Antiquated Procedures or Bedrock Rights: A Response to Professors Meares and Kahan The Right to a Fair Trial

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Over the opposition of most of the African American Aldermen who voted on the issue, the Chicago City Council enacted an “anti-gang” loitering ordinance in 1992. In subsequent litigation, the Illinois Appellate Court and the Illinois Supreme Court both ruled unanimously that the ordinance’s sweeping, ill-defined terms rendered it void for vagueness. The United States Supreme Court now has granted certiorari to review the Illinois Supreme Court’s decision invalidating the ordinance.

Tracey Meares and Dan Kahan contend that the ordinance is sufficiently clear and that the Illinois courts should have deferred to the judgments that prevailed in the political arena. They say that “residents of poor, minority neighborhoods favor Chicago’s gang loitering ordinance,” and they excoriate judges for “[i]gnoring the reality of this support.” Yet they never offer any evidence to justify their frequently repeated claim that this “reality” exists. The truth is that the anti-loitering ordinance was

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‡ Julius Kreeger Professor of Law and Director of the Center for Studies in Criminal Justice, University of Chicago Law School. We are grateful for discussions with Michael Dawson and Gerald Rosenberg and for the research assistance of C. Ben Foster and Ethan Heinz. After this article was written, Professor Schulhofer, together with Professors Randall Kennedy and Randolph Stone, filed a brief amici curiae in the United States Supreme Court, opposing the Chicago ordinance on behalf of the Chicago Alliance for Neighborhood Safety, US Representative Jesse Jackson, Jr., the Black Leadership Forum, local Chicago chapters of the NAACP, and other Chicago community organizations. Brief amici curiae in Support of Respondents, Chicago v Morales, 118 S Ct 1510 (1998) (No 97-1121).
1 See notes 20–22, 25–29 and accompanying text.
3 Chicago v Youkhana, 660 NE2d 34 (Ill App 1995); Chicago v Morales, 687 NE2d 53 (Ill 1997), cert granted, 118 S Ct 1510 (1998).
4 118 S Ct 1510 (1998).
6 Id at 211.
7 Id at 199.
8 See id at 199 (referring to “innovative community policing measures these [inner-city] citizens desire”); id at 198–99 (“curfews, loitering laws, loitering with intent, order maintenance policing . . . each enjoys high levels of support among members of minority communities”); id at 210 (“residents of the inner city prefer relatively mild gang-loitering
intensely controversial, that no one view can be attributed to "residents of the inner city" or to "the [minority] community," and that to the extent one can identify any predominant view, Chicago's anti-loitering ordinance was opposed by the very groups that Meares and Kahan identify as its principal supporters.

Similar flaws affect Meares and Kahan's account of the determinative legal issues. They simply do not discuss the serious defects that led the Illinois courts to hold the ordinance unconstitutional. The case they build for the ordinance seems plausible only because their discussion omits many crucial facts. On virtually every essential point, the picture they paint is incorrect or seriously misleading.

In Part I of this article, we describe the origins of the Chicago ordinance and African American opposition to it. In Part II, we address Meares and Kahan's bold but unsupported and unsupported claim that minority interests were adequately protected by the political process. In Part III, we discuss the ordinance itself and the vague provisions that led the Illinois courts to hold the law invalid under the due process clause.

Like Meares and Kahan, we believe that there are larger issues in this debate, and we turn to those issues in Part IV. The most important of these issues is not, as they claim, the need for an "updated conception of rights." It is instead the need for citizens and courts to be on guard against the appealing but highly manipulable rhetoric of "community," a rhetoric that is increasingly prevalent in contemporary discourse. It is easy to appreciate the attractions of a sense of place, shared values, and neighborhood empowerment — the aspirations that communitarian arguments compellingly evoke. But before we agree with Meares and Kahan "not to second guess the [inner-city] community's determination that [anti-loitering] measures enhance rather than detract from liberty," we must, at a minimum, be sure that this "community" exists and that it holds the views attributed to it.

At the intersection of politics, crime, police discretion, and race lie problems of enormous complexity and explosiveness. Any
responsible treatment of the issues demands research and careful discussion, not beguiling nostrums and rosy but unexamined assumptions. Meares and Kahan’s analysis of the Chicago anti-loitering ordinance demonstrates the dangers of their approach. Far from serving the needs of the disadvantaged, the concept of community can, in the wrong hands, become another weapon for perpetuating the disempowerment and discrimination that continue to haunt urban America.

I. THE POLITICAL ANATOMY OF CHICAGO'S ANTI-LOITERING ORDINANCE

Concerned by the increasing presence of gangs like the “Spanish Cobras” in their neighborhoods, the Northwest Neighborhood Federation, a community group based in a predominantly white section of Chicago, formed an Anti-Gang Task Force. Starting in early 1991, the group spent over a year researching and negotiating with city officials about anti-gang legislation. Two northwest side Council members, Aldermen Bialczak and Banks, “worked hand-in-hand with [the Federation’s] research committee to develop [the] ordinance” proposed to the City Council. Their wards, the 30th and 36th, were respectively 78 percent and 85 percent white.

In an effort to portray the anti-loitering ordinance as a measure welcomed by minority communities, Meares and Kahan assert that the ordinance originated with Chicago's African American residents. They write, “In response to voluminous citizen complaints . . . Alderman William Beavers, the representative of a predominantly black ward . . . sought to introduce [the] ordinance . . . in 1992.” This account is inaccurate. Beavers, as chair of the relevant City Council committee, forwarded the draft ordinance to the full Council after his committee held hearings on it in the spring of 1992. The proposal had been introduced six months earlier, mainly by white Aldermen with the support of the mayor and his administration.

As reported by the Chicago Tribune, the “measure [was] first proposed by Alderman William Banks (36th) [who is white] last

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13 Id at 31.
year [in 1991].” 16 Another Tribune news story provided additional detail:

The proposed [anti-loitering ordinance and a proposed curfew ordinance] were submitted to the City Council by four pro-[Daley] administration aldermen: Michael Wojcik (35th), William Banks (36th), and Carole Bialczak (30th), all from the [predominantly white] Northwest Side, and Lemuel Austin (34th) [a Black alderman] of the Far South Side . . . . Wojcik . . . drew up the two draft ordinances with the help of the [predominantly white] Northwest Neighborhood Federation community organization and the city law department . . . . 17

A later Tribune account described the ordinance as “drawn up by several white aldermen and enthusiastically endorsed by Mayor Richard Daley.” 18 In sum, white Aldermen and their constituents took the lead in initiating the anti-loitering proposal, with strong backing and drafting assistance from the Daley administration.

Once proposed, the ordinance drew support from some minority residents, many of them frustrated by the lack of adequate police protection in their neighborhoods. 19 Meares and Kahan stress minority-group support for the anti-loitering ordinance and make no mention of African American opposition to it. Yet the reaction in much of the black community was emphatically negative. 20 The Chicago chapter of the NAACP denounced the pro-

18 Robert Davis, New police arrest power lights City Council fuse, Chi Trib A1 (June 18, 1992).
19 That problem led to the underenforcement of existing laws. At the hearings on the proposed ordinance, Chicago Police Deputy Superintendent Gerald Cooper testified that “there are already enough laws on the books at this point, criminal laws, criminal penalties which are much different than the ones that are articulated in the ordinance . . . . In the examples that people have been giving, . . . 90 percent of those instances are actually criminal offenses where people, in fact, can be arrested.” Chicago City Council, Transcript of Proceedings at 181–182 (cited in note 12). On the common phenomenon of underenforcement in the black community of laws intended to promote security and public order, see Randall Kennedy, Race, Crime and the Law 76–135 (Pantheon 1997).
20 No pollster has counted, but for every D'Ivory Gordon, the resident of Chicago's 7th Ward quoted at the outset of the Meares and Kahan article, there may have been one or more Joan Suglish's. Suglish, a 54-year-old who raised six children in an inner-city neighborhood, declared, “When kids reach a certain age they hang around on street corners. I sure wouldn't like my children taken to a police station for hanging around.” Kevin Johnson, Chicago's new gang ordinance creates concern, USA Today 5A (July 8, 1992) (also quoting critical comments by several other inner-city residents including a 20-
City Council debate on the ordinance was intense and racially divisive. A Chicago Sun-Times headline noted that the Aldermen were "[bitterly s]plit." The Tribune described the proceedings as "one of the most heated and emotional council debates in recent memory." African American Aldermen opposed to the ordinance said it was "drafted to protect the downtown area and the white community at the expense of innocent blacks" and that under the ordinance "[y]ou're guilty until proven innocent." One African American alderman, a former police officer, warned that the law would be "ineffective and subject to potential police abuse." Some of the black Aldermen expressed their concerns in highly emotional terms. One said, "What did Hitler do to the Jews? The same thing." Another denounced the law as "anti-American and anti-African American — the Willie Horton of Chicago" and argued that the ordinance would "restrict the movement of young blacks in a manner similar to the pass laws of South Africa [under Apartheid]."

