a racially-biased manner.

The question whether an autonomous Black community that enacted its own laws and controlled its own police force could adjust the current constitutional balance between liberty and order is an intriguing hypothetical question.<sup>200</sup> But given the relative political disenfranchisement of Black inner-city residents, it is *only* a hypothetical question. Increasing Black political power is not the occasion for the demise of the Warren Court's criminal procedure protections.<sup>201</sup> That trend started

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woman, who police say brandished a screwdriver when 2 officers approached her to ask her whether the shopping cart she was pushing was stolen).

<sup>199</sup> See Kahan & Meares, *The Coming Crisis*, supra note 7, at 1156. See also Alschuler & Schulhofer, supra note 24, at 238 ("Anyone who contends that the 'institutionalized racism' of American police departments has vanished does not read the newspapers.").

<sup>200</sup> Similar questions arise in applying constitutional rules to decisions by sovereign Indian tribes. See Jill E. Adams, *The Indian Child Welfare Act of 1978: Protecting Tribal Interests in a Land of Individual Rights*, 19 AM. INDIAN L. REV. 301 (1994) (discussing the conflict between parents' constitutional rights and tribal sovereignty in issues involving Indian children); James A. Poore III, *The Constitution of the United States Applies to Indian Tribes*, 59 MONT. L. REV. 51 (1998). Moreover, legal protections against arbitrary official power may be unnecessary, and even harmful, in community-controlled programs that minimize hierarchical distance between those in authority and those served. Richard Boldt argues, for example, that federal confidentiality provisions that reflect liberal legalism's abhorrence of official discretion undermine helpful communication between staff members and parents at Head Start centers. See Richard C. Boldt, *A Study in Regulatory Method, Local Political Cultures, and Jurisprudential Voice: The Application of Federal Confidentiality Law to Project Head Start*, 93 MICH. L. REV. 2325 (1995). The stark difference between Head Start staff-parent relationships based on "a strong commonality of interest and experience," *id.* at 2363, and the largely antagonistic relationship between police and inner-city residents helps to illuminate why official discretion should be allowed in one context and restrained in the other.

<sup>201</sup> See Kahan & Meares, *The Coming Crisis*, supra note 7, at 1154 (asserting that "[t]he occasion for the current doctrine's demise, we predict, will be the political revolution that's now remaking urban law enforcement").

two decades ago and was hardly initiated by Blacks.<sup>202</sup> The Court has already relaxed the *Terry* standard for reasonable suspicion in deference to law enforcement concerns in ways that promote the arrest of Blacks and Latinos.<sup>203</sup> The retrenchment in criminal procedure protections is more accurately attributed to a conservative backlash against Black political advancement combined with the get-tough-on-crime politics of the Reagan and succeeding administrations.<sup>204</sup> If vague loitering laws are upheld as constitutional it would pull out one more thread from the rapidly unraveling quilt of constitutional safeguards against police abuse implemented during a bygone era.

In short, the political process required for political process theory to support the ordinance simply does not exist. There is no secure means for determining Black citizens' opinions about aggressive policing, let alone a democratic process for implementing them. It is therefore highly presumptuous to claim that inner-city residents have voluntarily relinquished their civil liberties in exchange for safer streets. Given the political vulnerability of Blacks and persistent bias against them by the police; given the damaging social meaning of order-maintenance policing; and given the danger of arguments advocating further deprivation of Black citizens' freedoms, those who use racial politics

<sup>202</sup> See COLE, *supra* note 114, at 6 ("At virtually every juncture since *Gideon* and *Miranda*, the Supreme Court has undercut the principle of equality reflected in those decisions. . . . Today those decisions stand out as anomalies").

<sup>203</sup> Harris, *supra* note 125, at 560-73; Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry "Stop and Frisk,"* 50 OKLA. L. REV. 451 (1997); Gregory Howard Williams, *The Supreme Court and Broken Promises: The Gradual But Continual Erosion of Terry v. Ohio*, 34 HOW. L.J. 567 (1991). See also *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (permitting a police officer to stop and frisk suspects without probable cause if he has reasonable and articulable suspicion that "criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous."). Tracey Maclin argues that *Terry* itself "deserves critical attention because it authorized a police practice that was being used to subvert the Fourth Amendment rights of blacks nationwide." Maclin, *supra* note 138, at 1277.

<sup>204</sup> See generally Michael C. Dawson, *Black Power in 1996 and the Demonization of African Americans*, 29 POL. SCI. & POL. 456, 458-60 (1996) (describing that marginalization of African Americans in mainstream democratic politics since the 1970s that has "disrupted black political aspirations and weakened black power since the end of the civil rights and black power eras.").

to defend weakening rights should bear a heavy burden of proof. They have failed to make their case.

#### V. CONCLUSION: SACRIFICING BLACK FREEDOMS FOR THE PUBLIC GOOD

The Chicago gang-loitering ordinance can be seen as a state-sponsored experiment that tests the broken windows hypothesis in inner-city communities using an especially broad grant of police power. This brand of community policing is part of a broader practice of experimenting with solutions to social problems at the expense of Black citizens' liberties. Protecting white people's liberties, on the other hand, usually takes precedence over efforts to institute substantive racial equality.<sup>205</sup> Arguments that white Americans should relinquish a piece of their liberty for the sake of creating a more egalitarian society are renounced as reverse discrimination. At the same time, proposals that restrict Black Americans' freedoms to improve public welfare span the arenas of crime control, welfare reform, reproductive health policy, and child protection.

