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City of Chicago, Petitioner v. Jesus Morales,
et al.

No. 97-1121

In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO, PETITIONER

v.

JESUS MORALES, ET AL.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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HEADLINE: Court to Rule on Loitering Law Aimed at Gangs; Chicago Officials Say Ordinance Deters Presence; Rights Groups Call It Unconstitutional

BYLINE: Joan Biskupic, Washington Post Staff Writer

BODY:

The Supreme Court agreed yesterday to hear Chicago's defense of an anti-loitering ordinance aimed at gang members, who, the city says, "blatantly engage in drug deals" but once police arrive pretend to be innocently hanging out.

Numerous states and municipal groups urged the high court to take the case in light of increasing legislation targeting gangs as well as many types of public conduct on the streets. Civil libertarians and defense lawyers, meanwhile, contend authorities are going too far, curtailing harmless behavior and violating constitutional rights.

The ordinance adopted by the Chicago City Council in 1992 allows a police officer to order any group of individuals loitering in a public place to disperse if the officer "reasonably believes" that someone who belongs to a street gang is in the group. Anyone who fails to leave can be sentenced to six months in prison, a \$ 500 fine or up to 120 hours of community service. "Loiter" is defined as "to remain in any one place with no apparent purpose."

The Illinois Supreme Court ruled last year that the law was impermissibly vague and violated constitutional due process of law. The state court said the law failed to give people notice of exactly what conduct was prohibited and deprived "persons suspected of being in criminal street gangs . . . of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime."

But the city, in its appeal, said "no one who has been given a police order to move on could fail to understand what is required of him." It noted that the ordinance says no arrest can be made unless there is first a police order to move on and a refusal by the subject to abide by the officer's order.

Brian L. Crowe, lawyer for the city, told the court that the ordinance was carefully crafted after public hearings and a determination that "the intimidating presence of gangs . . . has a palpable detrimental effect on a family's sense of well-being, on the willingness of parents to allow their children outside and on the willingness of Chicago residents to remain in the city."

Defense lawyers urged the high court not to take the case or to revive the ordinance.

QUESTIONS PRESENTED

1. Whether a loitering ordinance making it a misdemeanor to disobey a police order to move on, given when a police officer has reasonable cause to believe that a group of loiterers contains one or more members of a criminal street gang, is impermissibly vague on its face in violation of the Due Process Clause.

2. Whether petitioner's ordinance, which requires a group of loiterers containing one or more criminal street gang members to obey a police order to move on, violates substantive due process guarantees.

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INTEREST OF THE UNITED STATES

The federal government has identified the control of gang-related crime and violence as an important priority. For example, in 1995, the Department's Office of Community Oriented Policing Services funded an Anti-Gang Initiative, which awarded \$11 million in grants to a number of cities (including Chicago) to pursue various locally developed anti-gang strategies.¹ The Federal Bureau of Investigation has developed a National Gang Strategy for working with state and local governments to identify gang problems and to employ the anti-gang resources of each level of government in a coordinated and effective manner.²

¹ Office of Community Oriented Policing Services, U.S. Dep't of Justice, *COPS Office Report: 100,000 Officers and Community Policing Across the Nation* 14 (Sept. 1997).

² Office of Investigative Agency Policies, U.S. Dep't of Justice, *Reducing Violent Crime in America: A Five-Year Strategy* 21-22 (May 1996).

The Department of Justice operates a grant program known as "Weed and Seed" which encourages cooperation among law enforcement and other agencies in targeted areas to "weed" out gangs and others involved in violent crime and drug activity, and to "seed" the areas with resources and community development. Congress has supported local efforts to address the problem of criminal street gangs by providing for enhanced penalties when certain federal crimes are committed in connection with such gangs. 18 U.S.C. 521 (Supp. II 1996).