African American concerns about the ordinance carried weight with thoughtful mainstream spokesmen. Both of the city's leading newspapers, the Tribune and the Sun-Times, condemned the proposal. The Tribune acknowledged that "Chicago residents . . . feel trapped in their homes because of the fear of gang violence" but noted "genuine concern that the ordinance would invite police abuses." It concluded that "if [residents] expect that this new ordinance will make their streets safe, they are bound to be disappointed . . . ." The Sun-Times was more em-
phatic, comparing City Council supporters of the ordinance to "the likes of George III and the tyrants of Beijing" and concluding that "[t]he proposed city ordinance to ban loitering by 'known gang members' is too vague, too unworkable and, above all, too unconstitutional." 32

In the final vote, the ordinance passed by a wide margin, thirty-one to eleven. 33 As Meares and Kahan note, some African American aldermen did support it. Six (out of a total of eighteen) voted in favor. But Meares and Kahan do not mention that eight African American aldermen voted no. 34 The claim that "residents of poor, minority neighborhoods favor Chicago's gang loitering ordinance" 35 is oversimplified and misleading. 36

33 The racial identity of the opponents is noted in Fran Spielman, Anti-Gang Law Won't Be Abused, City Says, Chi Sun Times 10 (June 19, 1992). Among the thirty-one Aldermen who voted yes, the African Americans were Toni Preckwinkle, William M. Beavers, Lorraine L. Dixon, Ed H. Smith, Carrie M. Austin and Percy Z. Giles. Among the four black Aldermen who did not vote, at least one, Allan Streeter, was a vocal opponent of the proposal. See note 28 and accompanying text.
34 Meares and Kahan, 1998 U Chi Legal F at 211 (cited in note 5).
35 A recent but more ambiguous measure of African American views is a vote in May 1998 on a City Council resolution asking the United States Supreme Court to uphold the ordinance. The resolution passed by a vote of twenty-five to eight, and Aldermen representing predominantly African American wards split eight to five in favor of the resolution. Official Journal of Proceedings, City of Chicago 70134-35 (May 20, 1998). If one were to accord this vote the same weight as the original vote to approve the ordinance, the political situation would pose a puzzling problem under Meares and Kahan's demand "not to second guess the [minority] community's determination ... ." Meares and Kahan, 1998 U Chi Legal F at 210 (cited in note 5). Their approach might require courts to rule that an ordinance, unconstitutional when initially adopted, became valid when resolutions of support or public opinion polls registered the necessary degree of approval. But the validity of the ordinance could then be thrown into question whenever resolutions of opposition or public opinion polls revealed a reversal in prevailing sentiment in the relevant community.

These complexities aside, the significance of the May 1998 resolution is unclear. It was presented, apparently without notice or debate, when Alderman Banks "moved to Suspend the Rules Temporarily for ... immediate consideration," Official Journal of Proceedings, City of Chicago 70134, at a time when more than a third of the Council members (seventeen Aldermen) were either absent or unwilling to vote. The support from eight African American Aldermen was significant but less than a majority; nineteen African American Aldermen serve on the 1998 City Council. The political situation can best be described as one of substantial dissensus among African American voters. To date the ordinance has never commanded the support of a majority of the African American Council members.

In a further effort to demonstrate public support for the ordinance, Mayor Daley launched a campaign to collect signatures on petitions asking the Supreme Court to uphold the constitutionality of the ordinance. See City seeks support for anti-gang law, Chi Trib 5 (May 9, 1998). As of July 16, 1998, more than 14,000 people had signed the petitions. Andrew Martin, Daley defends gang-loitering crackdown, Chi Trib 3 (July 16, 1998). The City is presumably continuing to accumulate additional signatures. In light of the active efforts of City officials to collect such signatures, public support at this level is
II. RACE, POLITICS, AND THE POLICE

Like Meares and Kahan’s account of the adoption of the anti-loitering ordinance, their broader claim of racial progress in American politics paints an overly optimistic and fundamentally misleading picture. The authors note that America now has more registered black voters, more black officials, and more black police officers than it did in the 1960s. As they observe, some of our greatest cities — New York, Los Angeles, and Chicago among them — once had black mayors. Meares and Kahan contend that “given the political strength of African Americans,” courts “should relax their individualist distrust of community judgments.” There is now, they say, “a compelling reason not to second-guess” the results of the political process.

These claims are too simple, as Chicago’s recent political history makes clear. Harold Washington, the only African American ever to win popular election as Mayor of Chicago, gained office in 1983 after a split in the Democratic Party machine produced a three-way race in both the Democratic primary and the general election. Washington served most of his tenure without controlling the City Council, where twenty-nine of the fifty seats were firmly in the hands of anti-Washington (predominantly white) Aldermen led by Edward Vrdolyak. The resulting “Council Wars” prompted the Chicago Tribune to protest the “paralysis” gripping city government and the Wall Street Journal to describe Chicago as “Beirut on the Lake.” Mayor Washington was unable to gain passage for his budget; the Vrdolyak faction voted it down and enacted their own instead. After three years of chaos, a 1986 federal-court redistricting order and a new aldermanic...
election produced a 25-25 split in the City Council.\textsuperscript{44} With his right to cast the tie-breaking vote, Washington finally gained fragile control. He died in office eighteen months later, and control of Chicago's city government soon returned to the predominantly white faction within the city's Democratic Party.\textsuperscript{45} The notion that the election of a black mayor can be taken as signaling the end of racism in urban politics is too sanguine.

The same sort of complexities exist elsewhere. Despite increases in black voter registration in the South and despite dramatic increases in the number of black elected officials, there is no basis for assuming that the days of institutional racism are behind us.

Meares and Kahan appear to argue that because matters were considerably worse in the past, close judicial scrutiny of legislation aimed primarily at minority neighborhoods is no longer needed. This is an obvious nonsequitur. The fact (if it is a fact) that matters were worse in the past hardly suggests that all serious problems have evaporated. Indeed, it is not even clear that blacks have more political power today than they did in the 1960s. University of Chicago political scientist Michael Dawson notes that the black community was a crucial constituency for the Democratic Party in the 1960s and 1970s. More recently, however, "[t]he successful distancing from African Americans by the Clinton campaign [and other Democrats] was considered an essential component of their success."\textsuperscript{46} As a result of the "shift to the right and the marginalization of African Americans," Dawson concludes that recent developments "have disrupted black political aspirations and weakened black power since the end of the civil rights and black power eras."\textsuperscript{47}

Even if African Americans were as fully represented in the political process as the rest of us, they would remain a "discrete and insular minority" in most American jurisdictions. Accordingly, they would remain the potential victims of majority imposition and discrimination. Contrary to Meares and Kahan's suggestion, eliminating the disenfranchisement of a political minority does not diminish the need for other safeguards. Voting rights and civil liberties are not fungible. Even more than the white majority, African Americans need both.

