SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 43 | Issue 2 Article 9

1993

Curbing Gang Related Violence in America--Do Gang Members Have a Constitutional Right to Loiter on Our Streets ?

Lisa A. Kainec

CURBING GANG RELATED VIOLENCE IN AMERICA. DO GANG MEMBERS HAVE A CONSTITUTIONAL RIGHT TO LOITER ON OUR STREETS?

I. INTRODUCTION

Public officials today are faced with ever increasing crime rates and escalating violence in their cities and on their streets.[1] Many people attribute these urban disasters to the rise of gang and drug activity Lawmakers' efforts have been on-going in recent years to curb such violence, resulting in the enactment of many laws aimed at crime prevention. On June 17, 1992 the City of Chicago passed an ordinance that allows police to order persons reasonably believed to be gang members who are observed loitering on the City's streets to disperse. Failure to obey the order is a violation of the ordinance for which the loiterer may be arrested.

Chicago's ordinance is expected to be challenged on constitutional grounds. Loitering laws have faced constitutional challenges on several occasions, the central concern being the potential for abuse and arbitrary enforcement. Whether Chicago's ordinance can quell this fear of misuse of power and meet the strict constitutional criteria that protect conduct considered innocent will decide the fate of this latest attempt by a City to protect its citizens.

This Comment will first explore the history of loitering laws and the constitutional challenges most commonly experienced.[2] Specific types of loitering laws will then be discussed, with close consideration paid to the ways in which such laws have been able

---

1. *See, e.g.*, Frank James, *Championship City Awakens To A Hangover of Looting, Arson, Arrests*, CHI. TRIB., June 15, 1992, § C, at 1; Richard A. Serrano and Tracy Wilkinson, *Violence Follows Verdicts*, L.A. TIMES, Apr. 30, 1992, § A, at 1.

2. *See infra* notes 8-28 and accompanying text.

to overcome constitutional challenges.[3] Next, the particular terms of the Chicago ordinance will be examined in light of challenges to prior loitering laws.[4] This Comment argues that Chicago's ordinance should pass constitutional muster and be upheld as a legitimate and appropriate means by which to combat the problems of escalating violence and crime in American cities.

II. BACKGROUND

Lawmakers have attempted to prohibit loitering in public places for many years. Present day loitering statutes are in fact an outgrowth of the breakup of the feudal system in England.[5] With this breakup came the unemployment of hundreds of men who, with their families, became vagrants, wandering the roads of England in search of work.[6] Early vagrancy laws directed at this problem later became the basis of criminal laws prohibiting persons from supporting themselves on the streets through unlawful acts.[7]

Many states and cities base their statutes and ordinances outlawing vagrancy upon these English predecessors. The modern versions of vagrancy prohibitions have faced two different types of challenges. The first challenge rests on the contention that the state has exceeded its power in enacting the law.[8] Generally, in the exercise of their police powers, states and municipalities may enact laws to protect the public safety, health and morals.[9] To be valid, these laws must be reasonably correlated to the effectuation of these ends.[10] Where the law's relationship to crime prevention is merely tenuous, the law will not survive such a challenge.

The second challenge rests on the void for vagueness doctrine, which contends that vagrancy laws are too vague for persons whose conduct may be prohibited to discern conduct that is permissible from that which is not. The void for vagueness doctrine has two aspects: the notice provided to citizens of the prohibited

3. *See infra* notes 29-66 and accompanying text.

4. *See infra* notes 67-98 and accompanying text.

5. Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972).

6. *Id.* at 161 n.4 (citation omitted).

7. *Id.* at 161.

8. *See, e.g.*, Fenster v. Leary, 229 N.E.2d 426, 428 (N.Y. 1967) (holding vagrancy statute invalid as overreaching of police power; conduct prohibited did not threaten others and had only tenuous connection to crime prevention).

