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THE TROUBLED CONSTITUTIONALITY OF ANTIGANG LOITERING LAWS

Joel D. Berg*

INTRODUCTION

Criminal gang activity plagues America's inner cities and suburbs. Every day, newspapers are filled with stories of drive-by shootings, narcotics trafficking, and the growing influence of criminal gangs. Law enforcement agencies are virtually powerless to stop criminal gangs before some crime is committed because most present statutes and ordinances only allow police officers to act after a crime has occurred. As a result, whole communities are terrorized by gun-toting gang members.

Loitering statutes are typical preventive statutes that give the police an opportunity to arrest suspected criminals during the preliminary stages of other, more serious criminal activity. Their preventive

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1. E.g., Don Terry, Chicago Housing Project Basks in a Tense Peace, N.Y. TIMES, Nov. 2, 1992, at A10 (describing the aftermath of the gang-related shooting of a child at a Chicago housing project).
4. E.g., id.
6. See infra text accompanying notes 50-52.
7. E.g., Seven Receive Life Terms in Racketeering Case, N.Y. TIMES, Oct. 3, 1992, at 26 (describing the terror tactics used by criminal gang members).
nature makes loitering statutes a promising means of stemming criminal gang activity. Thus, criminal gang members are thwarted from terrorizing their respective communities and committing violent crimes at will.

However, loitering statutes are fraught with constitutional problems. Thus, they must be carefully drafted to avoid a vast array of constitutional challenges. Nevertheless, the statutes cannot be so watered down as to undermine their preventive purpose.

This Note has several purposes. First, it briefly examines the history of loitering laws. Second, typical constitutional challenges to loitering laws are examined and explained. Finally, Chicago's anti-gang loitering ordinance is scrutinized for constitutional deficiencies, and an alternative, constitutional means of dealing with criminal gang activity will be suggested.

I. History of Anglo-American Loitering Laws

Loitering laws come from early English vagrancy laws. In 1349, the first Statute of Labourers restricted the movement of unemployed, non-landowning people. The Statute was enacted primarily for eco-


10. See infra part II.
11. See infra part I.
12. See infra part II.
13. See infra part III.A.
14. See infra part III.B.

Loitering prohibitions were usually contained within English vagrancy laws because both concepts so substantially overlap. Mark Malone, Note, Homelessness in a Modern Urban Setting, 10 FORDHAM URB. L.J. 749, 758 (1982). That the concepts overlap is rather obvious. Loitering is defined as "stand[ing] idly around; . . . linger[ing] or spend[ing] time idly." BLACK'S LAW DICTIONARY 942 (6th ed. 1990). Vagrancy is defined as "going . . . from place to place by a person without visible means of support, who is idle, and who, though able to work for his or her maintenance, refuses to do so, but lives without labor or on the charity of others." Id. at 1549.

16. Yeamans, supra note 9, at 782. The Statute of Labourers was only "the first 'fully fledged vagrancy statute.'" William Trosch, Comment, The Third Generation of Loitering Laws Goes to Court: Do Laws That Criminalize "Loitering With the Intent to Sell Drugs" Pass Constitutional Muster?, 71 N.C. L. REV. 513, 515-16 (1993) (quoting Peter Archard, Vagrancy—a Literature Review, in VAGRANCY, SOME NEW PERSPECTIVES 11, 17 (Tim Cook ed., 1979)). English vagrancy laws actually date to around 700 A.D. and the reign of the obscure King Ine. Id. at 515. The purpose of those early vagrancy laws was the same as their successors—to prevent laborers from leaving their feudal lords. Id. The penalty was pretty stiff for violating King Ine's vagrancy law: anyone caught running away from their feudal lord was returned to the lord and forced to pay the lord sixty shillings (which, at the time, was the equivalent of sixty cows). Id. at 515 n.26.
onomic reasons: to provide cheap labor for landowners in the aftermath of the Black Plague, thus preventing the collapse of the feudal system.\textsuperscript{17} These goals were accomplished by forcing people to remain employed in fixed areas, working for fixed wages.\textsuperscript{18}

When the feudal system collapsed, vagrancy statutes survived as a means of preventing crime.\textsuperscript{19} The evolved vagrancy laws assumed that the unemployed members of society supported themselves through crime.\textsuperscript{20} To prevent unemployed wanderers from preying on the wealthy, the laws restricted the movements and activities of wanderers who frequented unpopulated roads.\textsuperscript{21} The punishment for violating these laws could be harsh. For example, during the reign of Elizabeth I, facilities were built where able-bodied vagrants were sentenced to hard labor until they found employment or until they were banished from the kingdom.\textsuperscript{22}

The evolution of England's vagrancy laws eventually led to a differentiation between criminal vagrancy and poor-relief vagrancy.\textsuperscript{23} Criminal vagrancy laws were originally aimed at those wanderers and beggars physically capable of working.\textsuperscript{24} However, in 1744 vagrancy crimes were divided into three classes: "idle and disorderly persons, rogues and vagabonds, and incorrigible rogues."\textsuperscript{25} As a result, mere status—such as being poor or unemployed—was no longer illegal; rather, only criminal conduct was punishable.\textsuperscript{26} The 1744 laws are the foundation of current English vagrancy and loitering statutes.\textsuperscript{27}

Vagrancy and loitering laws were quickly enacted upon the settling of the American colonies, and remained in force after the colonies were freed from English rule.\textsuperscript{28} American vagrancy statutes were

\begin{footnotes}
\item[17] Yeamans, supra note 9, at 782.
\item[18] Id.
\item[19] Newsome, 492 F.2d at 1172; Berns, supra note 8, at 718.
\item[20] Newsome, 492 F.2d at 1172; Berns, supra note 8, at 718; Malone, supra note 15, at 754.
\item[21] Newsome, 492 F.2d at 1172; Berns, supra note 8, at 718; Malone, supra note 15, at 754 n.16. This was effectuated primarily through the requirement that the sovereign give written permission before any laborers could travel from their homes. Malone, supra note 15, at 754 n.16.
\item[22] Malone, supra note 15, at 754 n.17.
\item[23] Id.
\item[24] Id. at 754 nn.16-17.
\item[25] Id. at 754 n.17.
\item[26] Id.
\item[27] Id.
\item[28] Yeamans, supra note 9, at 782.
\end{footnotes}
based on their English counterparts and founded on crime prevention theories. These statutes eventually encompassed a wide range of criminal and otherwise undesirable activity, including begging, loitering, public drunkenness, gambling, prostitution, and narcotics trafficking.

The constitutionality of vagrancy and loitering laws remained virtually unchallenged for most of this country's history for two reasons. First, poor defendants could rarely afford legal counsel to prosecute an appeal. And second, the lengthy appeals process was usually barely begun before defendants had finished serving their typically short sentences. These problems disappeared when the United States Supreme Court handed down its decision in *Gideon v. Wainwright*, guaranteeing legal representation for indigent defendants accused of felonies.

Shortly after *Gideon*, the courts began hearing appeals on vagrancy and loitering convictions. State courts soon struck down several vagrancy and loitering laws for various constitutional deficiencies. Eventually a constitutional attack on a vagrancy statute reached the United States Supreme Court.

In *Papachristou v. City of Jacksonville*, the Court agreed to determine the constitutionality of a Jacksonville, Florida, vagrancy ordinance. *Papachristou* was a consolidation of five cases where the

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29. Berns, *supra* note 8, at 718; Malone, *supra* note 15, at 754-56. The original American colonial vagrancy laws actually had two components: crime prevention and poverty relief. Malone, *supra* note 15, at 755 n.18. However, the poverty relief components were more akin to a crude form of welfare than to a form of criminal punishment. *Id.*


31. *Id.*

32. *Id.*

33. *Id.*

34. 372 U.S. 335 (1963). *Gideon* incorporated the Sixth Amendment's right to counsel into the Fourteenth Amendment, thus applying it against the states. This guaranteed legal counsel to any defendants accused of a felony if the defendants couldn't themselves afford legal counsel.

35. Yeamans, *supra* note 9, at 783.

36. *Id.* at 784 n.27.

37. 405 U.S. 156 (1972).

38. The questioned Jacksonville ordinance read as follows:

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 around 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, gambling 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.
various defendants were convicted under the city's vagrancy ordinance of such offenses as prowling by auto, loitering, disorderly loitering, being a common thief, and being a vagabond. The Court unanimously struck down the ordinance as unconstitutionally vague because such a broad prohibition of seemingly innocuous activities didn't provide citizens adequate notice of what conduct was forbidden and didn't sufficiently harness police discretion.

However, Papachristou didn't strike down loitering and vagrancy statutes per se. Rather, the decision only placed clarity requirements on the drafting of those statutes. Of course, state legislatures—being comprised, in substantial part, of lawyers—were quick to note the limited scope of Papachristou, and new loitering ordinances that met the Court's guidelines were quickly enacted. Many of those new statutes have, in turn, been upheld by state appellate courts against constitutional attacks. Thus, properly drafted loitering statutes are still constitutionally enforced to help prevent various crimes, including narcotics trafficking and prostitution.

The Chicago City Council expanded the scope of loitering ordinances by enacting an antigang loitering ordinance to give the police a flexible tool for stemming criminal gang activity. That statute reads as follows:

(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal 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.

Id. at 156-57 n.1 (quoting Jacksonville, Fla., Ordinance Code § 26-57 (1965)).
39. Id. at 158. 40. Id. at 170-71. For a detailed explanation of the void-for-vagueness doctrine, see infra parts II.A.1-3.
41. Papachristou, 405 U.S. at 171.
44. See, e.g., City of Cleveland v. Howard, 532 N.E.2d 1325 (Cleveland (Ohio) Mun. Ct. 1987).
(2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, 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:

The following sections of the Criminal Code of 1961: 9-1 (murder), 9-3.3 (drug-induced homicide), 10-1 (kidnapping), 10-4 (forcible detention), subsection (a)(13) of Section 12-2 (aggravated assault-discharging firearm), 12-4 (aggravated battery), 12-4.1 (heinous battery), 12-4.2 (aggravated battery with a firearm), 12-4.3 (aggravated battery of a child), 12-4.6 (aggravated battery of a senior citizen), 12-6 (intimidation), 12-6.1 (compelling organization membership of persons), 12-11 (home invasion), 12-14 (aggravated criminal sexual assault), 18-1 (robbery), 18-2 (armed robbery), 19-1 (burglary), 19-3 (residential burglary), 19-5 (criminal fortification of a residence or building), 20-1 (arson), 20-1.1 (aggravated arson), 20-2 (possession of explosives or explosive incendiary devices), subsection (a)(6), (a)(7), (a)(9) or (a)(12) of Section 24-1 (unlawful use of weapons), 24-1.1 (unlawful use or possession of weapons by felons or persons in the custody of Department of Corrections facilities), 24-1.2 (aggravated discharge of a firearm), subsection (d) of Section 25-1 (mob action-violence), 33-1 (bribery), 33A-2 (armed violence); Sections 5, 5.1, 7 or 9 of the Cannabis Control Act where the offense is a felony (manufacture or delivery of cannabis, cannabis trafficking, calculated criminal cannabis conspiracy and related offenses); or Sections 401, 401.1, 405, 406.1, 407 or 407.1 of the Illinois Controlled Substances Act (illegal manufacture or delivery of a controlled substance, controlled substance trafficking, calculated criminal drug conspiracy and related offenses).