\textsuperscript{44} Id at 189.
\textsuperscript{45} Id at 197.
\textsuperscript{47} Id at 457, 460 (emphasis added).
Meares and Kahan's observation that black representation in the United States House of Representatives increased from 3 percent prior to 1973 to 9 percent in 1991 underscores this point: blacks remain underrepresented politically, and even full political representation would not end their potential vulnerability to oppressive legislation. Nine percent is substantially short of proportional representation, and even 14 percent — the proportional number — would be substantially short of a majority. That is why Newt Gingrich, not Maxine Waters, is Speaker of the House, and why the political gains of racial minorities do not diminish the need for judicial review of legislation targeted at minority neighborhoods.

The Meares and Kahan discussion of racist police behavior rests on another nonsequitur. By stressing how bad things were in the past and remaining silent about the abuses that persist, Kahan and Meares persuade themselves that judicial vigilance can be reduced. But police racism cannot be dismissed as a relic of the past.

Recent news stories have described the gleeful racist boasts of Mark Fuhrman in his taped conversations with a screen writer and the serious injury inflicted by the New York City police officers who sodomized a black man with the handle of a toilet plunger in the backroom of a stationhouse. Our newspapers have reported police scandals in Philadelphia and other cities in which officers have planted evidence and committed perjury in cases involving African American suspects. Americans have witnessed on videotape the police beating of Rodney King and have heard on audiotape a participant's enthusiastic, racist description of the incident. A state-court jury's failure to convict the participants in the King beating triggered "the bloodiest, most
destructive American riot in the twentieth century.\footnote{Kennedy, Race, Crime and the Law at 118 (cited in note 19).} The jury's action and the ensuing loss of fifty-eight lives came a little more than one month before the enactment of Chicago's anti-loitering ordinance.

Despite some progress in hiring and promoting black police officers,\footnote{African Americans, who comprise 39 percent of Chicago's population, City of Chicago, Population by Race at 24 (cited in note 14), constitute 26 percent of Chicago's sworn police officers, 17 percent of its sergeants and 11 percent of its lieutenants. Chicago Police Department Operational Report, Sworn Members by Race and Title (July 24, 1998).} study after study confirms that abuses of police discretion, especially in dealing with African Americans, remain with us. The Christopher Commission, formed to investigate the Los Angeles Police Department's responsibility for the Rodney King affair, reported in 1992 that "the problem of excessive force [was] aggravated by racism,"\footnote{Kennedy, Race, Crime and the Law at 120 (cited in note 19) (quoting the Christopher Commission).} and that "racial contempt for blacks (and other colored people) . . . clearly infused the organizational culture of the LAPD."\footnote{Id (summarizing the findings of the Christopher Commission).} In a May 1998 editorial, the New York Times opined, "The weakness of the New York City Police Department's internal system for investigating and punishing misconduct by police officers is an established fact."\footnote{Editorial, Slow Response on Police Misconduct, NY Times A24 (May 12, 1998).} Two leading police experts, Hubert Williams and Patrick Murphy, have warned:

[Al]though the police are better prepared to deal with residents of the inner city than they were 20 years ago, they are far from having totally bridged the chasm that has separated them from minorities — especially blacks — for over 200 years. There are still too few black officers, at all levels. Racism still persists within contemporary police departments.\footnote{Hubert Williams and Patrick V. Murphy, The Evolving Strategy of Police: A Minority View, in No. 13 Perspectives on Policing 12 (US Dept of Justice, Natl Inst of Justice Jan 1999).}

Former New York City Police Commissioner William Bratton observes, "As police leadership has accepted responsibility for reducing crime and fear, so too must it accept responsibility for dealing with racism, brutality, and inappropriate attitudes in the ranks. The first step is to admit there is a problem.\footnote{William Bratton, Turnaround 312 (Random House 1998). Bratton is a noted champion of community policing, as is James Q. Wilson. Wilson recently observed:} The

\footnote{\textsuperscript{52} Kennedy, Race, Crime and the Law at 118 (cited in note 19).} \footnote{\textsuperscript{53} African Americans, who comprise 39 percent of Chicago's population, City of Chicago, Population by Race at 24 (cited in note 14), constitute 26 percent of Chicago's sworn police officers, 17 percent of its sergeants and 11 percent of its lieutenants. Chicago Police Department Operational Report, Sworn Members by Race and Title (July 24, 1998).} \footnote{\textsuperscript{54} Kennedy, Race, Crime and the Law at 120 (cited in note 19) (quoting the Christopher Commission).} \footnote{\textsuperscript{55} Id (summarizing the findings of the Christopher Commission).} \footnote{\textsuperscript{56} Editorial, Slow Response on Police Misconduct, NY Times A24 (May 12, 1998).} \footnote{\textsuperscript{57} Hubert Williams and Patrick V. Murphy, The Evolving Strategy of Police: A Minority View, in No. 13 Perspectives on Policing 12 (US Dept of Justice, Natl Inst of Justice Jan 1999).} \footnote{\textsuperscript{58} William Bratton, Turnaround 312 (Random House 1998). Bratton is a noted champion of community policing, as is James Q. Wilson. Wilson recently observed:}
Meares-Kahan thesis — that legal safeguards should be relaxed because things were even worse thirty years ago — is illogical and misinformed.

Chicago residents who live with crime on a daily basis want and deserve effective protection from gang intimidation and violence. But they have the right to insist that law enforcement make use of laws that are reasonably specific and well-targeted, not blank-check ordinances that grant sweeping, ill-defined powers to the police. Despite their broad demands for deference to the will of "the community," Meares and Kahan ultimately agree that law enforcement measures must satisfy a constitutional requirement of guided discretion. This requirement in fact has always limited the power of the police. In the end their only complaint is that they think the Chicago ordinance satisfies this requirement, while the Illinois courts ruled that it does not. Strangely, Meares and Kahan fail to discuss the terms of the ordinance that led the Illinois courts to hold it unconstitutional.

III. THE VAGUENESS OF THE ORDINANCE

Chicago's anti-loitering ordinance is riddled with ambiguous directives and unhelpful, open-ended definitions. It defines loitering as the act of "remain[ing] in one place with no apparent purpose;" it provides that whenever an officer observes loitering by a group of two or more individuals, any one of whom she reasonably believes to be a gang member, she can order the entire group to "disperse and remove themselves from the area." 69

The problems of interpretation are numerous: When is a purpose "apparent"? Does any purpose, if apparent, render the ordinance inapplicable — even a criminal purpose? If so, how does the ordinance help to restrict gang activity? If not, what principles determine which apparent purposes count? And what does it mean to "disperse?" How large is the "area" that a person ordered to disperse must leave? May this person ever come back?

We are at mid-stream in our efforts to produce a society in which whites and blacks can live together decently well. Such a transformation is still decades away, and in this time there will be more riots, more suspicion, and more political manipulation. The vast gains that African Americans have made . . . coexist with a deep layer of anger, distrust, and confusion . . . . In the troubled meantime, it would be useful to remind ourselves that . . . electoral politics often brings out the worst in us.


If so, when and with whom? Can one be punished for unknowing proximity to a gang member? Kahan and Meares discuss none of these issues. *Papachristou v Jacksonville*⁶⁰ and a host of other Supreme Court precedents make clear that a law framed in open-ended terms of this sort is void for vagueness.