9. Tower Realty v. City of East Detroit, 196 F.2d 710, 723 (6th Cir. 1952).

10. People v. Pagnotta, 253 N.E.2d 202, 205 (N.Y. 1969).

conduct and the likelihood of arbitrary enforcement.[11] The Supreme Court has stated that the important criteria "is not actual notice, but . the requirement that a legislature establish minimal guidelines to govern law enforcement."[12] The Supreme Court explained that without such protection, a statute may allow policemen, prosecutors and juries to enforce the law according to their personal predilections.[13] In addition, the Court applies a more rigorous vagueness test where permitted conduct may be inhibited because the law is too vague to differentiate between permitted and prohibited conduct.[14]

The Supreme Court first addressed the constitutionality of a vagrancy ordinance in *Papachristou v. City of Jacksonville.*[15] The ordinance at issue provided:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling about from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.[16]

The Court struck down the ordinance as void for vagueness because it did not give persons of ordinary intelligence adequate notice of the specific conduct it prohibited.[17] The Court also noted that the ordinance "encourage[d] arbitrary and erratic arrests and

---

11. Kolender v. Lawson, 451 U.S. 352, 357-58 (1983).
12. *Id.* at 358.
13. *Id.* (citation omitted).
14. Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).
15. 405 U.S. 156 (1972).
16. *Id.* at 156 n.1.
17. *Id.* at 162.

convictions."[18]

While the ordinance was held void on its face for vagueness, the Court went on to note that it made activities normally considered innocent criminal.[19] This overbreadth, the Court stated, became clear when the ordinance was considered in light of its earlier statement in *United States v. Reese*[20] that: "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[21] Thus, the ordinance in *Papachristou* failed on overbreadth grounds as well, since it swept too broadly, encompassing activities the Court deemed valuable and constitutional. In describing those protected activities, the Court cited to the works of Walt Whitman and Henry D. Thoreau, and discussed the important role of leisure in society, deeming strolling and wandering "the amenities of life."[22] Such "loafing" activity, the Court stated, is "in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity "[23]

Following *Papachristou*, numerous statutes and ordinances prohibiting loitering[24] have been challenged on constitutional grounds. These constitutional challenges are usually based on the void for vagueness doctrine.[25] Laws that either fail to adequately inform ordinary persons of the prohibited conduct or which may be subject to arbitrary enforcement will fail under this challenge.

That loitering laws may prohibit constitutionally protected conduct and are therefore overbroad is a theme that has also been the basis for numerous challenges in the state courts. As the Supreme Court stated in *Papachristou*, loitering or wandering the public streets is protected conduct.[26] While local governments have sought to ban criminal activities such as prostitution[27] and drug

18. *Id.*

19. *Id.* at 163.

20. 92 U.S. 214, 221 (1876). In *Reese*, a criminal statute enacted by Congress was held to be overbroad and thus unconstitutional.

21. *Papachristou*, 405 U.S. at 165 (citing *Reese*, 92 U.S. at 221.

22. *Id.* at 163-64.

23. *Id.*

24. Traditionally, loitering has been defined as including acts which constitute vagrancy. *See* BLACK'S LAW DICTIONARY 942 (6th ed. 1990). The two concepts overlap to a considerable degree.

25. *See supra* notes 11-14 and accompanying text.

26. *See supra* notes 22-23 and accompanying text.

27. *See infra* notes 36-44 and accompanying text.

trafficking[28] on their streets, courts have steadfastly refused to let the laws stand if the constitutional standards are not unequivocally fulfilled.

A. Laws Generally Prohibiting Loitering

Following the Supreme Court's decision in *Papachristou* holding the Florida vagrancy law to be unconstitutional, other states' general loitering statutes were challenged. For instance, in *People v. Berck*,[29] a New York statute prohibiting loitering was struck down as void for vagueness. The statute made illegal loitering without apparent reason where the surrounding circumstances justified suspicion that criminal activity may take place.[30] The New York Supreme Court held that the statute failed to adequately notify persons of the forbidden behavior because it prohibited loitering "without apparent purpose."[31] The court also found the "suspicious circumstances" element of the statute to be obscure, stating: "this additional language does not condemn any identifiable act or omission . but, rather, it merely indicates that a person may be held for loitering if suspicion of criminality happens to be created in the mind of the arresting officer."[32] The statute's significant shortcomings were the failure to specify the actual prohibited act and failure to distinguish the prohibited from the permitted conduct for the public.[33]

General loitering statutes like those in *Berck* and *Papachristou* have been consistently held unconstitutional on vagueness grounds.[34] To avoid having their statutes likewise held to be invalid, other state and local governments began to narrow the focus of their loitering laws.[35] Rather than prohibiting all loitering on the public streets by anyone, these statutes began to specify particular purposes which when manifested by persons loitering would