(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 violated 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 perform up to 120
hours of community service pursuant to Section 1-4-120 of this Code.\textsuperscript{46}

It's clearly desirable to give police officers broad powers to prevent criminal gang activities, and loitering statutes such as the Chicago ordinance are suitable vehicles for granting such powers. However, as will be seen, this ordinance probably cannot survive a constitutional attack.\textsuperscript{47}

II. TYPICAL CONSTITUTIONAL CHALLENGES TO LOITERING STATUTES

"[L]oitering statutes and ordinances are probably the most controversial laws used to prevent crime."\textsuperscript{48} Of course, loitering laws aren't the only preventive statutes enacted by legislatures. Laws against the inchoate offenses of attempt, solicitation, and conspiracy are all valid preventive statutes.\textsuperscript{49} However, the inchoate offenses are only legitimately enforced after some criminal act beyond mere preparation has occurred,\textsuperscript{50} whereas loitering laws rarely require any criminal acts beyond mere preparation before they are legitimately enforced.\textsuperscript{51} Loitering laws thus afford the police, judges, and juries substantial discretion in deciding when a crime has been committed.\textsuperscript{52} Such discretion is quickly abused.\textsuperscript{53}

To stem discretionary abuses, state and federal courts subject loitering laws to various constitutional tests. This Note will examine four constitutional attacks typically leveled against loitering ordinances: vagueness, overbreadth, impermissibly premising arrests on suspicion rather than on probable cause, and impermissibly criminalizing status.

\textsuperscript{46} CHICAGO, ILL., MUN. CODE § 8-4-015.
\textsuperscript{47} See infra part III.A.
\textsuperscript{48} Berns, supra note 8, at 717.
\textsuperscript{49} Id.
\textsuperscript{50} See, e.g., United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114 (1975) (adopting the Model Penal Code's substantial step test to allow conviction for attempt only if the defendant's overt actions constitute a substantial step towards commission of the offense); Commonwealth v. Skipper, 294 A.2d 780 (Pa. Super. Ct. 1972) (allowing conviction for attempt only if the defendant's preparations have progressed beyond the point where the defendant is likely to voluntarily stop short of committing the full crime); cf. Commonwealth v. Peaslee, 59 N.E. 55 (Mass. 1901) (suggesting that some conduct constituting mere preparation may be sufficient for an attempt conviction depending on the proximity of the preparations to the completion of the crime); see also MODEL PENAL CODE § 5.01(2) (1962) (defining circumstances constituting a substantial step).
\textsuperscript{51} See, e.g., CHICAGO, ILL., MUN. CODE § 8-4-015 (1992). The Chicago ordinance doesn't require any act for a violation to occur. Rather, doing nothing is sufficient to trigger an arrest and sustain a conviction. Id. § 8-4-015(c)(1). For a more complete explanation of this, see infra text accompanying notes 193-98.
\textsuperscript{52} Papachristou v. City of Jacksonville, 405 U.S. 156, 167-68 (1972).
\textsuperscript{53} Id. at 170; see also Berns, supra note 8, at 717.
A. Vagueness

1. The Void-for-Vagueness Doctrine

The Fourteenth Amendment’s due process clause requires that state laws and regulations be both sufficiently clear to provide people notice of what the state commands or forbids and provide minimal guidelines to harness the discretion of those who enforce the laws. Laws that fail either requirement are unconstitutional under the void-for-vagueness (or simply vagueness) doctrine.

The notice requirement is fulfilled if the statute gives persons of ordinary intelligence warning of what the state commands or forbids. This foundational principle of due process is premised on the common sensical notion that people shouldn’t be punished for conduct they were not told was prohibited. However, statutes don’t have to meet “impossible standards of clarity” to meet the notice requirement. Rather, notice is adequate if the statute warns that certain areas of conduct may be adjudicated illegal.


56. Grayned, 408 U.S. at 108; Papachristou, 405 U.S. at 162; Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (“All [persons] are entitled to be informed as to what the State commands or forbids.”); Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927) (“[I]t will not do to hold an average man to the peril of an indictment...[where] neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result” of his actions.); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) (“[A] statute...so vague that men of common intelligence must guess at its meaning...violates the first essential of due process.”); Anthony G. Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. PA. L. REV. 67, 68-69 (1960).

57. Kolender, 461 U.S. at 361; see also Hallock, supra note 54, at 1059; Amsterdam, supra note 56, at 68-69.

The Supreme Court has explained the reason for at least some elasticity in certain statutes:

There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. [For example, control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area requiring as it does an on-the-spot assessment of the need to keep order.


This leads to a related dilemma that legislatures face every time they draft statutes. Namely, “draft[ing statutes] with narrow particularity...risk[ing] nullification by easy evasion of the legislative purpose;...draft[ing] with great generality...risk[ing] enshrinement of the innocent in a net designed for others.” LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-31, at 1033 (2d ed. 1988).

Under vagueness analysis, the minimal guidelines requirement enjoys greater prominence than does the notice requirement. There are two primary reasons for the greater emphasis on this prong of the test. First, a lack of minimal guidelines allows those who enforce the laws to encroach upon the legislature's powers to decide basic policy matters. Second, the absence of minimal guidelines enables the police, judges, and juries to arbitrarily and discriminatorily oppress members of minority groups. Thus, statutes must clearly define the offense to provide the police and the courts with a clear standard for determining when violations have occurred.

Justice Holmes somewhat matter-of-factly articulated the consequences of allowing some imprecision in statutory construction. He noted that "the law is full of instances where a man's fate depends on his estimating rightly... to some matter of degree. If his judgement is wrong, not only may he incur a fine or a short imprisonment... he may incur the penalty of death." Nash v. United States, 229 U.S. 373, 377 (1913).

There is another reason why harnessing police and judicial discretion enjoys greater prominence than notice: notice isn't realistically provided by criminal statutes. To the contrary, notice of criminal statutes is accomplished through publication, even though publication to provide notice is only permitted as a last resort in civil cases. Jeffries, supra note 60, at 207. Moreover, criminal statutes are not published in some widely distributed newspaper, which would at least give people a fighting chance of running across the most recent whims of the legislature. No, laws are published in books that are only found in large metropolitan libraries, legal libraries, or law offices. As if this weren't enough, laws are also written by legislators who ignored their English teachers' advice to keep their writing simple so that it may be more easily comprehended. Instead, many laws are incomprehensible to many lawyers; laypersons may just as well try and translate the Dead Sea Scrolls rather than waste their time trying to figure out what the law either commands or forbids. See id. at 207-08.

Long ago, Judge Learned Hand said that "[t]here is something monstrous in commands couched in invented and unfamiliar language; an alien master is worst of all. The language of the law must not be foreign to those who are to obey it." Learned Hand, Speech in Washington, D.C. (May 11, 1929), in THE NEW YORK PUBLIC LIBRARY BOOK OF 20TH-CENTURY AMERICAN QUOTATIONS 293, 293-94 (Stephen Conadio et al. eds., 1992). Let's not fool ourselves: Dan Rostenkowski is probably the only nonlawyer who really knows what the tax laws say, and that's only because he wrote most of them.

There is another problem with notice that undermines its importance in the vagueness analysis. Namely, how can notice be provided where the penal statute may be reinterpreted by the courts after a person has been arrested? See Jeffries, supra note 60, at 207. It's ludicrous to suppose that people can really know their state's and the federal government's statutory laws that occupy shelf after shelf in a law school's library; it's flat out fantasy to presume that people should also be able to guess how the courts will subsequently interpret a statute. Thus, even people who have bothered to memorize all of the criminal laws still have no idea what conduct is forbidden because the courts can change how those laws are interpreted and then punish people for not conforming with the new interpretation. Id. at 207-08.

The justification for this requirement was noted by the Supreme Court more than a century ago:

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
Because different statutes are subjected to different specificity requirements, the courts look at several factors when examining statutes for sufficient minimal guidelines. First, the statute’s nature prescribes different levels of judicial scrutiny. For example, civil statutes and economic regulations are held to a lesser standard of specificity than are criminal statutes. The justification for this distinction is evident: the loss of liberty typically associated with violating criminal statutes is both qualitatively and quantitatively more severe than the monetary losses associated with other types of statutes. Second, a statute’s scope may demand greater specificity. For example, statutes that, due to their vagueness, infringe on constitutionally protected freedoms are more closely scrutinized than statutes that broadly define classes of conduct that can be constitutionally regulated.

2. Loitering Laws and the Notice Requirement

The vagueness doctrine requires loitering statutes to give people adequate notice of what the state forbids. The ordinance in Papachristou v. City of Jacksonville did not provide adequate notice because it broadly proscribed innocuous activities—such as nightwalk-

rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. United States v. Reese, 92 U.S. 214, 221 (1875).

This leads to yet another justification for vagueness doctrine that is often overlooked, or at least not baldly stated, namely, that vagueness doctrine preserves the separation of powers. Separation of powers recognizes that the province of the legislature is to make the laws; the province of the executive branch, roughly, is to enforce those laws; and the province of the judiciary is to interpret the laws and settle legal disputes. Vague laws place the lawmaking authority in the hands of the judiciary, thus allowing the courts to perform a function that is only properly performed by the people’s elected officials—the legislature. However, this argument doesn’t really hold water because the courts don’t actually create entire laws when they interpret vague statutes. Rather, they are merely being given too much latitude in interpreting what the legislature desired. See Jeffries, supra note 60, at 202-03.

Of course, separation of powers still plays a role in how courts operate. First, the courts cannot read and apply legislation in a manner completely at odds with the plain meaning of the statute’s words, or in a manner that is clearly contrary to the legislature’s intent. Id. at 205. Second, “in confronting statutory ambiguity, courts should ordinarily avoid large-scale innovation.” Id. However, separation of powers isn’t much of an issue “in ordinary cases of small-scale ambiguity . . . .” Id. Nor is separation of powers really an issue in cases of vague statutes where the legislature, through vague language, has decided to confer greater interpretive latitude upon the courts. Id.

64. Id. at 498.
65. Id. at 498-99.
66. See, e.g., Smith v. California, 361 U.S. 147, 150-51 (1959) (setting a stricter standard for statutes that, due to their vagueness, have a potentially chilling effect on First Amendment liberties to ensure protection of the free dissemination of ideas).
67. See Amsterdam, supra note 56, at 75-76.
ing and loafing—that people wouldn't even suspect were illegal. 69
Thus, the ordinance was unconstitutionally vague. 70

In other cases, loitering laws have been upheld against vagueness attacks. In State v. Evans, 71 a North Carolina appellate court upheld the state's antiprostitution loitering statute in the face of a vagueness attack. 72 The North Carolina statute criminalized loitering with the intent to engage in prostitution. 73 Under the statute, a violation consisted of, first, engaging in at least one of three types of specific conduct indicative of soliciting prostitution and, second, having the intent to solicit prostitution. 74 The three types of illicit conduct and the intent requirement were all clearly enumerated within the statute. 75 Thus, the court said that the statute afforded sufficient notice because "[p]ersons of ordinary intelligence would readily understand what illegal conduct was prohibited . . . ." 76

3. Loitering Laws and the Minimal Guidelines Requirement

In Papachristou v. City of Jacksonville, the Court held the Jacksonville vagrancy ordinance unconstitutionally vague, in part, because it failed to establish minimal guidelines to harness law enforcement discretion. 77 The all-inclusive nature of the Jacksonville ordinance

69. Id. at 163.

The United States District Court for the Eastern District of Pennsylvania clearly summarized the most basic problem with outlawing common, innocuous activities. That court noted that "[i]f 'loafing' were a criminal activity . . . one could expect that all the good citizens in that community would at some time or other become defendants in a criminal action." Waters v. McGuriman, 656 F. Supp. 923, 927 (E.D. Pa. 1987). Additionally, "Luis Munoz-Martin, former Governor of Puerto Rico, commented once that 'loafing' was a national virtue in his commonwealth and that it should be encouraged." Papachristou, 405 U.S. at 163.