A. *Papachristou* in Perspective

For more than seventy years, the Supreme Court has insisted that "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited."⁶¹ In addition, the Court has required that offenses be defined "in a manner that does not encourage arbitrary and discriminatory enforcement."⁶² *Papachristou v Jacksonville,*⁶³ a straightforward application of these principles, unanimously held void for vagueness a city ordinance that punished, among others, all "persons wandering or strolling around from place to place without any lawful purpose."⁶⁴

Meares and Kahan maintain that the Court's decision in *Papachristou* manifested the Burger Court's "community distrust" and "discretion skepticism."⁶⁵ They write, "Each of these principles . . . was clearly aimed at counteracting the distorting influence of institutionalized racism on America's criminal justice system."⁶⁶ At the time that *Papachristou* was decided, they say, "institutionalized racism fully justified the Court's suspicion of democratic politics."⁶⁷ Indeed, "[g]iven the nature of the problems that then confronted African Americans . . . the conception of rights embodied in *Papachristou* deserves admiration."⁶⁸ They conclude, however, that "the law at issue in that case, as well as the political and social dynamics of the time, do not map well onto

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⁶⁰ 405 US 156 (1972).
⁶² Kolender, 461 US at 357.
⁶⁴ Id at 157 n 1.
⁶⁶ Id. Although the Court's opinion did not refer to the distorting influence of institutionalized racism on America's criminal justice system, Meares and Kahan infer that this racism was the Court's target because the Court mentioned that vague loitering ordinance can be used to discriminate against groups that have incurred the displeasure of the police and because Justice Douglas, the author of the *Papachristou* opinion, mentioned in a 1960 law review article that people arrested for loitering and vagrancy often were members of disempowered minority groups. See id at 202.
⁶⁷ Id at 205.
⁶⁸ Id at 206.
the contemporary circumstances against which [the cases invalidating Chicago's gang loitering ordinance] were decided. The authors declare, "Papachristou's conception of rights is wrong for the nineties." They even suggest, astonishingly, that the Illinois courts should not have followed the Supreme Court's decision: These "courts should have upheld the gang loitering ordinance whether or not it satisfied Papachristou's demand for hyperprecision."

Meares and Kahan's characterization of Papachristou as demanding "hyper-precision" and requiring "relentless judicial second-guessing" is puzzling. Far from demanding "hyper-precision," Papachristou merely invalidated a municipal ordinance whose language, Meares and Kahan themselves tell us, "could easily be applied to any person, in any situation, at any time, by any police officer."

Papachristou, moreover, did not invent the "void for vagueness" doctrine, and the purpose of this doctrine was not to combat institutionalized racism or black political disempowerment. Long before 1972 — in 1926 in fact — the Supreme Court held that "a statute which either forbids or requires the doing of an act in

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60 Meares and Kahan, 1998 U Chi Legal F at 206 (cited in note 5).
61 Id at 207.
62 Id at 211.
63 Id at 205, 211.
64 Meares and Kahan, U Chi Legal F at 206 (cited in note 5). Meares and Kahan assert that the ordinance invalidated in Papachristou and the Chicago anti-loitering ordinance are clearly different. Id. We disagree. In Papachristou the Supreme Court condemned Jacksonville's prohibition of "wandering or strolling around from place to place without any lawful purpose or object." The Court remarked, "The qualification 'without any lawful purpose or object' may be a trap for innocent acts." Papachristou, 405 US at 164. The Chicago ordinance declares, "'Loiter' means to remain in any one place with no apparent purpose." Municipal Code of Chicago, § 8-4-015(c)(1). Remaining in one place is as harmless as wandering, and the qualification "with no apparent purpose" is even more vague and even more clearly a potential "trap for innocent acts" than the qualification "without any lawful purpose." See Part III C. One commentator concludes that the Chicago ordinance's "definition of loitering . . . does not adequately restrict the Ordinance's scope. Specifically, this language appears indistinguishable from the language of the Papachristou ordinance . . . ." Comment, Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws, 83 Cal L Rev 379, 409–10 (1995).

Kahan and Meares offer two distinctions. First, they say, all police officers could enforce the Jacksonville ordinance while only some officers were authorized to enforce the Chicago ordinance. Second, they argue that police guidelines limit the reach of the Chicago ordinance. Restricting the number of officers who can enforce an ordinance, however, neither enhances the ability of citizens to know what is proscribed nor limits the discretion of the officers authorized to enforce it. Being subjected to the whim of only some police officers may not greatly improve the quality of life, especially when the authorized officers are plentiful. Kahan and Meares emphasize the police guidelines but fail to mention that the guidelines do not limit or clarify the ordinance's concept of "loitering" at all. The guidelines are concerned entirely with other issues.
terms so vague that men of common intelligence must necessarily
guess at its meaning and differ as to its application, violates the
first essential of due process of law. And in 1939, in Lanzetta v New Jersey, the Court applied this doctrine to strike down an
anti-gang statute in circumstances having nothing whatever to do
with racial oppression or political disenfranchisement. The Illi-
nois Supreme Court relied on Lanzetta as much as on Papachris-
tou when it held the Chicago ordinance invalid.

B. Unhelpful Guidelines

To support their claim that the Chicago ordinance is not
egregiously vague, Meares and Kahan point to Chicago Police
Department regulations that ostensibly limited the circum-
stances in which the ordinance would be enforced. Referring to
the decision in which the Illinois Supreme Court held the ordi-
nance invalid, they report, "The Morales court was [ ] dismissive
of the Chicago Police Department's efforts to guide the discretion
of enforcing officers, ignoring the promulgated regulations com-
pletely in the analysis of the ordinance's constitutionality."

Meares and Kahan do not accurately describe the decision
they disparage. Far from "ignoring the promulgated regulations
completely," the Morales court concluded, first, that the police
had not followed the guidelines and, second, that even if they
had, the guidelines would not have remedied the vagueness of the
ordinance. The court noted that, while the ordinance requires a
police officer's reasonable belief that one person in a group of loi-
terers is a gang member, the regulations declare, "[M]embership
may not be established solely because an individual is wearing
clothing available for sale to the general public." The officer
who arrested the defendant Jesus Morales testified, however,
that his only reason for concluding that Morales was a gang
member was that the suspect wore black and blue, colors which
the officer associated with the Gangster Disciples gang.

The Illinois Supreme Court also stressed a more important

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14 Connally v General Construction Co, 269 US 385, 391 (1926). See also United States v Reese, 92 US 214, 221 (1875) ("It 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.").
16 Meares and Kahan do not discuss whether, under their theory, Lanzetta, Connally, Kolender and other Supreme Court "void for vagueness" decisions are outdated.
19 City of Chicago v Morales, 687 NE2d 53, 64 n 1 (Ill 1997).
reason for the insufficiency of the guidelines. It noted that “the general police order . . . does absolutely nothing to cure the imprecisions of the definition of the ‘loitering’ element of the crime.” The regulations were concerned only with identifying (a) the neighborhoods in which the ordinance would be enforced, (b) what officers would enforce it, (c) what groups would be treated as gangs, and (d) what individuals would be treated as gang members. The Illinois Supreme Court held the anti-loitering ordinance unconstitutional, however, because its concept of loitering was incomprehensible. The police guidelines did nothing to remedy this defect.

C. Imperceptible Purposes and Undecipherable Law

In Papachristou, the Supreme Court noted two reasons for the constitutional requirement that criminal law be comprehensible. It said, “This ordinance is void for vagueness, both in the sense that it ‘fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,’ . . . and because it encourages arbitrary and erratic arrests and convictions.” The loitering provisions of the Chicago ordinance fall far short of satisfying either goal of the due process requirement.

Under the ordinance, a person may be ordered to disperse (and arrested if she fails to comply) whenever she is “loitering” with a person whom a police officer reasonably believes to be a gang member. The ordinance declares, “Loiter[ing]’ means to remain in any one place with no apparent purpose.” One commentator notes that when statutes define loitering in terms of the absence of a proper purpose, they “have consistently been found unconstitutional.”