28. *See infra* notes 45-65 and accompanying text.
29. 300 N.E.2d 411 (N.Y. 1973).
30. *Id.* at 413.
31. *Id.*
32. *Id.*
33. *Id.*
34. *See* People v. Diaz, 151 N.E.2d 871 (1958) (ordinance prohibiting loitering or lounging about any street corner held unconstitutionally vague); Farber v. Rochford, 407 F. Supp. 529 (N.D. Ill. 1975) (ordinance prohibiting loitering by drunkards, prostitutes or drug dealers held unconstitutional); *but see* Watts v. State, 463 So. 2d 205 (Fla. 1985) (ordinance upheld even though it prohibited loitering or prowling "in a place, at a time, or in a manner not usual for law-abiding individuals").
35. *See infra* notes 39-44 and accompanying text.

support a conviction for loitering. Two such prohibited purposes commonly the subject of loitering laws are prostitution and drug dealing.

B. Prohibitions Aimed at Prostitution

Several courts have examined loitering statutes aimed at prohibiting prostitution and have often upheld the statutes as constitutional. To overcome the vagueness challenge, the statutes focus on the second prong of the vagueness test — the establishment of explicit standards for enforcement to avoid ad hoc, subjective, and arbitrary applications of the law

In *People v. Smith*,[36] for example, the New York Supreme Court upheld a loitering for prostitution statute. The court held the statute was not void for vagueness "because it details the prohibited conduct and limits itself to one crime."[37] The court further observed that "the police are precluded from speculating or groping for violations in a Serbonian bog of ambiguous behavior," precisely the "death knell" for statutes struck down in other cases.[38]

Similarly, in *City of Milwaukee v. Wilson*,[39] another statute prohibiting loitering for prostitution was upheld. The ordinance specified several circumstances to be considered by law enforcement officials to determine whether the requisite purpose is manifested to support an arrest.[40] The statute provided: "The violator's conduct must be such as to demonstrate a *specific intent* to induce, entice, solicit or procure another to commit an act of prostitution."[41] This specific intent requirement coupled with the statute's prohibition of a limited kind of loitering cured the statute of vagueness and constitutional infirmity The threat of arbitrary or capricious enforcement was quelled because overt conduct manifesting an unlawful purpose as well as intent to further that purpose are required and cannot be properly applied to innocent, protected activity[42] These cases and others[43] set the stage for more

36. 378 N.E.2d 1032 (N.Y. 1978).
37. *Id.* at 466.
38. *Id.*
39. 291 N.W.2d 452 (Wis. 1980).
40. *Id.* at 457.
41. *Id.* (emphasis added).
42. *Id.*
43. *See* City of Cleveland v. Howard, 532 N.E.2d 1325 (Ohio Mun. 1987) (prostitution ordinance upheld as neither vague nor overbroad); Seattle v. Slack, 784 P.2d 494 (Wash. 1989) (prostitution loitering ordinance that identified intent requirement held constitutional);

recent enactments addressing another threat to society's well-being — drug dealing.

C. Prohibitions Aimed at Drug Trafficking

In response to the escalating drug problem in American cities, local governments have attempted to use loitering laws to criminalize drug-related activity occurring on public streets.[44] This type of city ordinance was challenged in *American Civil Liberties Union v. City of Alexandria.*[45] However, this challenge was not based upon the void for vagueness doctrine. Instead, the ordinance was alleged to be constitutionally overbroad.[46] "An ordinance is impermissibly overbroad if it deters constitutionally protected conduct while purporting to criminalize nonprotected activities."[47]

The Alexandria ordinance provided that if a person was observed engaging in conduct described by the ordinance then that person was deemed to have as his or her purpose drug related activity Seven specific circumstances and behaviors were delineated,[48] and proof of all was required for conviction.[49] Unlawful in-

---

Seattle v. Jones, 488 P.2d 750 (Wash. 1971) (predecessor to ordinance in *Slack* held constitutional).