70. Papachristou, 450 U.S. at 171.
72. Id. at 306.
73. Id. at 306 n.1. The statute in question read as follows:
   (a) For the purposes of this section, "public place" means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility, or the doorways and entrance ways to any building which fronts any of those places, or a motor vehicle in or on any of those places.
   (b) If a person remains or wanders about in a public place and (1) repeatedly beckons to, stops, or attempts to stop passers-by, or repeatedly attempts to engage passers-by in conversation; or (2) repeatedly stops or attempts to stop motor vehicles; or (3) repeatedly interferes with the free passage of other persons for the purpose of [engaging in prostitution or committing a crime against nature as defined by other statutes], that person is guilty of a misdemeanor and, upon conviction, shall be punished as for a violation of [engaging in prostitution].
Id. (emphasis added).
74. Id.
75. See id.
76. Id.
77. 405 U.S. at 170-71.
permitted and encouraged the police and the courts to arbitrarily and
discriminatorily apply the law against traditionally disfavored
groups.78 A vagrancy or loitering ordinance that, by its broad terms,
casts a net as large as the Jacksonville ordinance “results in a regime
in which the poor and the unpopular are permitted to ‘stand on a pub-
lic sidewalk . . . only at the whim of any police officer.’”79 Such results
so unequally tip the scales of justice that equal protection of the laws
is impossible.80

There are several ways that loitering statutes can provide suffi-
cient minimal guidelines to the police and the courts. The most obvi-
ous way is to include an intent requirement in the statute81 and to
delineate what circumstances or conduct the police and the courts
may consider when arresting and convicting people for loitering.82 In
City of Milwaukee v. Wilson,83 the Wisconsin Supreme Court held that
the city’s antiprostitution loitering ordinance provided sufficient mini-
mal guidelines.84 The ordinance had both an intent requirement and a
list of specified conduct that manifested the proscribed purpose of
soliciting prostitution.85 The court said that the overt act requirement
coupled with the specific intent requirement precluded arbitrary and
discriminatory enforcement.86

B. Overbreadth

1. Overbreadth Doctrine

Overbreadth is a label attached to two distinct concepts.87 First,
the doctrine has a substantive dimension that prohibits public officials
from enforcing laws that infringe on constitutionally protected free-

78. Id. at 170.
79. Id. (quoting Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965)).
80. Id. at 171.
81. The Court’s opinion in Papachristou alluded to the fact that an intent requirement
would have helped the Jacksonville ordinance by restricting police discretion to only those in-
stances where intent could have been proven. Id. at 163.
82. Lists of specific conduct give people notice of what kinds of conduct may subject them
to arrest. More importantly, however, delineating specific conduct harnesses police discretion
to enforcing the statute in question only when the specific actions set out by the legislature have
83. 291 N.W.2d 452 (Wis. 1980).
84. Id. at 457.
85. Id. at 455.
86. Id. at 457.
87. Henry P. Monoghan, Overbreadth, 1981 Sup. Ct. Rev. 1, 3; Ely, supra note 61, at 105-
06, 229 n.1.
doms. Second, the overbreadth doctrine has a procedural dimension characterized by a special standing rule that allows litigants to raise the rights of third parties to challenge a statute's substantive infirmities.

The substantive dimension of the overbreadth doctrine relates to a law's scope. States can't legitimately restrict certain constitutionally protected freedoms, particularly First Amendment liberties. The overbreadth doctrine invalidates statutes that, by their broad scope, regulate activities the legislature is constitutionally prohibited from regulating.

The courts apply a two-step analysis when subjecting statutes to the substantive dimension of the overbreadth doctrine. First, the law is read in light of any limiting constructions the state's courts have placed on the statute. Second, the courts determine the degree to which the statute as applied will infringe on protected activities. A


Several scholars argue that overbreadth isn't really comprised of two separate doctrines. Professor Monoghan contends that the overbreadth doctrine doesn't contain a separate standing rule. Rather, the standing rule is merely consistent with the "application of conventional standing concepts in the First Amendment context." Monoghan, supra note 87, at 3. "Under 'conventional' standing principles, a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law." Id. Professor Tribe apparently agrees with Professor Monoghan's contention. Tribe, supra note 57, § 12-27.

The Court's decisions don't appear to support such a hypothesis. Granted, statutes allegedly infringing on First Amendment liberties are more closely scrutinized than other statutes, particularly under vagueness analysis. E.g., United States v. Mazurie, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."). However, "one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." Parker v. Levy, 417 U.S. 733, 756 (1974) (emphasis added). Moreover, most courts, when referring to the standing component, clearly label it an exception to traditional standing requirements. See, e.g., Broadrick, 413 U.S. at 611; Coleman v. City of Richmond, 364 S.E.2d 239, 242 (Va. Ct. App. 1988).

90. Grayned, 408 U.S. at 114-15; Tribe, supra note 57, § 12-27; Monoghan, supra note 87, at 3.

91. Tribe, supra note 57, § 12-27; Amsterdam, supra note 56, at 75-76.


94. Id. at 977. There are restrictions on limiting constructions. First, state statutes can only be limited in scope by the respective state's courts. Gooding v. Wilson, 405 U.S. 518, 520 (1972). Second, "[b]y pruning a statute of its overbroad sections, courts run the risk of leaving the remainder impermissibly vague." Tribe, supra note 57, § 12-29, at 1030. Third, some statutes are either so poorly drafted or so overbroad that courts cannot possibly limit them without rendering the statute unconstitutionally vague. E.g., Coleman v. City of Richmond, 364 S.E.2d at 243.

statute is struck down for being overbroad if it substantially infringes on constitutionally protected activities, regardless of whether the statute may be legitimately applied in certain instances.

In City of Houston v. Hill,96 the United States Supreme Court struck down as overbroad an ordinance that made it unlawful to interrupt a police officer in the course of the officer's duties.97 That ordinance was substantially overbroad because it "criminaliz[ed] a substantial amount of constitutionally protected speech, and [it] accord[ed] the police unconstitutional discretion in enforcement."98

The procedural dimension of the overbreadth doctrine is an exception to the principle that a person to whom a law may constitutionally be applied cannot challenge the law on the grounds that it may be unconstitutionally applied to others.99 The reason for this exception is that laws which trample on First Amendment liberties may go unchallenged by those unconstitutionally affected because law-abiding citizens will avoid the conduct rather than risk arrest.100 The special standing rule thus doesn't require people to place themselves between a rock (punishment under the statute) and a hard place (sacrifice free speech) to protect their First Amendment rights.101

2. Loitering Laws and the Overbreadth Doctrine

Loitering laws are clear candidates for overbreadth challenges because they often infringe on rights of assembly and association.102

97. The relevant portion of the ordinance read as follows: "(a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest." Id. at 455.
98. Id. at 466.

The Court premised its decision on several factors. First, the ordinance dealt with speech, not criminal conduct. Id. at 460. Second, the ordinance criminalized abusive speech directed at police officers, but the First Amendment protects many types of such speech, even when it is directed at the police. Id. at 461. Third, the ordinance wasn't narrowly tailored to prohibit only that abusive speech not protected by the First Amendment. Id. at 465. Finally, for a reason more characteristic of vagueness analysis, the ordinance afforded the police too much discretion to determine when a violation occurred. Id. at 466.
99. Broadrick, 413 U.S. at 610.
100. The reason for such special protection is consistent with the Court's zealous protection of First Amendment speech liberties:
It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.
Id. at 611-12.
101. Id. at 612.
102. Trosch, supra note 16, at 538.

There are additional implicit rights that are infringed upon by typical loitering statutes. These include liberties implicitly protected by the First and Fourteenth Amendments such as
"[T]he right of the people peaceably to assemble" is explicitly protected by the First Amendment.\textsuperscript{103} Loitering laws often violate the

"[t]he rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others." Bykofsky \textit{v.} Borough of Middletown, 401 F. Supp. 1242, 1254 (M.D. Pa. 1975), aff'd without opinion, 535 F.2d 1245 (3d Cir.), cert. denied, 429 U.S. 964 (1976). Also, some courts have decided that the act of loitering itself is a constitutionally protected liberty. \textit{See, e.g.,} Johnson \textit{v.} Carson, 569 F. Supp. 974, 978 (M.D. Fla. 1983); City of Cleveland \textit{v.} Howard, 532 N.E.2d 1325, 1329 (Cleveland (Ohio) Mun. Ct. 1987). Such constitutional protection for loitering presumably derives from the following excerpt from \textit{Papachristou v. City of Jacksonville}:

The difficulty is that [loafing and loitering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

405 U.S. at 164. While this passage certainly elevates loitering and loafing to a higher station than they had previously enjoyed, the language does not confer upon anyone a constitutional right to loiter and loaf for purposes of overbreadth analysis. Rather, an entirely different interpretation is presented when this passage is taken in proper context. Namely, \textit{Papachristou} was about vagueness, not overbreadth. \textit{See id.} at 170-71. No "right to loiter" was invented in \textit{Papachristou}; the Court merely noted that loitering was such an historically practiced, habitual, seemingly innocent activity that to outlaw mere loitering failed to provide notice of what was forbidden. \textit{Id.} at 163 ("The Jacksonville ordinance makes criminal activities which by modern standards are normally innocent."). This is somewhat akin to the Court's decision in Lambert \textit{v.} California, 355 U.S. 225 (1957) (striking down as violative of due process a Los Angeles ordinance that made it illegal for a convicted felon not to register within five days of arriving in the city because mere presence somewhere is typically of an innocent nature and because ordinary citizens would never think that registration would be required). Thus, the Court's praise for loitering in \textit{Papachristou} is used to strike down the law for vagueness, not to confer yet another unenumerated right upon the people.

One commentator took the passage from \textit{Papachristou} even further and noted that the "[c]onstitutional freedoms associated with loitering are derived implicitly from the right to travel as guaranteed under Article IV, Section 2, from the right to freedom of association under the First Amendment, and from the general principles of the Constitution." Trosch, supra note 16, at 551. One must be more careful than that when interpreting the above-quoted passage from \textit{Papachristou}. First, it is difficult to envision how the right to travel is connected to loitering. Loitering, by its very definition, is standing around; not traveling. \textit{See supra} note 15. It is difficult to fabricate a connection between loitering and the Court's right to travel decisions. \textit{See, e.g.,} Zobel \textit{v.} Williams, 457 U.S. 55 (1982) (striking down an Alaskan statute that distributed income derived from the state's natural resources to the state's citizens based on how long the recipients had lived in the state); Sosna \textit{v.} Iowa, 419 U.S. 393 (1975) (upholding a one-year residency requirement for divorce actions); Shapiro \textit{v.} Thompson, 394 U.S. 618 (1969) (striking down residency requirements for welfare applicants). Second, if freedom of association gives rise to a right to loiter, does that mean that single loiterers aren't protected? After all, where there is no association—by its very definition, associations require two or more people—the right to freedom of association cannot be violated.

What all of this boils down to is that just because loitering laws may sometimes affect these freedoms, that doesn't mean that loitering itself is protected by these freedoms. Rather, a very narrowly drafted loitering law may not conflict with any of these substantive constitutional rights. Also, there is no reason to believe that loitering laws cannot overcome any procedural infirmities if sufficient notice is given and if sufficient guidelines are drafted into a loitering statute. But it is improper to take a procedural safeguard like the one the Court created in \textit{Papachristou}—and its predecessor \textit{Lambert}—and turn it into yet another unenumerated substantive right, which is what most commentators and courts appear to be doing.

\textsuperscript{103} U.S. CONST. amend. I.
assembly right by making it illegal for people to peaceably, innocently assemble if the circumstances of that assembly are construed as illicit, improper, or annoying by other members of society. This limitation on assembly is unconstitutional:

The First and Fourteenth Amendments do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct.

Simply substitute "loitering" for "annoying" in that passage and it becomes easy to see that simple loitering laws can raise serious assembly-restricting implications.

The freedom of association protects people and organizations that gather together to engage in activities protected by the First Amendment. Of course, only innocent associations are protected: the Mafia cannot claim protection from racketeering charges under the rubric of the freedom of association. However, the associations need not necessarily be political to be protected by the freedom of association. Protected associations include those associations which "pertain to the social, legal, and economic benefit of the members." As a result, families, fraternal organizations, community service organizations, and the like are all protected in varying degrees by the freedom of association.