Youths standing on a streetcorner to plot crimes, sell drugs, hassle women, bully men, drink whiskey, discuss the Chicago Bulls, exchange witticisms, bond with one another, philosophize about life, view the passing scene, panhandle, recite poetry, learn

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80 Id at 64.
81 Meares and Kahan declare that the anti-loitering ordinance “was implemented through regulations that clearly defined . . . ‘loitering’ . . . .” Meares and Kahan, 1998 U Chi Legal F at 211 (cited in note 5). This statement is incorrect. The regulations contain no language purporting to clarify or define the term “loitering.” They are concerned with other issues exclusively.
83 Municipal Code of Chicago, § 8-4-015(c)(1).
84 Comment, 88 Cal L Rev at 400 (cited in note 73).
where the action is, shoot craps, breakdance, break windows, catch a bus, escape the heat of a tenement, assist the elderly, or praise Mayor Daley all have their purposes. Their purposes may or may not be apparent. When the purposes of people on the streetcorner are apparent, they sometimes include disrupting a neighborhood and dealing drugs. People with these apparent purposes presumably are close to the top of the list of people the Chicago City Council would like the police to disperse. The Council, however, enacted an ordinance that, taken literally, denies the police the power to disperse them. No one in public with an “apparent purpose,” however dreadful this purpose may be, is in violation of the ordinance. Under the ordinance, however, people with harmless or noble purposes who fail to make these purposes apparent can be ordered to disperse (and arrested if they fail to comply) whenever they are knowingly or unknowingly in the company of a reputed gang member.

For example, when a reputed gang member sits on a lengthy park bench, he may be joined by a jogger taking a rest and then in turn by a person waiting for a taxi, a social science researcher from the University of Chicago, a reporter for the Chicago Tribune, a United States Supreme Court Justice, and a teacher who has come to plead with the reputed gang member to return to school. Under the ordinance, a police officer who comes upon the scene and cannot discern the purpose of anyone on the bench (but who recognizes the suspected gang member) may order them all to leave. The officer then may arrest the bench-sitters if they refuse to comply or if they return to the park too soon. A judge may sentence each of the people on the bench to six months in jail.

Of course the Chicago anti-loitering ordinance was not meant to be, and never would be, taken so literally. When this ordinance is not taken literally, however, its audiences — both the consumers and the enforcers of law — cannot know what it means. And when police officers cannot know what a loitering ordinance means, they are likely to tailor its contents to the exigencies of the moment as they see them. The “law in action” then may be what the City Council probably wanted it to be. In the anti-loitering ordinance, the Council effectively awarded the police a hassling licence with teeth. As the Illinois Supreme Court

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85 We realize that this part of our hypothetical is unrealistic.
86 Meares and Kahan say that “those who object to the gang loitering ordinance . . . are mistaken when they argue that the ordinance broadens police discretion.” Meares and Kahan, U Chi Legal F at 213 (cited in note 5). They quote Debra Livingston (who was quoting Jerry Mashaw) for the proposition that “[e]limination of discretion at one choice
noted, the ordinance was "drafted in an intentionally vague manner so that persons who are undesirable in the eyes of police and prosecutors can be convicted even though they are not chargeable with any particular offense."7

Under the Chicago ordinance, a police officer must direct a person to disperse before arresting her, and the officer's order may provide a kind of personalized notice prior to arrest. Nevertheless, an order that leaves at large both the boundaries of the area a person must vacate and the circumstances under which she may return is itself too vague to support the imposition of criminal punishment. As we will explain in greater detail, rather than provide fair warning, the order to disperse can easily become an unfair trap set by the police.

Moreover, the police order obviously provides no notice prior to the order itself. An order to leave the sidewalk burdens constitutional rights and withdraws one of the ordinary comforts of life, and the imposition of this constraint requires notice and standards. In *Shuttlesworth v Birmingham*,8 the Supreme Court considered an ordinance that made it "unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on."9 The Court observed that, if this ordinance meant what it appeared to say, it would be clearly unconstitutional. In the Court's words, an ordinance that allows a person to "stand on a public sidewalk . . . only at the whim of any police officer" is unconstitutional.10 The Court upheld the ordinance only because local courts had limited its application to people who impeded the passage of others.11 Similarly, in *Coates v Cincinnati*,12 the Court declared an ordinance unconstitutionally vague "because it subjects the exercise of the right of

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point merely causes the discretion that had been exercised there to migrate elsewhere in the system." Id at 214 (quoting Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum L Rev 551, 593 (1997)).

Although we recognize the often hydraulic character of discretion in the criminal justice system, we doubt that efforts at legislative precision are futile. If Meares and Kahan's bottom line is simply that discretion will migrate and cops will be cops, they ought to urge abandonment of the vagueness doctrine and of all law purporting to restrict the police. Their own recommendations of "guided discretion" and police regulations would seem to be doomed.

67 *Morales*, 687 NE2d at 64.
68 382 US 87 (1965).
67 Id at 88.
60 Id at 90.
91 Id at 91. The Chicago gang loitering ordinance has not been given, and is not susceptible to, the construction that saved the ordinance in *Shuttlesworth*.
assembly to an unascertainable standard.  

The Illinois Appellate Court found the anti-loitering ordinance overbroad and invalid under the First Amendment as well as unconstitutionally vague and invalid under the Due Process Clause. A gang member's mother has a constitutional right to speak to him in public, urging him to reconsider his wayward conduct and its harmful effect on family members and others. In Chicago, however, unless the mother's purpose is "apparent," she can be ordered not to do it. This illustration is only one of countless situations in which people have a right to speak to or assemble in public with people whom they know to be gang members.

Under the Chicago ordinance, moreover, people can be ordered off a sidewalk even when they have no reason to know that they are in the company of a gang member. The ordinance provides, "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." The Illinois Supreme Court observed that "[a]n individual standing on a street corner with a group of people has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang," and the Illinois Appellate Court declared that ordering non-gang members to disperse simply because they are unknowingly in the presence of a gang member "smacks of a police-state tactic and clearly violates the first amendment rights of the innocent persons."

The ordinance's declaration that one may not stand near a reputed gang member even unknowingly may not be vague, but this prohibition is constitutionally defective for the same reason that vague criminal prohibitions are. Under the ordinance, a person has no way of conforming her behavior to the requirements of law and no way of knowing whether a police order to

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93 Id at 614. The ordinance made it illegal for "three or more persons to assemble [in public and] . . . conduct themselves in a manner annoying to persons passing by . . . ." Id at 611.
95 Municipal Code of Chicago, § 8-4-015(a) (emphasis added).
96 Morales, 687 NE2d at 62.
97 Youkhan, 660 NE2d at 38. Meares and Kahan quote the court's reference to "a police state tactic" without revealing the aspect of the ordinance that prompted the use of this strong language. Perhaps they consider the language hyperbolic, but they neither respond to nor acknowledge the court's first amendment concerns. See Meares and Kahan, 1998 U Chi Legal F at 201 (cited in note 5).
disperse is valid. As a commentator on the Chicago ordinance observed, “Laws cannot constitutionally require people to have psychic powers . . .”

D. The Relocation Trap

The ordinance’s broadest grant of discretion to police officers does not arise from its incomprehensible definition of loitering or its prohibition of even unknowing proximity to a reputed gang member. It lies in the almost unfettered power of an arresting officer to determine whether a suspect has adequately complied with a police order to disperse.

People could usually avoid liability under traditional anti-loitering laws simply by “moving along.” Not so under Chicago’s ordinance, which permits the police to order loiterers to do something more — “disperse and remove themselves from the area.” The ordinance adds, “Any person who does not promptly obey such an order is in violation of this section.” None of the crucial terms — “disperse,” “the area,” and “obey” — is defined by the ordinance or addressed in any police department regulation. In practice, these terms have proven exceptionally elastic.