44. *See* City of Akron v. Holley, 557 N.E.2d 861 (Ohio Mun. 1989) where the court noted at length the drug problem in the City of Akron:

> Since mid-summer of 1988, illegal drug use in Akron has increased to an alarming level, and the number of drug-related arrests has skyrocketed. To date, most of the increase is caused by the influx of crack cocaine. The level of other crime has also increased, particularly violent crime. Much of this increase is believed to be drug related. So-called drug houses have sprung up all over Akron, especially in the older neighborhoods. The number of drug houses is reported to be in the hundreds, and the number is constantly changing. The presence of drug houses not only causes illegal drug trade but also other crime. The very existence of some residential areas is threatened. The ordinance is a reaction to this crisis.

Id. at 863. It can be reasonably assumed that all of the drug loitering statutes that have been enacted are in response to similar concerns.

45. 747 F. Supp. 324 (E.D. Va. 1990).

46. *Id.* at 325.

47. *Id.* at 326 (citation omitted).

48. Those seven circumstances are: "(1) the person is in the same general location for at least 15 minutes; (2) while in the same general location and in a public place, the person has two or more face-to-face contacts with other individuals; and (3) each of such contacts (a) is with one or more different individuals, (b) lasts no more than two minutes, (c) involves actions or movements by the person consistent with an exchange of money or other small objects, (d) involves actions or movements by the person consistent with an effort to conceal an object appearing to be or to have been exchanged, and (e) terminates shortly after the completion of the same apparent exchange." *Id.* at 325.

49. *Id.* at 328.

tent could be inferred from the occurrence of these enumerated circumstances.[50] Since innocent behavior[51] could fall within the described conduct and were brought within the sweep of the ordinance, it was declared unconstitutional.[52]

A similar drug loitering ordinance was upheld as constitutional in *City of Tacoma v. Luvene*.[53] The ordinance was attacked on both vagueness and overbreadth grounds. It was alleged that the ordinance "identifies the actus reus of the prohibited conduct in terms of constitutionally protected conduct" and was thus overbroad.[54] The ordinance was also alleged to be vague because no overt act in addition to loitering was identified and therefore the ordinance would not adequately apprise the public of the prohibited conduct.[55]

Specifically, the statute provides that "[i]t is unlawful for any person to loiter on or near any thoroughfare, place open to the public, or near any public or private place in a manner and under circumstances manifesting the purpose to engage in drug-related activity contrary to any of the provisions [of the Revised Code of Washington]."[56] The ordinance further provides that ten circumstances may be considered to determine if the "purpose" to engage in drug related activity is manifested.[57]

---

50. *Id.*

51. The court noted several such innocent behaviors, including "speaking in a public place for 15 minutes, shaking hands, and exchanging small objects such as business cards or phone numbers on small pieces of paper. Enforcement of the ordinance may result in the conviction of individuals for distributing campaign literature, approaching persons to sign petitions, collecting organizational dues, soliciting community support, and directing voters to the polls." *Id.* at 328.

52. *Id.* at 329. Many cases discussed earlier in this Comment in which the statutes or ordinances were challenged under the void for vagueness doctrine were also challenged on overbreadth grounds. The overbreadth challenges, however, were not determinative of the outcomes in those cases.

53. 827 P.2d 1374 (Wash. 1992).

54. *Id.* at 1381.

55. *Id.*

56. *Id.* at 1379.

57. *Id.* The ten circumstances are:

> (1) Such person is a known unlawful drug user, possessor, or seller. For purposes of this chapter, a "known unlawful drug user, possessor, or seller" is a person who has, within the knowledge of the arresting officer, been convicted in any court within this state of any violation involving the use, possession, or sale of any [controlled substance] , or a person who displays physical characteristics of drug intoxication, such as "needle tracks"; or a person who possesses drug paraphernalia as defined [in the Tacoma Municipal Code];
>
> (2) Such person is currently subject to an order prohibiting his/her pres-

In upholding the ordinance, the Washington Supreme Court noted that an ordinance prohibiting loitering may survive a challenge on overbreadth grounds if the ordinance requires the specific intent to engage in the prohibited act.[58] Moreover, the court stated that an ordinance will be constitutional if, in addition to loitering, the police observe conduct consistent with the intent to engage in the unlawful activity.[59] The court read the ordinance's requirement of "manifesting" to require some overt conduct while loitering in order to establish the requisite intent.[60] By requiring both specific intent and overt acts, the ordinance did not reach into the "arena of constitutionally protected First Amendment conduct" and thus was held not to be overbroad.[61]