In Johnson v. Carson, a federal district court struck down yet another Jacksonville, Florida, loitering ordinance which prohibited loitering for purposes of soliciting prostitution. The Florida courts had not previously limited the scope of the ordinance's plain meaning. Thus, it was left to the district court to decide whether the

104. See, e.g., Johnson, 569 F. Supp. at 978.
107. See id.
109. See Coates, 402 U.S. at 616.
111. Id. at 974-75.
112. Id. at 978.
statute regulated a substantial amount of protected activity. The court noted that under the wording of the statute, people could be arrested and convicted for such innocent activities as standing on the street corner talking to passers-by. Additionally, known prostitutes could be arrested for such innocent activities as window shopping, standing on the street waiting for a bus, or merely standing in a public place doing absolutely nothing. The statute was struck down for being overbroad because of such chilling effects on those First Amendment activities.

In City of Cleveland v. Howard, a similar ordinance survived an overbreadth challenge. However, the Cleveland ordinance had something the Jacksonville ordinance did not have—an intent requirement. Though the illicit conduct enumerated in the Cleveland ordinance was virtually identical to the illicit conduct enumerated in the Jacksonville ordinance, the Cleveland ordinance's intent requirement precluded the police from arresting people without considering the totality of the circumstances. In essence, a person could be arrested under the Jacksonville ordinance merely for exhibiting one of the enumerated modes of conduct, while the Cleveland police could only arrest people under their city's ordinance after considering the totality of the surrounding circumstances and determining that the person in question actually was loitering for the purpose of soliciting prostitution. As such, known prostitutes could not legitimately be arrested or convicted under the Cleveland ordinance for window shopping or for gathering in public with others. Accordingly, the court held that First Amendment rights were protected under the Cleveland ordinance because the ordinance explicitly applied only to loitering for a demonstrably illegal purpose.

113. Id.
114. Id.
115. Id. at 979-80.
117. Id. at 1329.
118. For example, both ordinances list repeatedly beckoning to passers-by and repeatedly stopping or attempting to stop motor vehicles as conduct manifesting a purpose to engage in solicitation. Id. at 1326; Johnson, 569 F. Supp. at 975.
119. Howard, 532 N.E.2d at 1329.
120. Johnson, 569 F. Supp. at 978. The Jacksonville ordinance did have an intent requirement. Id. at 975. However, that intent requirement could be inferred solely from the enumerated conduct. Id. at 978. Thus the court concluded that the ordinance could really be inflicted on people so long as the enumerated conduct was observed. Id.
121. Howard, 532 N.E.2d at 1329.
122. Id.
C. Fourth Amendment Requirements

1. Fourth Amendment Doctrine

The Fourth Amendment guarantees that "no [w]arrants shall issue, but upon probable cause." The probable cause requirement gives the judiciary independent review over police practices by ensuring that police officers arrest people only when there is probable cause to believe that a crime is going to be committed, is being committed, or has been committed. Arrests not based on probable cause are invalid.

There are several exceptions to the probable cause requirement. In Terry v. Ohio, the United States Supreme Court created the reasonable suspicion exception in upholding a police officer's frisk of a suspect where there was no probable cause to believe that a crime was being committed. The Court applied a Fourth Amendment balancing test that weighs the government's interest in the search against the privacy invasion the search presents to the individual. The Court concluded that the government's interest in protecting police officers and in preventing crime outweighed the minimal intrusion caused by a brief detention and frisk. However, the frisk is allowed only when the officer has a reasonable suspicion, based on articulable facts, that the suspect is armed and dangerous. Moreover, the detention itself may last no longer than is required for the police officer to ensure that no criminal activity is afoot.

There are three other exceptions to the probable cause requirement. In Camara v. Municipal Court, the Supreme Court allowed searches for administrative safety inspections in the absence of individualized suspicion that the place searched has violated, or is violating, safety and health standards. The Court justified these searches on the grounds that they were made to enforce safety codes, not to uncover evidence of criminal acts. The second exception is an expansion of the administrative search. Thus, non-personal searches need not comply with the probable cause requirement so long as they are conducted as safety measures rather than as criminal investigative tools. See, e.g., United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (holding that the probable cause requirement does not apply to documents searched aboard oceangoing vessels); Donovan v. Dewey, 452 U.S. 594 (1981) (holding that the warrantless inspection of highly regulated mining industry operations does not violate the Fourth Amendment).
Though the *Terry* doctrine permits limited detention based solely upon a reasonable suspicion that crime is afoot, the doctrine does not grant the police the authority to actually arrest the suspect. Recent expansions of the doctrine have loosened probable cause requirements for other minimal intrusions, but only for those intrusions which amount to less than a full-scale arrest. The probable cause requirement is still interpreted to prohibit both arrests and convictions based solely on suspicion.

Keeping that in mind, it next becomes necessary to define probable cause. The Supreme Court has defined the probable cause required for a search as "a fair probability that contraband or evidence of a crime will be found." Because it would be impractical to reduce this definition to a "neat set of legal rules," the test for measuring the presence of probable cause in a given situation is to look at the totality of the circumstances and decide if there is a "probability or substantial chance of criminal activity."

Under the totality of the circumstances approach, there are instances where wholly innocent behavior may at least give rise to a suspicion that criminal activity is afoot and may even "provide the

The third exception scraps the probable cause requirement for searches and seizures in schools in favor of a reasonable suspicion standard. New Jersey v. T.L.O., 469 U.S. 325 (1985). This exception is justified on the grounds that teachers need flexibility to maintain order in the schoolhouse environment. *Id.* at 339-40.

None of these three exceptions applies to loitering laws. The first two are irrelevant to the issue at hand because they specifically do not apply to criminal investigations. The third exception obviously does not apply because loitering isn't limited to the schoolhouse environment. *See Trosch, supra* note 16, at 556 n.338.

132. The Court's most recent forays into *Terry* involve investigative stops where law enforcement authorities stop and temporarily detain people suspected of smuggling narcotics. The Court has been quite willing to uphold such brief detentions based solely on reasonable suspicion. However, the Court still requires that arrests be predicated on probable cause. *See, e.g., United States v. Sokolow, 490 U.S. 1 (1989); United States v. Mendenhall, 446 U.S. 544 (1980).*


134. *E.g., Stoutenburgh v. Frazier, 16 App. D.C. 229 (1900).*

135. *See Amsterdam, supra* note 9, at 226-28.


137. *Id.* at 232.

138. *Id.* at 230-31.

139. *Id.* at 243 n.13. The Court justified this expansive approach as follows:

> The process [of determining probable cause] does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.


140. *See Reid v. Georgia, 448 U.S. 438, 441 (1980) (per curiam) (stating that there may "be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity [is] afoot").*
basis for a showing of probable cause." 141 This is because when determining probable cause, "the relevant inquiry is not whether particular conduct is ‘innocent’ or ‘guilty,’ but the degree of suspicion that attaches to particular types of non-criminal acts." 142 However, as broad as this approach may at first appear, there must be at least "some minimal level of objective justification" 143 to satisfy the Fourth Amendment.

2. Loitering Laws and the Fourth Amendment

Vagrancy and loitering laws have historically allowed, in two distinct senses, arrests and convictions based on suspicion. 144 First, loiterers may be arrested for suspicions of past criminality. 145 In this way, the loitering laws give police a chance to investigate whether the suspect is wanted elsewhere or has committed other crimes. 146 However, in Papachristou v. City of Jacksonville, the Court said that arresting people on suspicions based on past criminality is not compatible with the probable cause requirement. 147 Second, loiterers may be arrested for suspected future criminality. 148 This is the justification for present American vagrancy and loitering laws. Such arrests based on suspicion also suffer from probable cause deficiencies.

In Farber v. Rochford, 149 a federal district court struck down a Chicago, Illinois, loitering ordinance for violating the constitutional doctrines of vagueness, overbreadth, status, and probable cause. 150 The ordinance made it a crime for known drunkards, drug addicts, prostitutes, pimps, and convicted felons to congregate together in public or to loiter in places serving alcoholic beverages. 151 The plaintiff was arrested for loitering in a hotel bar, though she had never previously been arrested for, or convicted of, any of the crimes delineated in the ordinance. 152 She responded to the arrest by challenging the constitutionality of the ordinance and by seeking monetary damages

142. Id. at 245 n.13.
144. Id. at 226.
146. Amsterdam, supra note 9, at 226-27.
148. Foote, supra note 145, at 625.
150. Id. at 531.
151. Id. at 530.
152. Id. at 530-31.
for violations of her civil rights stemming from her arrest under the ordinance.\textsuperscript{153} The court agreed with her constitutional challenges and struck down the ordinance.\textsuperscript{154}

The Fourth Amendment discussion in \textit{Farber} is illustrative of the difficulties facing loitering ordinances. In \textit{Farber}, the defendants argued that the ordinance didn’t undermine the probable cause requirement.\textsuperscript{155} But the court disagreed, noting that “ordinance[s] of this nature inevitably preclude[ ] application of probable cause” because they are directed at suspected conduct rather than at observable conduct.\textsuperscript{156} Even police officers who act in good faith cannot justify arrests under such an ordinance with the probable cause requirement.\textsuperscript{157}

This doesn’t mean, however, that loitering laws can never meet Fourth Amendment requirements. Rather, the Fourth Amendment deficiencies usually stem from the close connection between the vagueness doctrine and the probable cause requirement.\textsuperscript{158} Stated simply, laws that fail to provide the police with reasonable criteria upon which to base an arrest also typically deny the police grounds upon which to form a probable cause belief that a crime is being committed.\textsuperscript{159} Conversely, laws that provide clear, reasonable criteria to believe that a crime is being, or is about to be, committed provide police reasonable criteria upon which to justify an arrest consistent with the demands of the Fourth Amendment. Thus, laws that meet specificity requirements will probably also meet the probable cause requirement.

\section*{D. Status Offenses}

\subsection*{1. Status Doctrine}

Starting with the Scottsboro Boys,\textsuperscript{160} the United States Supreme Court has greatly expanded procedural protections in criminal cases.\textsuperscript{161} However, the Court generally didn’t review substantive

\begin{thebibliography}{99}
\bibitem{153} Id. at 531.
\bibitem{154} Id.
\bibitem{155} Id. at 533.
\bibitem{156} Id.
\bibitem{157} Id.
\bibitem{159} \textit{Stone}, 507 F.2d at 96-97.
\bibitem{160} The Scottsboro Boys case is the infamous episode where multiple black defendants were convicted in a circus atmosphere of raping two white women. The defendants appealed their convictions, and in \textit{Powell v. Alabama}, 287 U.S. 45 (1932), the Supreme Court insisted that states provide legal counsel to poor defendants in capital cases.
\bibitem{161} Amsterdam, \textit{supra} note 9, at 234.
\end{thebibliography}
criminal law. That changed with the Court’s decision in Robinson v. California.

In Robinson, the defendant was convicted of violating a California law that made it illegal to be a drug addict. The Court struck down the law as violative of the Eighth Amendment’s cruel and unusual punishment clause and reversed the defendant’s conviction. The Court noted that the California law made the defendant’s status—drug addict—a criminal offense regardless of whether the defendant had ever possessed or taken illegal drugs within the state’s borders. The Court likened such status criminalization to criminalizing mental illness or leprosy. Though a state may legitimately compel treatment for such illnesses, such conditions may not be made crimes in and of themselves. “[C]riminal penalties may be inflicted only if the accused . . . has committed some actus reus.”

The Robinson decision is noteworthy for two reasons. First, it incorporated the Eighth Amendment into the Fourteenth Amendment, thus making the cruel and unusual punishment clause applicable to the states. Second, the decision expanded the meaning of the cruel and unusual punishment clause to preclude the government from criminalizing certain areas not otherwise protected by the Bill of Rights.