The Chicago Sun-Times, citing Police Department statistics, noted that during the period between enactment of the ordinance in 1992 and its invalidation by the Appellate Court in 1995, the ordinance was “used to arrest 41,740 people and disperse 43,457 others.” Although the ordinance was ostensibly enforced only

58 Compare Lambert v California, 355 US 225, 230 (1957) (notice is not provided by a law “written in print too fine to read or in a language foreign to the community”). The Chicago ordinance’s prohibition of unknowing proximity to a person reasonably believed to be a gang member is enforced initially, not by a criminal sanction, but by an order to remove oneself from the area. This police-imposed sanction is not trivial, especially since both the area from which one is banished and the length of the banishment remain unspecified. See Part III D.

59 Note, The Troubled Constitutionality of Antigang Loitering Laws, 69 Chi-Kent L Rev 461, 486–87 (1993). The police guidelines require department officials to maintain a file on suspected gang members but prohibit disclosure of this information to the public. Chicago Police Department, General Order No 92-4 at §§ III; IIIA. Ironically (albeit for good reason), the guidelines prevent the police from giving the notice that might make compliance with the ordinance possible.

100 See American Law Institute, Model Penal Code and Commentaries, Part II, Comment to §250.6 at 387–90 (1980).

101 Municipal Code of Chicago, § 8-4-015 (a).

102 Id.

103 Michael Gillis and Fran Spielman, City’s Loitering Law Ruled Unconstitutional, Chi Sun-Times 3 (Dec 19, 1995). In a more recent report, the Chicago Police Department put the number of arrests at a slightly higher figure — 42,987. Chicago Police Department, Gang and Narcotic Related Violent Crime, City of Chicago, 1993-1997 at 7 (June 1998).
in “certain areas of police districts with demonstrated gang problems,” one should note that the number of African American males aged fifteen to twenty-four, inclusive, who resided in the entire city of Chicago was 88,053 in 1990. One may note, too, that in 1972, at the time of the Papachristou decision, the total number of vagrancy arrests annually throughout the United States was about 100,000. The Supreme Court apparently cited this figure because, to the Court, the number seemed large. If the ordinance was indeed enforced by only a “small group of officers,” these officers did keep busy.

The large number of loitering arrests may seem surprising partly because the ordinance permits the arrest only of people who fail to obey a police order “to disperse and remove themselves from the area.” One wonders whether tens of thousands of Chicago youth proved so defiant of police authority, so fond of the food at the Cook County Jail, or so dedicated to civil liberties that, rather than obey an order to disperse, they stood their ground and submitted to arrest.

Our conversations with a public defender who represented

105 United States Department of Commerce, Bureau of the Census, 1990 Census of Population: General Population Characteristics for Illinois (CP-1-15) at Table 61 (City of Chicago African American Population - Age Groups). Of course we understand that not everyone arrested for violating the anti-loitering ordinance was black or male or between the ages of fifteen and twenty-four, and we also understand that some people may have been arrested repeatedly. Our purpose is not to determine the percentage of young black men who were arrested for violating the ordinance but simply to gain some rough perspective on the arrest statistics.
107 See Kahan and Meares, 1998 U Chi Legal F at 206 (cited in note 5).
108 There is no reason to believe that only a small group of officers were authorized to enforce the ordinance. Meares and Kahan report, “General Order 92-4, authorized only gang tactical unit officers and other youth officers — those assumed to have the greatest knowledge of Chicago’s criminal street gangs — to enforce the new ordinance.” Id at 200 (emphasis added). These claims are inaccurate, as they overlook critical language in the relevant portion of the order: “Only sworn members of the Gang Crime Section, district tactical units and other personnel designated by an exempt member of the Department may arrest members of criminal street gangs who violate the provisions of Section 8-4-015 of the MCC.” Chicago Police Department, General Order No 92-4 at § III(c) (emphasis added). Lee Carson, a public defender who represented many gang loitering defendants, reports that by at least 1995 every Chicago patrol officer in the districts in which the ordinance was enforced considered herself authorized to make gang loitering arrests. Telephone interview, July 29, 1998. Meares and Kahan present no evidence to support their view that only a “small group” of Chicago police officers was authorized to arrest violators of the ordinance. [Editor’s Note: The University of Chicago Legal Forum does not verify telephone interviews.]
109 One common response of young people to the appearance of the police — flight — would appear to constitute speedy (or perhaps even anticipatory) compliance with an order to disperse.
gang-loitering defendants (Lee Carson)\textsuperscript{110} and a prosecutor who prosecuted them (Abigail Abraham)\textsuperscript{111} suggest a different explanation. Both report that the police usually “shagged” suspected loiterers off streetcorners without difficulty. In other words, accused loiterers promptly obeyed police orders to disperse. Minutes or hours later, however, an officer might observe a person he had previously ordered to leave the area. This person might not be close to the same streetcorner. He might not still be loitering with the same group or with anyone in it. He might even be alone. The officer, however, would arrest this accused loiterer for failing to “obey” the order to “disperse” and “remove himself from the area.”

We do not contend that this police practice violated the ordinance. In most cases, there is no way to tell whether it did or not. We agree with the police that one does not obey an order to leave an area by departing only long enough for the police to disappear, then resuming the same “loitering” activity. The critical question in the enforcement of the anti-loitering ordinance, however, is left unanswered by the ordinance itself: \textit{How much more does it take?}

An order to remove oneself from “the area” presumably is not satisfied just by crossing the street. Equally clearly, the order does not require a loiterer to leave the city. Between these points lies a murky range of possibilities that the ordinance commits to the arresting officer’s discretion. Is a removal of one block sufficient, or does removal require two blocks, five, or ten? Is the order satisfied by going inside — say, at a pool hall open to the public — or must everyone simply go home?

When a group of twelve reputed Disciples is ordered to “disperse,” may no member of the group lawfully remain in the company of any other member? Or may two members of the group proceed together to a McDonalds restaurant a few blocks away?\textsuperscript{112} What if all twelve go to the restaurant?

Similarly, an order to disperse presumably is not satisfied by a one-minute departure, but the order does not banish a loiterer from the street forever. May someone who has been ordered to “remove himself” return a half-hour later to the area from which

\textsuperscript{110} Telephone interviews on June 3 and July 29, 1998.

\textsuperscript{111} Telephone interview on May 21, 1998. Abraham, an Assistant State’s Attorney, prosecuted some gang-loitering defendants in the Juvenile Division of the Cook County Circuit Court. Members of the Corporation Counsel’s Office prosecuted defendants over seventeen years of age in the Municipal Division of the Circuit Court.

\textsuperscript{112} A restaurant appears to qualify as a “public place” under the ordinance. See Municipal Code of the City of Chicago, § 8-4-015(c)(6) (defining “public place” as any “location open to the public, whether publicly or privately owned”).
he was banished? Two hours later? Or twelve?

The ordinance leaves all of these issues to the unguided discretion of arresting police officers. In most cases, moreover, the arresting officer serves in practice as the accused loiterer's final judge and jury. We were unable to determine how many of Chicago's gang-loitering arrests led to either convictions or acquittals. We did, however, seek this information from the office of the Clerk of the Circuit Court of Cook County, the Administrative Office of the Illinois Courts, the office of the Corporation Counsel of the City of Chicago, and the office of the Cook County State's Attorney. Lee Carson, the public defender with whom we spoke, estimated that only about five percent of all loitering arrests led to either guilty pleas or trials; he reported that the overwhelming majority of loitering prosecutions were dismissed. None of the other sources we contacted contradicted Carson's picture of the processing of these cases.

Most of the reasons given for the dismissal of loitering cases by prosecutors seem legitimate.\textsuperscript{1} Mass dismissals nevertheless underscore the fact that, in the administration of Chicago's anti-loitering ordinance (as in the administration of many other public order offenses), the most significant sanctions often are: (1) the arrest itself; (2) the search incident to arrest which may enable the police to charge the suspect with a drug or weapons offense; and (3) the period spent in jail before the suspect appears in court. In the words of the title of a classic study, "the process is

\textsuperscript{1} Many dismissals occurred simply because a substantial majority of the trial judges who considered the issue held Chicago's anti-loitering ordinance unconstitutional. See note 115 and accompanying text. Prosecutors could not influence the assignment of cases to courtrooms, and when loitering cases were assigned to the courtrooms of judges who had held the ordinance invalid, prosecutors had little choice but to dismiss.