The Washington Supreme Court also held that the ordinance was not unconstitutionally vague. The court interpreted the ordinance as requiring conduct beyond mere loitering; i.e., conduct which must be done for the purpose of engaging in drug-related activity.[62] Consequently, the court found the statute provides fair warning of the conduct prohibited to persons reading the statute

---

ence in a high drug activity geographic area;

(3) Such person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is then engaged in an unlawful drug-related activity, including by way of example only, such person acting as a "look-out";

(4) Such person is physically identified by the officer as a member of a "gang," or association which has as its purpose illegal drug activity;

(5) Such person transfers small objects or packages for currency in a furtive fashion;

(6) Such person takes flight upon the appearance of a police officer;

(7) Such person manifestly endeavors to conceal himself or herself or any object which could reasonably be involved in an unlawful drug-related activity;

(8) The area involved is by public repute known to be an area of unlawful drug use and trafficking;

(9) The premises involved are known to have been reported to law enforcement as a place suspected of drug activity pursuant to [the Revised Code of Washington];

(10) Any vehicle involved is registered to a known unlawful drug user, possessor, or seller, or a person for whom there is an outstanding warrant for a crime involving drug-related activity.

Id. at 1379 n.2.

58. *Id.* at 1383.

59. *Id.*

60. *Id.*

61. *Id.* at 1384.

62. *Id.* at 1385.

and the cases interpreting the statute.[63] The court also rejected the argument that the statute lacked standards to guide enforcement of its terms. The court stated that the requirement of a showing of intent coupled with the overt act requirement precludes subjective enforcement.[64]

While both the Alexandria ordinance and the Tacoma ordinance required a showing of intent and specific conduct demonstrating a purpose to engage in illegal drug-related activity, the Alexandria law was struck down and the Tacoma law upheld. This seemingly anomalous result can be understood by examining the conduct described in the ordinances as manifesting the purpose to engage in drug-related activity The Alexandria ordinance described conduct from which intent was derived. However, it was possible for persons who lacked any unlawful intent to engage in the described conduct and be subjected to criminal penalties for engaging in constitutionally protected activities.[65] Conversely, the Tacoma ordinance enumerated behaviors from which intent could be inferred in such a way that constitutionally protected conduct would not be implicated.

These cases dealing with general loitering laws or laws aimed at the eradication of specific behavior on the public streets establish the standards by which any new legislation must be judged. The laws must (1) apprise the public of the specific conduct that is prohibited such that a person of ordinary intelligence may behave accordingly; (2) establish minimum guidelines to govern the enforcement of the law such that it may not be enforced in an arbitrary or erratic manner; and (3) define the prohibited conduct in sufficiently specific terms to ensure that constitutionally protected conduct is not brought within its sweep.[66] As state and local governments continue in their attempts to ensure their residents' safety, they must comply with the strict constitutional requirements discussed above or their attempts must fail.

III. THE CHICAGO CITY ORDINANCE

A. Preamble

In enacting its new ordinance, the City Council of Chicago

63. *Id.*
64. *Id.*
65. *See supra* note 52 and accompanying text.
66. *See supra* notes 11-23 and accompanying text.

made several legislative findings indicative of the Council's purpose and objectives.[67] Specifically, the Council found that Chicago's murder rate and rate of violent and drug related crimes have been increasing, a phenomenon experienced by many other U.S. cities. The Council further found that the increase in criminal street gang activity has been largely responsible for the situation and that the law abiding citizens of Chicago have been intimidated by the presence of street gang members in public places.

Street gangs establish control over identifiable areas of the City by loitering in those areas, intimidating others from entering such areas. Further, the Council stated that gang members avoid arrest by committing no offense punishable under existing law, but maintain control over identifiable areas by continued loitering; this loitering creates a justifiable fear for the safety of persons and property because of the violent activity often associated with criminal street gangs. The City has a legitimate interest in discouraging all persons from loitering with criminal gang members. As a consequence, the Council resolved to take the aggressive action necessary "to preserve the City's streets and other public places so that the public may use such places without fear."[68]

B. Municipal Code of Chicago, Section 8-4-015, as Amended

The ordinance provides:

> (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.
>
> (b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
>
> (c) As used in this Section:
>
> (1) "Loiter" means to remain in any one place with no apparent purpose.
>
> (2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons,

67. Chicago, Illinois, Substitute Ordinance (amending Municipal Code of Chicago by adding new Section 8-4-015) (June 17, 1992) [hereinafter *Substitute Ordinance*].