The Chicago ordinance at issue in this case is one of several possible approaches to the problem of gang violence. The ordinance appears to have had a significant impact on gang violence in Chicago.³ The federal government has a strong interest in supporting the efforts of local communities like Chicago to identify the law enforcement strategies best suited to each community's needs to combat gangs and gang-related violence.

STATEMENT

This case arises from respondents' challenges to their convictions for violating the City of Chicago's gang loitering ordinance. The Illinois Supreme Court held that the

³ According to a report published by the City of Chicago and the Chicago Police Department, enforcement of the ordinance resulted in 5251 arrests in 1993, 15,660 arrests in 1994, and 22,056 arrests in 1995. Aggravated battery with a firearm, drive-by shootings, and homicides all decreased dramatically in 1995; moreover gang-related aggravated battery with a firearm and gang-related homicide declined markedly as a percentage of the (declining) total. Gang-related aggravated batteries climbed back to their prior levels in 1996 and 1997 (though total aggravated batteries did not); drive-by shootings declined further in 1996 and began climbing in 1997; gang-related homicides increased in 1996 but declined again in 1997 (while total homicides decreased in both years). *Gang and Narcotic Related Violent Crime: City of Chicago 1993-97* (June 1998). See also Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 223-226 (1998) (reporting statistics and anecdotal accounts of effectiveness of ordinance from police officers and community residents).

ordinance was unconstitutionally vague on its face and violated substantive due process.

1. In May 1992 the Chicago City Council enacted a gang loitering ordinance following a series of hearings. In formal findings enacted as a preamble to the ordinance, the Council found that "the continuing increase in criminal street gang activity * * * is largely responsible for" the City's increasing rate of murder and other violent and drug-related crimes. Pet. App. 60a. The Council also found that "[i]n many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens." *Ibid.* The Council found that "[o]ne 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." *Ibid.* Gang members "maintain[] control over identifiable areas by continued loitering," but they "avoid arrest by committing no offense punishable under existing laws when they know the police are present." *Ibid.* As a result, "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." *Ibid.*

The ordinance itself provides in pertinent part:

Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

Pet. App. 61a. The ordinance provides that "[i]t 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." *Ibid.* Each violation of the ordinance is punishable by a fine of up to \$500,

imprisonment for not more than six months, and performance of up to 120 hours of community service. *Id.* at 63a.

The ordinance defines each of its key terms. The ordinance provides that “[l]oiter” means to remain in any one place with no apparent purpose.” Pet. App. 61a. The definition of “[c]riminal street gang” is modeled in part upon the definition in the 1994 federal statute enhancing penalties for certain federal crimes when they are committed in connection with a criminal street gang. 18 U.S.C. 521 (Supp. II 1996). A “[c]riminal street gang” is defined as “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 a series of enumerated crimes], and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” Pet. App. 61a-62a. The enumerated crimes include murder, aggravated assault or battery, intimidation, robbery and armed robbery, arson, possession of explosives, bribery, and drug trafficking. *Id.* at 62a. “Criminal gang activity” is defined as the commission or attempted commission of any of those enumerated crimes, so long as they are committed by two or more persons or by an individual acting “at the direction of, or in association with, any criminal street gang” and with the specific intent to “further[] or assist in any criminal conduct by gang members.” *Ibid.* Finally, a “[p]attern of criminal gang activity” is defined as “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 [the ordinance].” *Id.* at 63a.

After the City Council adopted the ordinance, the Police Department issued a general order that provided further guidance regarding the terms of the ordinance. The order provides that the ordinance “will be enforced only” within areas designated by district police commanders “in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding

community.” Pet. App. 68a-69a. The general order also provides that “[p]robable cause to establish membership in a criminal street gang must be substantiated by the arresting officer’s experience and knowledge” and must be “corroborated by specific, documented and reliable information.” *Id.* at 67a. Such information would include items such as an individual’s admission of membership, the wearing of distinctive gang insignia or colors, the use of distinctive gang signs or symbols, or the identification of an individual as a gang member by a reliable informant. *Id.* at 67a-68a. The general order provides that gang membership “may not be established solely because an individual is wearing clothing available for sale to the general public.” *Id.* at 67a.