The impact of Robinson was subsequently limited by the Court’s decision in Powell v. Texas. The defendant in Powell was convicted

162. Id.
164. Id. at 660-61.
165. Id. at 666-68.
166. Id. at 665.
167. Id. at 666.
168. Id.
170. Robinson, 370 U.S. at 666.
171. Id. Professor Amsterdam noted that Robinson was apparently predicated on substantive due process, not on the cruel and unusual punishment clause. Amsterdam, supra note 9, at 234. However, the cruel and unusual punishment clause has had some quite diverse applications. The Court’s decision in Furman v. Georgia, 408 U.S. 238, 239-40 (1972), struck down various death penalty statutes for violating both the Eighth and Fourteenth Amendments, mainly because the death penalty was so arbitrarily and discriminatorily administered. See William J. Bowers, Legal Homicide 20 (1984). The cruel and unusual punishment clause was also mentioned or applied in certain cases as a potential restriction on excessive criminal sentences. See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986) (Powell, J., concurring); Solem v. Helm, 463 U.S. 277 (1983), overruled by Harmelin v. Michigan, 111 S. Ct. 2680 (1991). Thus, given the flexibility of the cruel and unusual punishment clause, it is unclear whether Professor Amsterdam was correct.
172. 392 U.S. at 514.
of public drunkenness. His defense was that he was a chronic alcoholic who couldn't control himself when intoxicated. Thus, he claimed, the statute punished him for his alcoholic status, rather than for volitional conduct, in violation of the Robinson decision. The Court disagreed. The Court said that the Texas statute didn’t suffer the same infirmity as the California drug addict statute; namely, the Texas statute didn’t make illegal the status of alcoholism, but made illegal the act of appearing in public while drunk. Therefore, non-alcoholics could also be punished under the Texas statute if they appeared in public while drunk. The California drug addict statute, on the other hand, made illegal the specified status in the absence of any actus reus. In short, Powell stands for the proposition that a state may criminalize acts that stem from an individual’s status so long as the state does not criminalize status alone.

2. Loitering Laws and the Status Doctrine

Loitering laws must be carefully drafted to avoid criminalizing mere status. The easiest way to do this is to include an actus reus element in the statute. Statutes with no actus reus element run the risk of being held unconstitutional.

Farber v. Rochford demonstrated how loitering ordinances may violate the cruel and unusual punishment clause by improperly criminalizing status. In Farber, the court struck down the Chicago loitering ordinance, in part, because it criminalized a person’s status in the absence of some criminal act. The defendants argued that the ordinance didn’t criminalize the status of being a drug addict, drunk, prostitute, or pimp; rather, they argued, the ordinance criminalized the conduct of such people congregating together or loitering in bars. The court didn’t buy that argument because, the court noted,

173. Id. at 517.
174. Id. Powell’s chronic alcoholism was clearly shown when the defense proved that Powell had been convicted of public intoxication approximately 100 times in seventeen years. Id. at 555 (Fortas, J., dissenting).
175. Id. at 517.
176. Id. at 531-37.
177. Id. at 532.
178. Id.
179. Id. at 533.
181. Id.
182. Id.
congregating with others and loitering in bars are both typically innocent actions that cannot constitute an \textit{actus reus}.\footnote{183. \textit{Id.}} The court then distinguished the \textit{actus reus} requirement in the Chicago ordinance from the \textit{actus reus} requirement found sufficient in \textit{Powell v. Texas}.\footnote{184. \textit{Id.} at 534.} The Texas statute could punish an alcoholic who ventured into public while intoxicated, but the statute didn’t punish alcoholics who ventured into public while \textit{sober}.\footnote{185. \textit{See Powell v. Texas}, 392 U.S. 514, 517 (1968).} The Chicago ordinance, however, placed suspected prostitutes, pimps, drug addicts, and alcoholics in jeopardy of arrest any time they left their house.\footnote{186. \textit{Farber}, 407 F. Supp. at 530.} Thus, the Chicago ordinance “[sought] a shortcut, and shortcuts cannot trespass across constitutional rights.”\footnote{187. \textit{Johnson v. Carson}, 569 F. Supp. 974, 979 (M.D. Fla. 1983).}

III. \textbf{CONSTITUTIONAL CHALLENGES AND SOLUTIONS TO ANTIGANG LOITERING ORDINANCES}

Though loitering laws face many different constitutional challenges, legislatures may still want such laws to give law enforcement authorities a powerful tool to prevent criminal street gang activities. To accomplish this purpose, loitering laws must be carefully drafted to avoid constitutional challenges common to statutes of this nature. However, this being a case of first impression, to envision constitutional requirements for antigang loitering laws, it is prudent to first examine one such law—the Chicago antigang loitering ordinance—and its constitutional shortcomings. Only then can a constitutional means be developed to stem criminal street gang activities through loitering laws.

\textbf{A. The Constitution v. The Chicago Loitering Ordinance}

The Chicago antigang loitering ordinance was enacted by the City Council only after a long and heated debate.\footnote{188. \textit{Middleton}, supra note 45, at 3.} The Council enacted the ordinance primarily to help police deal with a rising murder rate attributed to the growing influence of criminal street gangs.\footnote{189. \textit{Amendment of Title 8, Chapters 4 and 16 of Municipal Code of Chicago by Implementation of Restrictions on Gang Related Congregations in Public Ways and by Expansion of Curfew Regulations Regarding Minors, J. CHICAGO CITY COUNCIL 18,292-93 (June 17, 1992) [hereinafter \textit{Floor Debates}].}} The Council officially noted that one of the methods by which criminal
street gangs control an area is loitering in that area and intimidating the local citizenry. Gang members easily avoid arrest for such conduct by doing nothing overtly illegal when police officers are nearby. To remedy this problem, the Council enacted an ordinance that basically makes it illegal for criminal gang members to stand around in public and do nothing. Unfortunately, this well intentioned, much needed ordinance is almost certainly unconstitutional.

1. The Chicago Loitering Ordinance and the Vagueness Doctrine

The Chicago antigang loitering ordinance clearly violates the vagueness doctrine. The first constitutional problem with the ordinance is that its definition of loitering fails the vagueness test. The Chicago ordinance defines "loitering" as "remain[ing] in any one place with no apparent purpose." The problem with such a broad definition isn't that it's "an imprecise but comprehensible normative standard; [rather] it specifies no standard at all, because one may

190. Id.
191. Id.
192. The City Council enunciated the reasons for passing the antigang loitering ordinance:

WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and

WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and

WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law-abiding citizens; and

WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and

WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know police are present, while maintaining control over identifiable areas by continued loitering; and

WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and

WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and

WHEREAS, Aggressive action is necessary to preserve the City's streets and other public places so that the public may use such places without fear; and

WHEREAS, The City Council has also determined that it is necessary to amend the Municipal Code of Chicago to provide for a stronger curfew ordinance and a more effective means of enforcement; . . . .

Id. at 18,293-94.

193. See supra part II.A.
194. CHICAGO, ILL., MUN. CODE § 8-4-015(c)(1) (emphasis added).
never know in advance what [actions constitute a violation of the statute].”

Laws that make illegal standing around and doing nothing violate both prongs of the vagueness test. Notice is not provided where a law is so all-inclusive as to actually criminalize doing absolutely nothing because people aren’t realistically given a prior opportunity to tailor their conduct appropriately. Nor can minimal guidelines harnessing police discretion be derived by reading the clear language of the ordinance. Rather, guidelines are starkly and intentionally absent so that the ordinance can accomplish its main purpose—“provide . . . a more effective means of [law] enforcement . . . .”

The Chicago ordinance is also unconstitutionally vague in its reasonable belief requirement. First, the reasonable belief requirement fails to afford adequate notice of who is subject to arrest. Granted, the ordinance defines what a criminal gang member is and what constitutes criminal gang activity. However, the ordinance doesn’t define what personal characteristics differentiate criminal gang members from law-abiding members of the community. A person’s reputation is apparently what the Chicago Police Department will rely on when enforcing the ordinance. Yet, people cannot constitutionally be arrested, let alone convicted, for their reputation. Apparently, to conform with the law people must accurately guess whether the police think that either they or whomever they are congregating with are criminal gang members. Laws cannot constitutionally require people

195. Tribe, supra note 57, § 12-32. The Chicago ordinance’s loitering definition is analogous to the ordinance struck down in Coates v. City of Cincinnati, 402 U.S. 611 (1971), which is the ordinance Professor Tribe discusses in his text. The ordinance in Coates 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 n.1. The Court declared the ordinance unconstitutionally vague “because it subjects the exercise of the right of assembly to an unascertainable standard . . . .” Id. at 614.

196. See id.

197. Of course, it can be argued that merely doing something—anything—would place the loiterer outside of the definition. This misses the point. The problem isn’t necessarily that standing idly is now illegal in Chicago if one happens to look like a gang member; the problem is that because there is no conduct specified at all by the ordinance, people have no idea how to act. Ergo, insufficient notice.

198. Floor Debates, supra note 189, at 18,294.

199. This means that people cannot change their behavior prior to arousing police suspicions. See supra text accompanying notes 51-52.


201. Middleton, supra note 45, at 3.

to have psychic powers to know what is forbidden. Such deficiencies are what the notice requirement was developed to remedy.\textsuperscript{203}

The Chicago ordinance also runs afoul of the second and more important component of the vagueness doctrine: the ordinance fails to provide minimal guidelines upon which the police may base their reasonable suspicions.\textsuperscript{204} The Chicago Police Department has stated that it will only enforce this ordinance if it can document that the arrestee has been previously arrested for crimes that constitute criminal gang activity.\textsuperscript{205} Yet, even an approach as narrow as that is seriously flawed. The Department doesn't require documentation that the arrestees have been \textit{convicted} of the specified crimes; it is enough that the arrestees have, in the past, been \textit{arrested}.\textsuperscript{206} Thus, the Department will still be premising its enforcement of the ordinance, at least in part, on the suspect's reputation.\textsuperscript{207} Such an approach can quickly lead to discriminatory enforcement against young males—particularly those who belong to minority groups—who at some time in their past were mistakenly arrested for inadvertently wearing gang colors, for associating with the "wrong" people, or for otherwise arousing a police officer's suspicions.\textsuperscript{208} It is doubtful that such transgressions merit arrest when they occurred;\textsuperscript{209} they certainly don't merit repeated harassment under the loitering ordinance.

Nor can the city argue that the loitering ordinance isn't vague because it adequately warns people that they will be arrested only if they ignore a police officer's orders to disperse.\textsuperscript{210} Such an argument misses the point of the vagueness doctrine: notice is required so that people may conform their behavior to the law \textit{before} the law is enforced against them.\textsuperscript{211} This ordinance allows no opportunity for people to conform their behavior until the order to disperse is given.\textsuperscript{212} More importantly, the dispersion requirement is insufficient to save the ordinance from a vagueness challenge because the police have too


\textsuperscript{204} \textit{See supra} notes 55-58 and accompanying text.

\textsuperscript{205} Middleton, supra note 45, at 3.

\textsuperscript{206} \textit{See id.}

\textsuperscript{207} \textit{See supra} text accompanying note 202.

\textsuperscript{208} This raises grave issues pertaining to equal protection analysis. \textit{See} Amsterdam, supra note 9, at 229-33.

\textsuperscript{209} \textit{See supra} text accompanying notes 110-15, 149-57.

\textsuperscript{210} \textit{See} Chicago, Ill., MUN. CODE § 8-4-015(a).

\textsuperscript{211} \textit{See} Farber v. Rochford, 407 F. Supp. 529, 531 (N.D. Ill. 1975) ("An ordinary citizen should be able to act with certainty as to the legal effect of his conduct.").

\textsuperscript{212} \textit{See} Chicago, Ill., MUN. CODE § 8-4-015(a).
much discretion when determining when the order to disperse is warranted, thus offending the minimal guidelines requirement. The vagueness doctrine doesn't apply only to those situations where arrestees are actually convicted; the doctrine is also implicated where the police's power is so broad as to chill First Amendment freedoms. Relying solely on the police's "[i]nstinct with its ever-present potential for arbitrarily suppressing First Amendment liberties . . . bears the hallmark of a police state."  

2. The Chicago Loitering Ordinance and the Overbreadth Doctrine

The Chicago antigang loitering ordinance is substantially overbroad because it impermissibly restricts First Amendment liberties. The Court in *Papachristou v. City of Jacksonville* granted limited constitutional protection to simple loitering. Yet, the Chicago ordinance makes it illegal for certain people to engage in such simple loitering.