68. *Id.* at 2.

whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity

(3) "Criminal gang activity" means the commission, attempted commission, or solicitation of the following offenses, provided that the offenses are committed by two or more persons, or by an individual at the direction of, or in association with, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.][69]

(4) "Pattern of criminal gang activity" means two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other and at least one such act occurred after the effective date of this Section.

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

(d) Any person who violates this Section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months, or both.

In addition to or instead of the above penalties, any person who violates this section may be required to per-

69. The Ordinance goes on to list as the applicable offenses: murder; drug induced homicide; kidnapping; forcible detention; aggravated assault-discharging firearm; aggravated burglary; heinous battery; aggravated battery with a firearm; aggravated battery of a child; aggravated battery of a senior citizen; intimidation; compelling organization membership of persons; home invasion; aggravated criminal sexual assault; robbery; armed robbery; burglary; residential burglary; criminal fortification of a residence or building; arson; aggravated arson; possession of explosives or explosive or incendiary devices; unlawful use of weapons; unlawful use or possession of weapons by felons or persons in the custody of the Department of Correctional Facilities; aggravated discharge of a firearm; mob action-violence; bribery; armed violence; manufacture or delivery of cannabis, cannabis trafficking, calculated criminal cannabis conspiracy and related offenses; illegal manufacture or delivery of a controlled substance, controlled substance trafficking, calculated criminal drug conspiracy and related offenses. *Id.* at 3-4.

form up to 120 hours of community service "[70]

IV. ANALYSIS

A. Reasonable Exercise of Police Power?

As the United States Supreme Court has recognized, a "city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct."[71] States have the right to exercise police powers in order to protect the health and safety of their citizens and the morals of the community.[72] Accordingly, the existence of loitering and vagrancy statutes is commonly justified based on the threat of future criminality to the public well-being.[73]

So long as legislation has a real and substantial relation to the ends sought to be achieved and is not "arbitrary, discriminatory, capricious or unreasonable," it will not infringe upon the Constitution.[74] However, where such legislation places restrictions on individual freedom of action as an exercise of police power, those restrictions must be reasonably related to the public good to be upheld as constitutional.[75]

Based on the legislative findings of the City Council set forth in the Chicago Ordinance's preamble, it is apparent that the Council is addressing a matter of grave concern to it and the citizens of Chicago. The Council stated that "intimidation by gang members who gather in public places has made many residents virtual prisoners in their own homes."[76] Indeed, the life of the community is threatened when groups such as gangs and drug dealers dominate the streets for their illegal purposes.[77] Moreover, while people have a constitutional right to associate with others,[78] including the

---

70. Section 2 of the *Substitute Ordinance* amends the Municipal Code of Chicago to provide for a stronger curfew ordinance and a more effective means of enforcement of those provisions. This portion of the Ordinance has been omitted, as it is beyond the scope of this Comment.

71. Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

72. *See supra* notes 8-10 and accompanying text.

73. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

74. City of Akron v. Holley, 557 N.E.2d 861, 863 (Ohio Mun. 1989) *citing* Kelley v. Johnson, 425 U.S. 238 (1976).

75. People v. Pagnotta, 253 N.E.2d 202, 205 (N.Y. 1969) (citation omitted).

76. Martha Middleton, *Gang Law Will Meet Court Test*, NAT'L L.J., July 20, 1992, at 3, 40.

77. *Id.*

78. This right is protected by the First and Fourteenth Amendments to the United States Constitution. *See* City of Akron v. Holley, 557 N.E.2d 861, 866 (Ohio Mun. 1989).

right to assemble in public, no individual or group of individuals has a constitutional right to assemble on public property for illegal activity.[79] Thus, it would appear that Chicago's prohibition against gang members loitering on public streets is reasonably related to the ends of furthering public safety and protecting the community.