I have documented elsewhere the proliferation of policies that seek to influence Black women's reproductive decision making based on the misguided premise that decreasing Black fertility can achieve positive social objectives.<sup>206</sup> States are experimenting with so-called family caps to see if they deter welfare mothers from having more babies.<sup>207</sup> A major newspaper proposed experimenting with incentives to use the long-acting contraceptive Norplant to see if they would reduce Black poverty.<sup>208</sup> Prosecutors have charged Black mothers with fetal crimes to see if it will deter crack use during pregnancy.<sup>209</sup> New York City recently extended the broken windows philosophy to its child protection policy, implementing a campaign of arrest-

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<sup>205</sup> See Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363 (1996).

<sup>206</sup> See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

<sup>207</sup> *Id.* at 202-45.

<sup>208</sup> *Id.* at 106-08 (discussing Donald Kimelman, *Poverty and Norplant: Can Contraception Reduce the Underclass?*, PHILADELPHIA INQUIRER, Dec. 12, 1990, at A18).

<sup>209</sup> *Id.* at 150-201.

ing primarily Black and Latina mothers for misdemeanor child endangerment on the theory that it will deter more serious child abuse.<sup>210</sup>

The Constitution places limits on the government's ability to conduct social experiments that sacrifice minority freedoms to enhance the welfare of the majority.<sup>211</sup> Without this restraint, the most powerful members of society would freely tinker with social programs designed to improve their own welfare but burden only minority groups. As Paul Butler notes about the disproportionate imprisonment of Blacks for drug offenses, "the luxury of maintaining a failed experiment in public policy can be appreciated only by those who do not bear the brunt of the failure."<sup>212</sup>

Whether or not the gang-loitering ordinance was approved by Black residents, its enactment depended on confining its deprivation of liberty to minority communities. It is a perfect example of the mechanism that perpetuates a criminal justice system that brutally punishes Blacks while preserving white Americans' civil liberties. The criminal law has resolved the tension between liberty and order by protecting the freedoms of white citizens while enforcing order against Blacks. David Cole argues that the criminal justice system affirmatively exploits this inequality: "[a]bsent race and class disparities, the privileged among us could not enjoy as much constitutional protection of our liberties as we do; and without those disparities, we could not afford the policy of mass incarceration we have pursued

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<sup>210</sup> Rachel L. Swarns, *In a Policy Shift, More Parents Are Arrested for Child Neglect*, N.Y. TIMES, October 25, 1997, at A1. Examples of offenders include Sourette Alwysh, a 34-year-old Haitian immigrant, who "was arrested for living with her 5-year-old son in a roach-infested apartment without electricity or running water;" and Sidelina Zuniga, a 39-year-old Mexican immigrant, who was charged for leaving her sons, ages 10 and four, at home for an hour and a half while she shopped at a grocery store. *Id.*

<sup>211</sup> See *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down eugenic law that imposed involuntary sterilization of certain criminals).

<sup>212</sup> Butler, *The Evil of American Criminal Justice*, *supra* note 189, at 153. Butler notes the reluctance of white Americans to use the criminal law to deal with their own drug use while supporting imprisonment of Blacks for drug offenses. *Id.* at 149 (noting that "African Americans account for only 13% of drug users, and yet make up 74% of the people who are incarcerated for drug use").

over the past two decades.”<sup>213</sup> The gang-loitering ordinance that targets Chicago’s minority youth similarly exploits America’s racial divide, continuing to “sidestep[] the difficult question of how much constitutional protection we could afford if we were willing to ensure that it was enjoyed equally by all people.”<sup>214</sup> White citizens expect police to protect their neighborhoods from crime without infringing their freedom to travel on public streets or to be safe from arrest because of the way they look. Black citizens deserve no less.

There is no consensus among Black scholars, politicians, or inner-city residents about the law enforcement policies that will best serve Black people’s interests. Yet it remains possible to evaluate these policies based on whether they further racial subordination or help to eradicate it. This decision is essentially a moral rather than a democratic one.<sup>215</sup> Scholars who advocate expanding police authority over Black communities have gravely underestimated the abiding antagonism between law enforcement and Blacks in America. These social norm theorists have misjudged the social meaning of aggressive policing and the way it influences racialized norms of criminal justice. Contrary to the prevailing faith in the positive influence of order-maintenance policing, this strategy—especially vague loitering

<sup>213</sup> COLE, *supra* note 114, at 5.

<sup>214</sup> *Id.* A police officer responding to Blacks who resisted aggressive patrol tactics used in the 1960’s poignantly expressed the tension between crime control in Black neighborhoods and Black rights:

It’s harder to work in these neighborhoods now than it used to be because we send the kids to school and teach them about rights and then put them back in the neighborhood. I think we ought to either get rid of these neighborhoods or stop teaching these kids about their rights.

Maclin, *supra* note 138, at 1271 (quoting JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 88 (2d ed. 1975)).

<sup>215</sup> See Butler, *The Evil of American Criminal Justice*, *supra* note 189, at 147-48 (noting that his defense of jury nullification is based on the moral case against racism in the criminal justice system rather than democratic consensus among Blacks). Of course, these two aspects of the problem—morality and democracy—are related in the question, “who should be empowered to make that moral judgment?” See Tracy L. Meares & Dan M. Kahan, *Meares and Kahan Respond*, 24 BOSTON REV. 22, 22-23 (April/May 1999). At this stage, we must rely more on moral argument than evidence of democratic decisionmaking within Black communities.

laws—reinforces stereotypes that portray Blacks as lawless and legitimate police harassment in Black communities. The racism that pervades the criminal justice system demands innovations that will give Blacks greater say in crime control strategies deployed in their communities. This project requires that we strengthen constitutional safeguards against race-based police abuse, not eviscerate them.