The Chicago ordinance's overbreadth problems don't end with its loitering definition. Rather, the ordinance offends the overbreadth doctrine in another way: it requires only one member of a group to be a suspected criminal gang member for the dispersion order to be triggered, but the dispersion order extends to all others gathered in the group regardless of whether those others are criminal gang members. Thus, the ordinance makes it a crime for innocent people to associate in public with criminal gang members even for completely legal purposes. And, of course, since the ordinance doesn't tell anyone what a criminal gang member looks like, no one knows with whom they can legally associate. However, even if the ordinance told us what a criminal gang member looks like for the purposes of the ordinance, the City Council still cannot make it illegal for upstanding citizens to innocently associate with suspected criminal gang members. The words of the ordinance and the City Council's explicit intent make illegal such commendable actions as trying to reform criminal gang members. Indeed, since no one may associate in public with a

216. 405 U.S. 156, 164 (1972); *see also supra* note 102.
217. *See CHICAGO, ILL., MUN. CODE § 8-4-015(c)(1).*
218. *Id.* § 8-4-015(a).
220. *See Floor Debates, supra* note 189, at 18,293.
criminal gang member, the ordinance makes it a crime for parents of suspected criminal gang members to associate with their suspected-renegade children in public.

As a result, both the core conduct made illegal by the ordinance—suspected criminal gang members and their cronies standing around doing absolutely nothing—and the fringe conduct made illegal by the plain meaning and intent of the ordinance—innocent people associating with suspected criminal gang members—are also restrictions on the freedoms of assembly and association. Those freedoms may not constitutionally be restricted in this manner. Thus, the Chicago ordinance is substantially overbroad.

3. The Chicago Loitering Ordinance and the Fourth Amendment

The Chicago antigang loitering ordinance violates the Fourth Amendment’s probable cause requirement because it permits arrests and convictions premised solely on reasonable suspicion. The words of the statute do not require the police to have a probable cause belief that the arrestee is a criminal gang member. Rather, the police need only have a reasonable suspicion that one of the arrestees is a criminal gang member. The burden of proof is then placed on the arrestees to demonstrate that no one in the arrested group is a criminal gang member. While Terry v. Ohio permits brief detention and limited frisks predicated on reasonable suspicion, neither arrests nor convictions can ever be predicated solely on reasonable suspicion. Granted, the Chicago ordinance has two other elements that require a probable cause belief: the loitering element and the failure to disperse element. However, this doesn’t save the ordinance from a Fourth Amendment challenge because the police must have a probable cause belief that all three elements of the offense—loitering, criminal gang

221. See supra notes 106-09 and accompanying text.
223. See id. at § 8-4-015(b). Granted, the ordinance calls this an affirmative defense rather than an initial shift of the burden of proof. Id. However, nothing in the ordinance requires law enforcement officials to ever have even a probable cause belief—let alone the burden of proving beyond a reasonable doubt—that the defendant is a criminal gang member. Id. Therefore, it can only be assumed that it’s not necessary for one to be a criminal gang member to be convicted of this offense. But if that’s the case, then why is there a reasonable suspicion requirement? And why is there an extensive listing of what constitutes a criminal gang and criminal gang activity?
224. 392 U.S. 1, 30 (1968).
225. See supra text accompanying notes 120-22.
member status, and failure to disperse—have been violated before an arrest may constitutionally occur.

Additionally, the courts must find proof beyond a reasonable doubt that all three elements have been fulfilled before convicting a defendant of violating the ordinance. But the Chicago ordinance requires the courts to find transgressions of two of the elements, while the burden of disproving the gang member status element is placed squarely with the defendant. In this way, the Chicago ordinance is caught between the Scylla (allowing arrests and convictions based on reasonable suspicion) and Charybdis (convicting people for loitering or for disobeying a dispersion order in violation of Papachristou v. City of Jacksonville and Shuttlesworth v. City of Birmingham, respectively).

By failing to provide the police with objective criteria upon which to base probable cause, the ordinance's vagueness contributes to its Fourth Amendment shortcomings. The probable cause requirement could be at least partially met if the ordinance contained a list of specific conduct upon which to base a probable cause belief that a crime is about to be, or is being, committed. However, the Chicago ordinance contains no such conduct element because such a list would only undermine the ordinance's purpose of giving the police virtually unfettered discretion in stemming criminal gang activity while giving the people no notice of what types of conduct to avoid.

4. The Chicago Loitering Ordinance and the Status Doctrine

Finally, the Chicago antigang loitering ordinance probably runs afoul of the Eighth Amendment's prohibition of status offenses. The Chicago ordinance bases arrests and convictions on suspected criminal gang member status; an actus reus element is conspicuously absent from the ordinance. As a matter of fact, the ordinance specifically precludes an actus reus requirement because, pursuant to the loitering definition, doing nothing is illegal. Thus, this ordinance

227. See id.
228. See id. at § 8-4-015(a)-(b).
229. See Trosch, supra note 16, at 559-60.
230. See infra part III.B.1.b.
232. See Floor Debates, supra note 189, at 18,293-94.
233. See supra part II.D.
235. Id. at § 8-4-015(c)(1).
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violates the Supreme Court's holding in Robinson v. California that people cannot be punished solely for their status.

Powell v. Texas doesn't save the Chicago ordinance. Granted, the ordinance can even be enforced against Pope John Paul II should he ever make the mistake of associating with a suspected criminal gang member for the purpose of trying to reform the suspected member. However, unlike the defendant in Powell, everyone who loiters and then ignores a dispersion order cannot be arrested and convicted. Rather, suspected criminal gang members and those with whom they associate in public are singled out for punishment even though no overt act, innocent or otherwise, need be committed. Again, the ordinance is caught between a rock (punishing suspected criminal gang members solely for being suspected criminal gang members) and a hard place (punishing suspected criminal gang members and those with whom they associate for exercising their First Amendment liberty of Association). The former is prohibited by the cruel and unusual punishment clause; the latter is unconstitutionally overbroad.

B. A Constitutional Antigang Loitering Statute

Of course, the first question to answer is whether loitering laws in any form are still a constitutionally viable means of preventing crime. As has been shown, constitutional challenges are not limited to antigang loitering laws alone. All manner of loitering laws are prone to various legitimate constitutional challenges. Moreover, most scholarly writings condemn loitering laws for their constitutional shortcuts. However, governing bodies still enact all kinds of loitering laws and the courts, in turn, have upheld many of those laws. Thus, regardless of what the scholars say, loitering laws per se are constitutionally valid so long as they are carefully drafted to avoid constitutional deficiencies.

Now that there's no doubt that valid loitering laws do exist, it seems necessary to identify the constitutional deficiencies common to loitering laws. As should be clear by now, there are only a few sections of loitering laws that are closely scrutinized. Those sections can

237. See id. at 533.
238. See, e.g., supra parts II.A.2, II.B.2, II.C.2, II.D.2.
239. See Amsterdam, supra note 9; Berns, supra note 8; Trosch, supra note 16; Yeamans, supra note 9.
be generally categorized as the intent element,\textsuperscript{241} the conduct element,\textsuperscript{242} and the probable cause requirement.\textsuperscript{243} Granted, there are many other things that may still render a loitering law unconstitutional. However, those other constitutional infirmities are not usually limited to, or specifically related to, loitering laws. For example, the vagueness doctrine isn’t limited to loitering statutes; all laws must meet at least some minimum level of specificity to survive constitutional scrutiny. With this in mind, it seems necessary only to describe the pitfalls endemic to loitering laws and to question how such pitfalls may apply to antigang loitering laws.

1. The Constitutional Pitfalls of Loitering Laws

\textit{a. The Intent Element}

Since Justice Douglas wrote about an intent element in \textit{Papachristou v. City of Jacksonville}, the courts have latched onto this factor when determining whether a loitering law passes the vagueness test.\textsuperscript{244} The outcome of such cases is predictable: loitering laws that have an intent element usually pass vagueness muster while loitering laws without an intent element are presumptively unconstitutional.\textsuperscript{245} Thus, intent elements are a common characteristic of nearly every constitutional loitering statute.\textsuperscript{246}

The intent element serves several vital, interrelated functions. First, it harnesses police discretion by allowing arrests only when people exhibit an intent to commit the act that the loitering ordinance is aimed at preventing.\textsuperscript{247} Second, the intent element gives people notice that loitering with the specified illegal intent is forbidden.\textsuperscript{248} The simple addition of an intent element thus goes a long way towards curing a statute’s vagueness problems.

Drafting an intent element into an antigang loitering ordinance—or any loitering statute, for that matter—isn’t nearly as simple as it would initially appear. Antiprostition loitering laws are aimed at

\begin{itemize}
\item \textsuperscript{241} See infra part III.B.1.a.
\item \textsuperscript{242} See infra part III.B.1.b.
\item \textsuperscript{243} See infra part III.B.1.c.
\item \textsuperscript{244} See Coleman v. City of Richmond, 364 S.E.2d 239, 242 (Va. Ct. App. 1988); City of Milwaukee v. Wilson, 291 N.W.2d 452, 457 (Wis. 1980); People v. Smith, 378 N.E.2d 1032, 1035 (N.Y. 1978).
\item \textsuperscript{246} Id. at 327.
\item \textsuperscript{247} Coleman, 364 S.E.2d at 243.
\item \textsuperscript{248} Id.
preventing only one type of crime—prostitution. Thus, one would reasonably deduce, drafting such a loitering law would be far simpler a task than drafting a multi-faceted antigang loitering ordinance such as the Chicago ordinance. Yet, even intent elements in antiprostition loitering laws have had their problems. In Coleman v. City of Richmond, a Virginia appellate court struck down the city’s antiprostition loitering ordinance because the intent element was unconstitutional for either vagueness or overbreadth. The intent element prohibited loitering “in a manner or under circumstances manifesting the purpose of engaging in prostitution . . . .” The law then detailed several circumstances that the police could consider when determining whether someone manifested the requisite intent. The court said that there were two possible interpretations of such an intent element, and that both interpretations were bad. First, engaging in the enumerated circumstances could, by itself, fulfill the intent element. In that case, the intent element would be unconstitutionally overbroad since the enumerated circumstances included constitutionally protected activities. Second, the enumerated “circumstances [could be viewed] . . . only as suggestions for what kinds of conduct might manifest an intent to engage in prostitution, but [would] not by themselves [be] sufficient to prove intent . . . .” In which case the intent element would be unconstitutionally vague because if the enumerated circumstances alone couldn’t fulfill the intent element, then they “are not relevant to the constitutional inquiry as they have no force of law.” Thus stripped of the enumerated circumstances, the statute failed to provide notice of what, other than loitering with an unlawful intent, was prohibited.

250. Id. at 242.
251. Id. Those circumstances were as follows:
(i) that, to the knowledge of the arresting officer at the time of arrest, such individual has within one year prior to the date of arrest been convicted of any offense chargeable under this section, or under any other section of this Code or the Code of Virginia, relating to prostitution, pandering, or any act proscribed as lewd, lascivious or indecent;
(ii) that such individual repeatedly beckons to, stops, attempts to stop, or interferes with the free passage of other persons, or repeatedly attempts to engage in conversation with passersby or individuals in stopped or passing vehicles; or (iii) that such individual repeatedly stops or attempts to stop motor vehicle operators by hailing, waving arms, or other bodily gestures.
Id. (quoting Richmond, Va., Code § 20-83(a)).
252. Id. at 243.
253. Id.
254. Id.
255. Id.
256. Id.
If the intent element can be so tricky for loitering statutes that seek to prevent only one crime, it’s easy to see how the intent element can quickly derail antigang loitering statutes, which seek to prevent a multitude of crimes. Of course, an antigang loitering ordinance could include an intent element for each and every crime it seeks to prevent, but this would create several problems. First, the intent elements must all be carefully drafted to avoid vagueness and overbreadth problems such as those encountered in Coleman v. City of Richmond. Second, the very use of such an omnibus measure may cast too large a net in violation of the most basic precept of the vagueness doctrine, which was the heart of the Court’s decision in Papachristou v. City of Jacksonville.

b. The Conduct Element

Most constitutionally valid loitering statutes contain lists of overt acts upon which the police and the courts may base arrests and convictions. These conduct lists typically contain actions commonly associated with the crimes the statute seeks to prevent. For example, an antiprositution loitering statute’s conduct list could contain such actions as repeatedly trying to engage passers-by in conversation or repeatedly trying to stop automobiles and engage the occupants in conversation. Though such conduct doesn’t justify an arrest or conviction for loitering unless accompanied by the requisite intent, these conduct lists do serve to harness police discretion and to give people notice of what actions to avoid.