B. Void for Vagueness?

The vagueness doctrine requires that the Ordinance both provide notice to the public of the prohibited conduct and establish minimum guidelines to guard against arbitrary enforcement of its terms.[80] Moreover, since this Ordinance is aimed at loitering, an activity held to be constitutionally protected by the United States Supreme Court,[81] the law must pass a more stringent vagueness test because of the threat that a constitutionally protected activity may be inhibited.[82]

Applying the first prong of the vagueness test — the notice requirement — the Ordinance must meet the ordinary intelligence test. It must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[83] The Chicago Ordinance prohibits loitering by criminal street gang members with one or more other persons in any public place.[84]

This prohibition alone would be insufficient to notify even the narrowly defined class of "criminal street gang members"[85] of the conduct prohibited. Because loitering is defined in the Ordinance as "[remaining] in any one place with no apparent purpose," such behavior still falls within the definition of protected conduct set forth by the Supreme Court.[86] In addition, the prohibition alone is inadequate to notify a person who may unknowingly loiter with a gang member that his or her conduct is prohibited.

However, these infirmities may be overcome by the Ordinance's addition of the dispersement requirement. Before any person can be deemed to have violated the Ordinance, that person must in fact have been observed loitering with a criminal street gang and thereafter refuse to obey the order of the observing po-

79. *Id.*
80. *See supra* notes 11-14 and accompanying text.
81. *See supra* notes 19-23 and accompanying text.
82. *See supra* note 14 and accompanying text.
83. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (citation omitted).
84. *See supra* note 70 and accompanying text.
85. *Id.*
86. *Papachristou*, 405 U.S. at 163-65.

lice officer to disperse.[87] With this additional requirement, the Ordinance no longer prohibits mere loitering; rather, it prohibits loitering *plus* some additional act. Because of the overt act requirement — refusal to disperse — the public is adequately informed of the prohibited conduct. Mere loitering is insufficient to establish a violation. Additionally, disobedience of a police order is required.

This dispersement requirement also serves to cure the Ordinance of the vagueness of the term "known gang member." The Ordinance permits the police to order dispersement of persons loitering with an individual the officer "reasonably believes to be a criminal street gang member."[88] The determination of whether a loiterer is a criminal street gang member under this standard is obviously left to the subjective judgment of the police officer.[89] "It is a long-accepted principle that the mere status of an individual cannot be made criminal."[90] If the officer's subjective belief regarding the status of the individual were enough to establish a violation of this criminal ordinance, the ordinance would surely fail for vagueness. There would be no way to ascertain to whom the ordinance would apply because the standard is at best unclear.

Nevertheless, the Ordinance in fact should not fail for vagueness because more than the officer's subjective determination is required to establish a violation. The alleged gang member and others observed loitering must refuse to disperse, which, as discussed above, is an overt act that must occur prior to arrest. The dispersement requirement also serves as a means by which persons who may not themselves be gang members, but who loiter with another who may be a gang member unbeknownst to them, may avoid criminal punishment. By dispersing upon order, that person avoids any adverse consequences whether or not he or she knew the other loiterer was a gang member. Therefore, the Ordinance passes the first prong of the vagueness test by defining in precise terms the conduct that is prohibited.

Additionally, the dispersement requirement arguably brings the Ordinance within the second prong of the vagueness test which requires the establishment of standards sufficient to prevent ad hoc

87. *See supra* note 70 and accompanying text.

88. *Id.*

89. Whether such a subjective judgment may have a discriminatory effect on particular racial or ethnic groups is beyond the scope of this analysis.

90. City of Akron v. Holley, 557 N.E.2d 861, 864 (Ohio Mun. 1989) *citing* Robinson v. California, 370 U.S. 660 (1962).

or arbitrary enforcement.[91] This second prong requires that the Ordinance establish minimum guidelines by which law enforcement officials can determine whether and when a violation has occurred. The purpose of these guidelines is to guard against subjective and arbitrary enforcement of the Ordinance at the whim of police or other prosecuting officials.

Were the Chicago Ordinance merely to prohibit "loitering for no apparent purpose," the determination of whether an individual had manifested any "purpose" would be left strictly to the subjective judgment of the law enforcement official. As previously discussed,[92] this problem has been overcome in many loitering statutes by the requirement that prior to arrest, an individual manifest a particular purpose or specific intent to engage in criminal activity in order to establish a violation. In many cases, this purpose or intent has been inferred from the observance of several behaviors enumerated in the particular statute or ordinance.