In addition, some — but not all — of the judges who upheld the ordinance (or who had not ruled on its constitutionality) imposed a heavy burden of proof on prosecutors. They not only required prosecutors to establish a police officer's reasonable belief that a loiterer was a member of, say, the Gangster Disciples (which often was not easy); they also required prosecutors to establish (in every case) that the Gangster Disciples fit the anti-loitering ordinance's definition of a criminal street gang. Prosecutors were required to demonstrate that the Disciples had three or more members, that members had committed at least two criminal acts of a kind specified in the ordinance, that the members had committed these criminal acts as gang members, that two of the acts had occurred within five years of one another, and that one of the acts had occurred after the effective date of the anti-loitering ordinance. See Municipal Code of Chicago, § 8-4-015(c)(2)-(c)(4). Prosecutors did try to meet these burdens — but only sometimes — and when the proof was unavailable, they dismissed.

When a search incident to an arrest for loitering revealed drugs or weapons, suspects were charged with offenses more serious than loitering, and prosecutors usually saw no reason to pursue the loitering charges.

Finally, some prosecutors in both the Corporation Counsel's Office and the State's Attorney's Office had no personal interest in enforcing the ordinance.
the punishment." The punishers are the police.

Before three justices of the Illinois Appellate Court and seven justices of the Illinois Supreme Court unanimously held the anti-loitering ordinance unconstitutional, twelve judges of the Circuit Court of Cook County, each ruling in a different case, declared the ordinance invalid. Three Circuit Court judges upheld the ordinance in other cases, and one judge held the ordinance constitutional as applied to people whom the police reasonably considered gang members and unconstitutional as applied to others. The two published law review commentaries on the ordinance both conclude that, in the words of one of them, "the Chicago anti-gang loitering ordinance clearly violates the vagueness doctrine."

E. The Sounds of Silence

Although Meares and Kahan repudiate a remarkable consensus of legal opinion, their article does not discuss any of the vagueness or overbreadth issues considered above and emphasized in the judicial opinions they reject. Meares and Kahan simply do not address the constitutionality of ordering people to disperse who are unwittingly in the presence of a gang member, nor do they consider the meaning of "loitering," "no apparent purpose," "disperse," "remove," "the area," and "obey."

Perhaps Meares and Kahan consider these issues prosaic. They hope to lead courts to "a different and updated conception of rights" and "an alternative way of thinking about protecting rights — an approach that takes into account contemporary social and political circumstances."


Comment, 83 Cal L Rev at 384 n 28 (cited in note 73). This comment cites the split decision, *Chicago v Pineda*, No. 94-MC1-390636 (Ill Cir 1994), ten Illinois Circuit Court decisions invalidating the ordinance, and two decisions upholding it. Lee Carson reports that between the completion of the comment and the ruling of the Illinois Appellate Court, six more Circuit Court judges held the ordinance invalid, and one more judge upheld it.

Carson observes that we live at a time when a significant number of elected judges have lost their offices for "soft on crime" votes. He says that, especially in view of Mayor Daley's support for the ordinance, most of the judges who voted to hold it invalid did not enhance their political prospects by doing so. He describes the judges' rulings as a testament to their willingness to follow the law even at some potential personal price. Telephone interviews on June 3 and July 29, 1998.


Id at 198.
We offer a few comments about Meares and Kahan's conception of rights in the section that follows.

IV. A NEW CONCEPT OF RIGHTS OR VANISHING RIGHTS? — THE PLIABLE RHETORIC OF COMMUNITY

Meares and Kahan see the Constitution as a chameleon. They argue that what was unconstitutional in 1972 has become constitutional today and that loitering ordinances that were properly invalidated then should now be upheld. Indeed, judicial views that were “fully justified” only twenty-six years ago and that deserved “admiration” then now reflect “anachronistic and unduly abstract understanding of individual rights.” According to Meares and Kahan, the constitutional rights of 1972 grew out of judicial concern about the institutionalized racism of an era now behind us. Those rights were right for 1972, but they are “wrong for the nineties.”

Meares and Kahan explain, “A 1990s conception of rights should follow two principles: community burden sharing and guided discretion.” Part III of this article indicated the sort of “guided discretion” that Meares and Kahan would provide. Taking Chicago’s anti-loitering ordinance as their paradigm, they would approve vast discretion and provide almost no guidance.

Part II of this article showed that the argument Meares and Kahan offer for abandoning the 1972 (and the 1939 and the 1926) conception of rights rests on a nonsequitur. Whether African Americans have made more than symbolic progress in the political arena since 1972 is debatable. But even if the gains of recent decades are properly characterized as substantial, these gains have left African Americans far short of parity. Anyone who contends that the “institutionalized racism” of American police departments has vanished does not read the newspapers. Any court willing to accept the Meares-Kahan approach presumably would have to afford the parties before it the opportunity to litigate such issues as whether and how much African American political power has increased in the city, county or state in question, and whether and how much systemic racism has diminished. We doubt the institutional capacity of courts to determine and redetermine, case-by-case, the issues that the Meares-Kahan approach would make dispositive.

120 Id at 206.
121 Id at 198.
122 Id at 207.
124 Any court willing to accept the Meares-Kahan approach presumably would have to afford the parties before it the opportunity to litigate such issues as whether and how much African American political power has increased in the city, county or state in question, and whether and how much systemic racism has diminished. We doubt the institutional capacity of courts to determine and redetermine, case-by-case, the issues that the Meares-Kahan approach would make dispositive. See notes 49–58 and accompanying text.
ity would provide no justification for limiting this minority’s civil liberties.

Part I of this article emphasized that the community Meares and Kahan portray as offering to “share the burden” has not agreed to any such thing. Large portions of Chicago’s African American community emphatically opposed the city’s anti-loitering ordinance, and most African American Aldermen did not support it. Even Meares and Kahan’s new conception of rights would not save the ordinance.

In this final section, we view Meares and Kahan’s new conception of rights from a broader perspective. Even in a hypothetical world in which their factual assumptions could be supported, their concept of rights would present insurmountable difficulties.

A. Burden Sharing When the Polity and the Community Correspond

We begin with a situation that the Meares-Kahan conception of rights makes easy: The democratically elected legislature of a city, state, or nation (or, even better, a majority of the citizens of this political unit themselves) unmistakably supports a restriction of rights, and the burdens of this restriction fall more-or-less evenly throughout the jurisdiction.

A 1989 Washington Post-ABC News poll provides an illustration, one that seems as close to full community burden-sharing as any limitation of rights in the real world could. This poll found that 55 percent of 764 adult respondents favored mandatory drug testing for all Americans. Because everyone would share the burden of the mandatory testing and officials would have no discretion, the Kahan-Meares conception of rights makes further analysis unnecessary. The new conception of rights would allow the mandatory drug testing of everyone.

The same poll found that 67 percent of adults favor drug tests for all high school students. This measure would pass the elastic Meares-Kahan burden-sharing test for the same reason they say that gang-loitering ordinances do: Although most high school students are disenfranchised, “it is critical to understand that this minority is by no means despised. . . . [T]eens and even gang members are linked to the majority by strong social and fa-

In 1990, Georgia legislators enacted a statute requiring candidates for public office to take drug tests before being listed on the ballot in future elections. The legislators included themselves in the shared community burden. This statute offered so few benefits in return for its intrusion upon privacy that in 1997 the Supreme Court, with only one justice dissenting, held it unconstitutional. The burden-sharing concept apparently would require the opposite result.