Of course, conduct lists are subject to the same overbreadth and vagueness analyses as is the intent element. For example, a conduct list drafted so broadly as to allow arrests and convictions based on

257. Thus, the intent element must be drafted so as to be an element separate from the other elements of the offense. If proof of the intent element rests solely on engaging in conduct listed in the conduct element, see infra part III.B.1.b, then the intent element is not sufficiently independent of the conduct element. True, engaging in the enumerated conduct may strongly support the intent element in many situations. However, if the intent element is proven simply by engaging in the enumerated conduct, then there are serious overbreadth problems because, absent an illegal intent, much of the conduct in such lists is constitutionally protected. Furthermore, the more innocent the enumerated conduct is, the greater becomes the potential for police overreaching, thus giving rise to vagueness problems.

258. See supra notes 59-62 and accompanying text.


260. See infra notes 299-304, 308-11 and accompanying text.

261. See Howard, 532 N.E.2d at 1326; Wilson, 291 N.W.2d at 455; Smith, 378 N.E.2d at 1034.

262. See Smith, 378 N.E.2d at 1035.
conduct that is usually considered innocent—such as window shopping or waiting for a bus—probably violates both the overbreadth and the vagueness doctrines.\textsuperscript{263} The easiest means of avoiding such problems is to require that the specified conduct be considered in light of the surrounding circumstances.\textsuperscript{264} In this way, people who are actually waiting for a bus will not automatically be eligible for arrest or conviction. Rather, such persons would only be prone to arrest and conviction if the police can articulate facts upon which to base a probable cause belief that crime is afoot and that the specified intent element has been fulfilled.\textsuperscript{265}

In this way, conduct lists cure at least two constitutional defects common to loitering statutes. First, conduct lists help cure certain vagueness defects by giving people notice of what types of activity may subject them to arrest\textsuperscript{266} and by limiting police discretion to enforcing the statute only when some overt act has been committed.\textsuperscript{267} Second, the conduct lists provide an \textit{actus reus}, guaranteeing that people will only be punished for proscribed conduct as opposed to proscribed status.\textsuperscript{268} This helps the loitering statute overcome status doctrine challenges.

c. The Probable Cause Requirement

The Fourth Amendment's probable cause requirement is not limited to loitering laws. Rather, no criminal law may predicate either arrest or conviction upon anything less than probable cause.\textsuperscript{269} However, loitering laws have long blurred the distinction between probable cause and mere suspicion.\textsuperscript{270} Because they are aimed at

\begin{itemize}
\item \textsuperscript{264} See infra notes 305, 312 and accompanying text.
\item \textsuperscript{265} See Timmons v. City of Montgomery, 658 F. Supp. 1086 (M.D. Ala. 1987) (striking down a loitering ordinance under the Fourth Amendment because arrests could be predicated on something less than a probable cause belief that the suspect has either committed or is committing a crime); Porta v. Mayor, Omaha, 593 F. Supp. 863 (D. Neb. 1984) (requiring police to enforce a loitering ordinance in compliance with Terry v. Ohio, 392 U.S. 1 (1968), and, when applicable, probable cause).
\item \textsuperscript{266} See supra part II.A.2. Simply stated, conduct lists inform people what types of conduct to avoid engaging in before they engage in that conduct and subject themselves to arrest for violating a loitering statute.
\item \textsuperscript{267} See supra part II.A.3; see also People v. Smith, 378 N.E.2d 1032, 1035 (N.Y. 1978). This means that the police may not enforce a loitering statute when they observe any actions that happen to strike their fancy as being suspicious or improper.
\item \textsuperscript{268} See supra part II.D. This is why the intent element alone is not enough to support a constitutionally valid loitering statute. The conduct list guarantees that the person arrested will be arrested for actual improper conduct (in addition to violating the other elements of the offense) rather than for merely being a "known" criminal appearing in public.
\item \textsuperscript{269} See supra part II.C.1.
\item \textsuperscript{270} See supra part II.C.2.
\end{itemize}
preventing crime at an early stage, loitering laws by their very nature often predicate arrest on something less than probable cause.\textsuperscript{271} After all, if the police have probable cause to believe that a suspect is actually committing a crime, that suspect could be properly arrested and charged with one of the more serious inchoate offenses.\textsuperscript{272}

Unfortunately, the courts have largely ignored the probable cause requirement when passing on the constitutionality of loitering laws.\textsuperscript{273} As a result, there is no truly coherent principle to apply when testing loitering laws against the probable cause requirement. However, there are several judicial opinions which can be used as a springboard in developing minimal probable cause requirements.

As usual, the first case to look at in developing these requirements is \textit{Papachristou v. City of Jacksonville}. In \textit{Papachristou}, the Court discussed the Jacksonville ordinance's Fourth Amendment implications by noting that allowing arrests on less than probable cause violated the vagueness doctrine because of the failure to harness police discretion.\textsuperscript{274} The Court noted that police can only make arrests based on probable cause: "Arresting a person on suspicion . . . is foreign to our system" of government.\textsuperscript{275} Thus, at the very least loitering laws can only be enforced pursuant to a probable cause belief that some law is being broken.

Were this all that the courts have said on this issue, the analysis could end here because all loitering laws would be unconstitutional. As has been noted, loitering laws are preventive statutes;\textsuperscript{276} they try to prevent crime before crime has actually occurred. Moreover, simple loitering itself isn't illegal, nor may it constitutionally be made illegal.\textsuperscript{277} Thus, at first glance it appears that loitering laws allow arrests based solely on a relatively unsubstantiated hunch that someone may be ready to engage in criminal activity. Regardless of how this is worded, the conclusion remains the same: loitering laws allow arrests on mere suspicion of future criminality.

However, loitering statutes may meet Fourth Amendment requirements if they sufficiently delineate activities upon which the po-

\textsuperscript{271} See id.  
\textsuperscript{272} See supra notes 50-51 and accompanying text.  
\textsuperscript{274} Papachristou v. City of Jacksonville, 405 U.S. 156, 168-70 (1972).  
\textsuperscript{275} Id. at 169.  
\textsuperscript{276} See supra notes 48-52 and accompanying text.  
\textsuperscript{277} Papachristou, 405 U.S. at 164; Trosch, supra note 16, at 551; see also supra note 102.
lice may base probable cause. In *City of Tacoma v. Luvene*,\(^{278}\) the Washington Supreme Court upheld the Tacoma, Washington, antidrug loitering ordinance in the face of an overbreadth challenge and a vagueness challenge. The court's discussion of the vagueness doctrine's discretionary prong illustrates how conduct lists limit arrests to circumstances where there is probable cause to believe that crime is afoot.\(^{279}\) The court noted that coupling an overt act requirement with an intent requirement allows the police to arrest people only where there is "articulable, identifiable conduct that is consistent" with the commission of whatever crime the loitering law is aimed at preventing.\(^{280}\)

Such a combination of an intent element and a conduct list seems to satisfy the Fourth Amendment's totality-of-the-circumstances approach to probable cause. Granted, some of the overt actions delineated in the conduct list may be wholly innocent when viewed alone.\(^{281}\) However, those overt actions shouldn't be viewed in a vacuum. Instead, they should be viewed in light of the surrounding circumstances.\(^{282}\) So long as a loitering law doesn't circumvent this requirement, there is no reason to believe that the law will fail the probable cause requirement.

2. Drafting a Constitutional Antigang Loitering Law

   a. *What Form Should Antigang Loitering Laws Take?*

Before drafting an antigang loitering ordinance, the legislature needs to decide what form such a law should take. At least two options are apparent. First, the loitering law can take an expansive approach, trying to prohibit each and every activity remotely associated with criminal gang activity.\(^{283}\) This omnibus approach is typified by the Chicago antigang loitering ordinance, which basically makes it illegal for a suspected criminal gang member to simply be in public and for non-gang members to publicly associate for no apparent reason with suspected gang members.\(^{284}\)

\(^{278}\) 827 P.2d 1374 (Wash. 1992).

\(^{279}\) *Id.* at 1385.

\(^{280}\) *Id.*

\(^{281}\) See infra text accompanying notes 304, 309-10.

\(^{282}\) See *supra* notes 264-65 and accompanying text.

\(^{283}\) See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972) (quoting the Jacksonville, Florida, loitering ordinance which was directed at such acts as begging, gambling, juggling, playing unlawful games, drinking excessively, stealing, acting lewdly and lasciviously, brawling, loafing, and walking at night, to name but a few).

\(^{284}\) See CHICAGO, ILL., MUN. CODE § 8-4-015.
Of course, the expansive approach doesn't have to follow the Chicago ordinance, particularly since doing so would probably render it unconstitutional.\textsuperscript{285} Instead, the expansive approach could be broken into sections, with each section criminalizing a specific type of loitering. For example, the first section could embody an antidrug loitering provision; the second section could embody an anti-intimidation loitering provision; the third section could embody an antiprostitution loitering provision; and so on.

Yet this piece-by-piece approach isn't without its problems, both practically and constitutionally. Because criminal gangs are involved in so many types of criminal activity,\textsuperscript{286} such an approach may prove impractical by its length alone since each section would require its own intent element and its own conduct list. Yet another practical concern is that many of the criminal activities these gangs engage in are simply not conducive to standardized conduct lists. Many gang crimes such as murder, armed robbery, and aggravated battery are simply not typified by visible, predictable preparatory behavior at a level lower than that meeting the elements of the inchoate offenses.\textsuperscript{287} Soliciting prostitution, on the other hand, typically occurs in full view of the public and is usually accompanied by consistent overt acts such as repeatedly flagging down automobiles and pedestrians. This suggests the constitutional concern that such a long loitering statute with such extensive and questionable conduct lists may violate both the overbreadth and the vagueness doctrines. The vagueness doctrine is implicated because the longer the conduct list becomes, the greater becomes the likelihood that a suspect's actions will fit at least one overt action contained in the statute.\textsuperscript{288} Because almost any otherwise innocent action can be covered by exhaustive conduct lists, such a statute fails to sufficiently harness police discretion and to provide people with notice of what is forbidden.\textsuperscript{289} The overbreadth doctrine is implicated because the longer the conduct list becomes, the greater

\textsuperscript{285} See supra part III.A.

\textsuperscript{286} See \textit{Chicago, Ill., Mun. Code} § 8-4-015(c)(3).

\textsuperscript{287} Granted, some of these things could be prefaced by publicly visible, preparatory behavior, such as casing a bank prior to robbing it. However, these crimes are usually prepared in private or done on the spur of the moment. Any publicly visible preparatory activities leading to such serious crimes is probably punishable under one of the inchoate offenses and would thus not properly be prevented by loitering laws.

\textsuperscript{288} See \textit{Papachristou v. City of Jacksonville}, 405 U.S. 156, 156 n.1 (1972) (quoting the Jacksonville, Florida, loitering ordinance which, although it doesn't contain a conduct list, prohibits so many types of conduct as to render the ordinance void for vagueness).

\textsuperscript{289} See supra part II.A.
the likelihood becomes that constitutionally protected activities will be punished by the statute.290

Fortunately, there is a narrower second approach to drafting an antigang loitering statute. The narrow approach consists of enacting only a few loitering laws aimed at preventing the most visible and serious criminal gang activities. Thus, the legislature could, at the least, enact an antidrug loitering statute and an antiprostitution loitering statute.