The Chicago Ordinance, however, does not follow this pattern. Instead of requiring the observance of several overt acts from which intent may be inferred, this Ordinance requires one specific overt act to establish a violation. Specifically, the persons observed loitering with a known gang member will be ordered to disperse by police. It is only if and when these persons refuse to obey the police order that they will have violated the Ordinance.

Since loitering itself is an overt act,[93] the police will be able to observe this behavior if it occurs once their order to disperse has been made. Therefore, because overt behavior must be observed in order to establish a violation following a police order to disperse, this Ordinance will not be subject to arbitrary enforcement based upon the subjective judgment of the enforcement officials. Until refusal to disperse has been manifested by continued loitering, no violation has occurred, and no one may be arrested under the Ordinance.

C. Unconstitutionally Overbroad?

The Ordinance will be constitutionally void if it prohibits constitutionally protected activity While loitering generally is protected conduct, the loitering described and prohibited by the Chicago

91. *See supra* notes 11-14 and accompanying text.
92. *See supra* notes 41-43 and accompanying text.
93. City of Cleveland v. Howard, 532 N.E.2d 1325, 1330 (Ohio Mun. 1987).

Ordinance is of a narrow class. Only loitering by or with a known gang member is prohibited. Given the City Council's findings regarding the dangers and intimidation caused by criminal street gangs,[94] the prohibition of loitering by these persons is reasonable in light of the ends sought to be achieved.

While gang members and persons who may loiter with them in public do indeed have the rights of assembly and association as does any other citizen, "no individual or group of individuals has a right to gather for an illegal activity."[95] The Chicago Ordinance defines criminal street gangs as having criminal activity as one of their substantial activities.[96] It is reasonable, therefore, for the City Council to believe that loitering by or with gang members on public streets may constitute the use of public property for the furtherance of gang activity

However, neither a person's status nor his or her "propensity" to commit crime may be the proper basis for arresting a person observed loitering.[97] An ordinance that "effectively transforms into criminal behavior ordinary conduct of individuals on the basis of status is patently unconstitutional."[98] The status of a loiterer as a gang member, however, is not the element upon which a violation of the ordinance turns. The individual's status makes reasonable the requirement that the loiterers disperse, but the refusal to disperse is the actual violation.

Moreover, the statute provides an affirmative defense to an alleged violation of the Ordinance where no person observed loitering is in fact a member of a criminal street gang. In the event a police officer mistakenly, or even willfully, arrests a person for loitering who was not loitering with a criminal gang member, that person could not be punished. Such an arrest "would not be a proper application of the ordinance, and the fact that a law may be improperly applied or even abused does not render it constitutionally invalid."[99] When properly applied, the Chicago Ordinance does not bring within its sweep constitutionally protected conduct — it merely prohibits loitering activity to the extent necessary to achieve the City's legitimate and reasonable objectives of reducing crime

94. *See supra* note 67 and accompanying text.
95. City of Akron v. Holley, 557 N.E.2d 861 (Ohio Mun. 1989).
96. *See supra* note 70 and accompanying text.
97. Farber v. Rochford, 407 F. Supp. 529, 534 (N.D. Ill. 1975).
98. *Id.* at 535.
99. City of Milwaukee v. Wilson, 291 N.W.2d 452, 458 (Wis. 1980).

and ensuring the continued viability of its neighborhoods.

IV CONCLUSION

The Chicago gang loitering ordinance represents a novel approach to the growing crime and violence of America's inner cities. The ability to prohibit conduct before any criminal activity has taken place has been sought by the enactment of numerous loitering laws in the past. Strong constitutional protections, however, have thwarted the efforts of cities and states to attain such power.

While the Chicago Ordinance will no doubt soon be challenged in the courts as an unconstitutional infringement on individuals' rights, the Ordinance should not fail for constitutional vagueness or overbreadth. If the Ordinance is nevertheless struck down, perhaps we as Americans should begin to ask ourselves if the protection of individual constitutional rights should at some point be subordinated to the protection of our cities and communities. For if the communities we call "home" are destroyed, the America that the Constitution is meant to protect and preserve may well cease to exist.

LISA A. KAINEC