Indeed, majority support for many of the guarantees of the Bill of Rights seems ephemeral, and the Meares-Kahan conception of rights could make many familiar freedoms disappear. The authors' error, however, is apparent: Our Constitution does not permit a majority to limit individual rights simply by offering to share the burden. The "sharing" is inherently unequal whenever some dissenters are unwilling to bear the burden because they value more than others their privacy, their right to speak, or their freedom to stand on a public sidewalk and chat with friends.

B. Burden Sharing When the Relevant Community Is Not Co-extensive With the Formal Political Community

The Meares-Kahan conception of rights would make constitutional law easy in the sort of case just described — one in which a law enacted by a democratic legislature imposes burdens that are shared by nearly all of the people of a city, state, or nation. In most cases, however, constitutional law would become more difficult.

Meares and Kahan do not maintain that the "burden-sharing" requirement is satisfied simply because an ordinance is enacted by a political majority. They see rights from the perspective of groups within political communities. But groups do not come predetermined. Identifying the groups most affected by a restriction of rights, determining the boundaries of these groups, and assessing the views of people within them would be formidable tasks.

For example, Meares and Kahan declare that Chicago's anti-
loitering ordinance had “critical support of the leaders of the highest crime (and mostly minority) wards.”

They offer no explanation for their shift of focus from support by minority groups to support by “high crime” neighborhoods. Which community counts — the minority community or the residents of the highest crime wards? And what procedures should be used to sort through the conflicting preferences held by members of either one of these groups? Meares and Kahan make no reference to the intense disagreements within these communities and provide no evidence to support their claim that the anti-loitering ordinance garnered majority support in either the “high-crime” or the African American wards.

These are the least of the difficulties. Should one speak of the “minority community” without dividing it, or should one speak of Chicago’s Latino community or, more narrowly, of its Mexican-American community? Or should one speak only of particular Mexican-American neighborhoods? If the residents of one Mexican-American neighborhood favor vague loitering ordinances and the residents of another do not, would vague loitering ordinances be constitutional in one neighborhood but not the other? If most of a city’s homeowners favor loitering ordinances but most of its youth do not, would an ambiguous loitering ordinance be enforceable against homeowners but not against juveniles? If the residents of a neighborhood were unanimous in supporting a vague loitering ordinance, would the ordinance be enforceable

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130 The only source cited in support of their claim is an unfootnoted and undocumented opinion piece authored by themselves. For discussion of the available evidence, see note 35. The phrasing of the Meares and Kahan contention about “the highest crime (and mostly minority) wards” is especially puzzling because crime rates are not available by wards. The boundaries of Chicago’s twenty-five police districts do not correspond even roughly to the boundaries of its fifty wards, and we know of no systematic way to determine which are the “highest crime” wards. The effect of the awkward Meares-Kahan phrase is to preserve some link to their discussion of African American opinion, without making a falsifiable claim about the actual level of support among African American aldermen.

Meares and Kahan reiterate their contention in the following sentence: “And in Chicago, while crime rates nationally have been declining steadily over the last decade, they have increased in the city’s highest crime communities — the same communities whose Aldermen promoted the gang loitering ordinance.” Meares and Kahan, 1998 U Chi Legal F at 208–09 & n 58. Again, we cannot determine the communities to which Meares and Kahan refer. The news story they cite to support their assertion of increased crime rates in Chicago’s highest crime communities mentions only a higher homicide rate in one Chicago police district. Of course, even when crime rates are falling, it is not difficult to find a few districts that run counter to the trend. Meares and Kahan do not indicate how many such districts there were, and one example does not suggest any correlation between these districts and Aldermanic support for the anti-loitering ordinance.
against individuals who pass through that neighborhood but live in a part of the city where residents oppose the ordinance? If the courts commissioned public opinion polls to resolve the burden-sharing issues posed by the 1990s concept of rights, would they poll ethnic group by ethnic group, ward by ward, block by block, apartment complex by apartment complex, building by building, floor by floor, or apartment by apartment? "Community-based" approaches of this sort deny our common citizenship.

Race is obviously important, but neither courts nor legal scholars have the right to cast an individual as a member of an "African American group" rather than some other group that this individual might consider more central to her identity. Neither race nor geography fully defines a person's communities. Community identity is likely to depend on varied characteristics in varied combinations — religion, race, ethnicity, residence, wealth, gender, sexual orientation, occupation, physical disability, age, and (especially in Chicago) political party and ward organization. Chicago's communities are in fact innumerable. They include its African American community, its West Side residents, its residents of the Austin neighborhood, its residents of high-crime neighborhoods, its academic community, its teenagers, its Baptists, its homeless, its residents of public housing, its Gangster Disciples, its union members, its lawyers, its elderly, its gays and lesbians, its Irish-Americans, its model train enthusiasts, its ACLU members, its Cubs fans, and on and on.

There is usually no way for outsiders to determine which communities are most affected by a legislative measure, to decide which communities count more than others, to mark the boundaries of informal, unorganized communities, or to assess the dominant sentiment of community members. The concept of community thus provides almost limitless opportunities for creative redefinition and manipulation.\footnote{Meares and Kahan recognize, for example, that Chicago's anti-loitering ordinance was aimed primarily at disenfranchised youths whom many older people regard as troublemakers. They nevertheless contend that the ordinance satisfies the burden-sharing concept because nearly all African Americans have a sense of racial identity or "linked fate" and because even gang members are not "despised" and "are linked to the majority by strong social and familial ties."\footnote{See generally Stephen Holmes, The Anatomy of Antiliberalism (Harvard 1993).}}\footnote{Meares and Kahan, 1998 U Chi Legal F at 210 (cited in note 5). Meares and Kahan, 1998 U Chi Legal F at 210 (cited in note 5).}
Supreme Court erred by “second-guess[ing] the community's determination that such measures enhance rather than detract from liberty.” Yet they offer no evidence that the preferences of Chicago's adult voters reliably mirror the preferences of its youth, and common sense (along with a wealth of data) suggests that among minority males, attitudes toward the police differ dramatically along age lines. If the disenfranchised need be consulted directly only when they are “despised” or when they have no social ties to those who are privileged to vote, political safeguards will be pallid indeed. The next step might be to say if you hate the sin but love the sinner, you can share her burden. The plasticity of Kahan and Meares's communitarian rhetoric is apparent.

CONCLUSION

In 1693, court officials in Philadelphia responded to complaints about the congregating and traveling of blacks without their masters by authorizing the constables and citizens of the city to “take up” any black person seen “gadding abroad” without a pass from his or her master. Of course the order to stop and detain any Negro found on the street did not distinguish between free and enslaved blacks.

Even in 1693, the sentiment that generated Meares and Kahan’s “new conception of rights” was very old. In Papachristou, the Supreme Court traced this sentiment to the English Statutes of Laborers in 1349 and 1350, and it surely was old then. When people become frustrated and impatient, they are tempted to un-
leash governmental power. They may conclude, "The sheriff knows who the troublemakers are. Just let him round them up."

As this article has shown, large numbers of African American citizens and most of Chicago's elected African American Aldermen have resisted this sentiment. Yet our times and those preferences could change. Fortunately, in both 1791 and 1868, the Framers of our Constitution guarded against the old sentiment, "unbridle the sheriff," with an old conception of rights — a concept commonly traced to the Magna Charta of 1215. At the core of this concept, due process, is a requirement of notice and fair warning. By approving it, the Framers made it difficult for all Americans, whatever their races and whatever their communities, to yield to the fears that generated the English Statutes of Laborers, Philadelphia's 1693 prohibition of "gadding abroad" by Negroes, and Chicago's anti-loitering ordinance of 1992. The reason for the Framers' endorsement of an old conception of rights was not their fear of institutionalized racism. It was their dread of tyranny. They enacted a Constitution that guaranteed rights, not to collectivities, but to individuals.

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138 Many of them in fact were slaveowners.