Several features recommend the narrow approach. First, this approach doesn’t require extensive conduct lists.291 Second, the crimes prevented by such an approach often occur in plain view of the public. And third, the crimes prevented are typified by certain overt actions or circumstances.292 As a result of these features, the narrow approach avoids many of the overbreadth and vagueness problems suffered by the expansive approach. However, there is a cost to avoiding constitutional problems: the narrow approach cannot prevent all criminal gang activities.293

Nevertheless, at least one of the most serious activities associated with criminal gangs—narcotics trafficking—can be attacked by the narrow approach to loitering laws. Of course, prostitution can also be curbed by loitering laws. Unlike the Chicago ordinance, the enforcement of loitering laws under this approach isn’t limited to criminal gang members. Rather, all drug dealers, drug users, and prostitutes are properly within the purview of this approach.

b. Constitutional Loitering Statutes

Antidrug loitering statutes are a relatively recent legislative innovation.294 At least one author has attacked the constitutionality of these laws on vagueness, overbreadth, and Fourth Amendment grounds.295 However, at least one state supreme court has upheld the constitutionality of an antidrug loitering ordinance in the face of vagueness and overbreadth challenges. In City of Tacoma v. Luvene, 827 P.2d 1374, 1379 n.2 (Wash. 1992); People v. Smith, 378 N.E.2d 1032, 1034 (N.Y. 1978).
the Washington Supreme Court upheld the constitutionality of the city’s antidrug loitering ordinance after interpreting and limiting that ordinance to require both specific intent and “identifiable, articulable conduct in addition to mere loitering that is consistent with the intent to engage in unlawful drug activity . . . .”  

Having survived constitutional scrutiny, the Tacoma antidrug loitering ordinance is a good place to start when drafting a model antidrug loitering ordinance. As changed to meet both the Washington Supreme Court’s interpretation and the other considerations mentioned in this Note, a model antidrug loitering ordinance could read as follows:

MODEL ANTIDRUG LOITERING ORDINANCE
(A) It is unlawful for any person to loiter in or near any thoroughfare, place open to the public, or near any public or private place.


The Tacoma ordinance read as follows:

(A) It is unlawful for any person to loiter in 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 Chapters 69.41, 69.50, or 69.52 of the [Revised Code of Washington].

(B) Among the circumstances which may be considered in determining whether such purpose is manifested 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 or usage, such as “needle tracks”; or a person who possesses drug paraphernalia as defined in Section 8.29 of the [Tacoma Municipal Code];
2. Such person is currently subject to an order prohibiting his/her presence 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 “lookout”;
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 [Revised Code of Washington Chapter 69.53];
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, 1379 n.2 (quoting TACOMA, WASH., MUN. CODE ch. 8.72.010 (1988)).

297. Id. at 1379. There are many direct quotes from various statutes contained in both this statute and in the antiprostition loitering ordinance below. Rather than muck up the ordi-
with the intent to engage in any statutorily prohibited drug-related activity. 2998
(B) Circumstances manifesting such purpose on the part of a person are: 2999
(1) The person transfers small objects or packages for currency in an elusive manner, 300 or the person repeatedly passes to or receives money or objects from passers-by; 301
(2) The person takes flight upon the appearance of a police officer; 302
(3) The person visibly attempts to conceal himself or herself or any object which could reasonably be involved in an unlawful drug-related activity; 303 or
(4) The person repeatedly beckons to, stops, or attempts to stop passers-by, or repeatedly attempts to engage passers-by in conversation. 304

nances with an endless series of quotation marks, I have merely noted after each quoted section the source of the phrase or sentence.

298. This language unambiguously sets forth the intent requirement. See supra notes 249-58 and accompanying text. Legislatures could tailor this section somewhat by substituting specific antidrug statute citations in place of "drug-related activity."

299. See Northern Virginia Chapter, ACLU v. City of Alexandria, 747 F. Supp. 324, 325 (E.D. Va. 1990). Some of the manifestations contained in the Tacoma ordinance are deleted from the text model ordinance because of potential constitutional problems. See Luvene, 827 P.2d at 1379 n.2 (quoting, in part, TACOMA, WASH., MUN. CODE ch. 8.72.010(B)(1), (3)-(4), (8)-(10)). The first and tenth manifestations raise serious status implications because they render drug addicts subject to arrest simply for being drug addicts and not for committing any overt act. See supra part II.D. The third manifestation raises vagueness problems because it leaves to the police officer’s discretion exactly what types of behavior are sufficient to raise a reasonable suspicion. See supra part II.A. Additionally, merely using the term "reasonable suspicion" raises Fourth Amendment implications that are better off avoided. See supra part II.C. The fourth manifestation also raises serious status problems because it may lead to arrests based solely on a person's suspected associations. See supra parts II.D, III.A.4. The eighth and ninth manifestations have potential vagueness implications because they may make mere presence in a high-crime area sufficient basis for an arrest. See supra part II.A.

300. See City of Alexandria, 747 F. Supp. at 325; Luvene, 827 P.2d at 1379 n.2.


302. Luvene, 827 P.2d at 1379 n.2; Trosch, supra note 16, at 523, 524-25 nn.72-73 (quoting, respectively, CHARLOTTE, N.C., CODE § 15-31(b)(5) (1990); HIGH POINT, N.C., CODE, § 12-1-9(b)(5) (1989); FAYETTEVILLE, N.C., CODE § 21-55(c)(6) (1989)). This is a long recognized manifestation of at least some sort of illegal conduct. See Model Penal Code § 250.6 (1961).

It should be noted that Model Penal Code § 250.6 isn't the best statute to turn to when drafting a loitering ordinance. At least one court has found a loitering law based on § 250.6 unconstitutionally vague. See City of Bellevue v. Miller, 536 P.2d 603 (Wash. 1975).

303. See Luvene, 827 P.2d at 1379 n.2; City of Alexandria, 747 F. Supp. at 325.

304. This is the most popular conduct clause, and it is contained in nearly every loitering statute. See, e.g., Luvene, 827 P.2d at 1379 n.2; Coleman v. City of Richmond, 364 S.E.2d 239, 242 (Va. Ct. App. 1988); City of Cleveland v. Howard, 532 N.E.2d 1325, 1326 (Cleveland (Ohio) Mun. Ct. 1985); Trosch, supra note 16, at 523, 524-25 nn.72-73 (quoting, respectively, CHARLOTTE, N.C., CODE § 15-31(b)(5) (1990); HIGH POINT, N.C., CODE, § 12-1-9(b)(5) (1989); FAYETTEVILLE, N.C., CODE § 21-55(c)(6) (1989)). Of course, this type of clause, standing alone, would be insufferably vague. However, when applied in conjunction with the totality-of-the-circumstances clause, see infra text accompanying note 305, such a vague clause is constitutional because it limits police officers to arresting people only when the conduct is engaged in under
(C) No person shall be arrested for a violation of this ordinance unless, when viewed under the totality of the circumstances, the conduct engaged in supports a probable cause belief that the person is loitering with the intent to engage in any statutorily prohibited drug-related activity. 305

Drafting an antiprositution loitering statute is a relatively simple task because so many such statutes have already been subjected to and passed constitutional scrutiny. However, this Note will still propose a model antiprositution loitering ordinance that combines the common attributes of those other loitering laws. A model antiprositution loitering ordinance could read as follows:

MODEL ANTIPROSTITUTION LOITERING ORDINANCE

(A) It is unlawful for any person to loiter in or near any thoroughfare, place open to the public, or near any public or private place with the intent to solicit or procure sexual activity for hire. 306

(B) Circumstances manifesting such purpose on the part of a person are:

(1) The person repeatedly beckons to, stops, or attempts to stop passers-by, or repeatedly engages passers-by in conversation; 309

(2) The person repeatedly stops or attempts to stop motor vehicles; 310 or

circumstances supporting a probable cause belief that the repeated beckonings are attempts to traffic narcotics.

305. There is more to this section than merely codifying the Supreme Court's decision in Illinois v. Gates, 462 U.S. 213 (1983). The main purpose of this section is to make clear that merely engaging in the enunciated conduct isn't enough for either an arrest or a conviction under this ordinance. Conversely, this section also makes clear that innocent conduct may sometimes justify an arrest if the surrounding circumstances justify a probable cause belief that the conduct in question is not so innocent in a given circumstance. In conjunction with the intent requirement, this helps to cure Fourth Amendment and vagueness problems because it prevents the police from arresting every single person who engages in the enunciated conduct without regard to the possibly exculpatory circumstances accompanying that conduct.

The police may consider many things under the totality-of-the-circumstances approach. Those factors include whether the suspect is a known drug dealer or drug user; whether the loitering occurs in an area of widespread drug use or drug trafficking; and whether there is any other legitimate reason to be loitering, such as waiting for a bus or the like. No status problems arise from this because these factors are viewed only in concert with the overt act requirement. Thus, mere status isn't punished; rather, the overt conduct coupled with the unlawful intent are punished. Nor is there a vagueness problem since the police can only arrest people when there has been specific overt action. The totality of the circumstances cannot lead to an arrest under this ordinance if the suspect engages in none of the delineated conduct.

306. Luvene, 827 P.2d at 1379.
307. Howard, 532 N.E.2d at 1326. Because in this case the city's ordinance wasn't statute-specific, its language is broad enough for other jurisdictions to use. Other jurisdictions are still free to insert the citations of their antiprositution legislation in place of this language. The result is the same for purposes of constitutional analysis.
309. Howard, 532 N.E.2d at 1326. Nearly all antiprositution loitering ordinances have this conduct requirement. See City of Milwaukee v. Wilson, 291 N.W.2d 452, 455 (Wis. 1980); People v. Smith, 378 N.E.2d 1032, 1034 (N.Y. 1978).
310. Howard, 532 N.E.2d at 1326; Wilson, 291 N.W.2d at 455; Smith, 378 N.E.2d at 1034.
(3) The person repeatedly engages passers-by in conversation.\textsuperscript{311}

(C) No person shall be arrested for a violation of this ordinance unless, when viewed under the totality of the circumstances, the conduct engaged in supports a probable cause belief that the person is loitering with the intent to solicit or procure sexual activity for hire.\textsuperscript{312}

There may be other criminal gang activities that legislatures may wish to attack through loitering laws.\textsuperscript{313} The introductory comments to the Chicago ordinance recommend many other ills connected to criminal gangs that deserve attention.\textsuperscript{314} However, for myriad reasons some of those problems cannot be properly dealt with through loitering laws. Yet, there are surely other criminal activities for which loitering laws are a viable preventive option. As those new situations arise, legislatures should be capable of crafting specialized loitering laws to meet society's needs. There is no reason to believe that such laws will be unconstitutional so long as they follow the basic guidelines laid out in this Note and in the ever-evolving case law.

\textbf{Conclusion}

Loitering laws can serve an instrumental function in helping law enforcement authorities prevent not just criminal gang activities, but all manner of criminal shenanigans. However, such laws must be carefully drafted to meet certain constitutional infirmities common to loitering laws. Loitering laws that fail to meet these constitutional guidelines present the danger of seriously trampling upon liberties we Americans typically hold dear. Loitering laws that meet constitutional mandate as well as serve their preventive function provide us all with the best of both worlds—streets free of violence and speech and expression rights free of censorship.

\textsuperscript{311} Howard, 532 N.E.2d at 1326; Wilson, 291 N.W.2d at 455; Smith, 378 N.E.2d at 1034.

\textsuperscript{312} This section is identical to the model antigang loitering ordinance's paragraph (C). See supra text accompanying note 305. In this ordinance, the presence of this section is particularly important to cure potential overbreadth problems. For example, under the clear wording of this ordinance's paragraph (B)(3), advocating political beliefs to every passer-by would fulfill the conduct element. Granted, the intent element wouldn't be fulfilled, but this section is an additional safeguard which puts everyone on notice that the circumstances surrounding the enunciated conduct will determine whether the ordinance has been violated. See supra note 305.

\textsuperscript{313} See, e.g., CHICAGO, ILL., MUN. CODE § 8-4-015(c)(3).

\textsuperscript{314} See Floor Debates, supra note 189, at 18,293-94.