2. Respondents are 70 defendants who were charged with violating the gang loitering ordinance. Pet. App. 1a. Six of them were found guilty after separate bench trials and sentenced to jail terms from one to 27 days. *Id.* at 1a-2a. The trial courts dismissed each of the other cases, finding the ordinance unconstitutional on a variety of grounds. *Id.* at 1a. The state appellate court reversed the convictions and affirmed the dismissals. *Id.* at 2a.

3. The Illinois Supreme Court held that the ordinance “violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties.” Pet. App. 5a.

a. The court held that the ordinance is not “sufficiently defined so it provides persons of ordinary intelligence adequate notice of proscribed conduct.” Pet. App. 7a. In the court’s view, the term “loiter,” even as defined by the ordinance to mean “to remain in any one place with no apparent purpose,” is not “sufficiently definite so that ordinary persons can comprehend the prohibited conduct.” *Id.* at 9a, 10a.

The court also held that the other elements of the offense do not cure the difficulty. The court construed the ordinance to include the additional element “that the arresting officer have a reasonable belief that one person in a

group of loiterers is a gang member," but concluded that this element too is vague because "[a]n individual standing on a street corner with a group of people has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal street gang." Pet. App. 11a-12a. The court added that "even adding a knowing association with a gang member to the act of loitering is still insufficient because the city cannot 'forbid, on pain of criminal punishment, assembly with others merely to advocate activity, even if that activity is criminal in nature.'" *Id.* at 12a.

The court also held that the element of failure to obey a police dispersal order "is * * * insufficient to cure the vagueness of the ordinance." Pet. App. 12a. In the court's view, that conclusion was dictated by *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90-92 (1965), in which this Court stated that a statute prohibiting standing or loitering after having been requested by a police officer to move on would be unconstitutional.

b. The court also held that the ordinance "provides such ambiguous definitions of its elements that it does not discourage arbitrary or discriminatory enforcement." Pet. App. 15a. In particular, the court believed that the definition of the term "loiter" "provides absolute discretion to police officers to decide what activities constitute loitering." *Ibid.* The court also stated that the ordinance gives police "complete discretion to determine whether any members of a group are gang members." *Ibid.* The court acknowledged that the police general order "goes to great lengths to define criminal street gangs." *Id.* at 16a. But the court stated that the general order "does absolutely nothing to cure the imprecisions of the definition of the 'loitering' element of the crime." *Ibid.*

c. With respect to the substantive due process challenge to the ordinance, the court referred to activities such as "loafing, loitering, and nightwalking," and held that "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due

process clause." Pet. App. 17a. The court stated that the gang loitering ordinance "impedes upon" a number of "protected personal liberties," including "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." *Id.* at 18a (citations omitted). Although the court recognized that these liberties "are not absolute," the court found "that the gang loitering ordinance unreasonably infringes upon personal liberty." *Ibid.* In the court's view, "[p]ersons suspected of being in criminal street gangs are deprived of the personal liberty of being able to freely walk the streets and associate with friends, regardless of whether they are actually gang members or have committed any crime." *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

The problem of gang-related crime and violence has dramatically increased in recent years. Criminal street gangs increasingly attempt to control entire neighborhoods, intimidating the law-abiding citizens who live there and making it impossible for them to enjoy the amenities of public life. Experience has repeatedly demonstrated that, once such gangs take control of the sidewalks and streets, the ordinary social mechanisms that tend to inhibit crime and other anti-social behavior cease working. Although attacking the homicides, drug crimes, and other serious crimes that gangs commit is one facet of the solution, effective efforts to combat gang activity may also require targeted community-based efforts to reacquire control of the streets from violent street gangs and restore public spaces to the use and enjoyment of the vast majority of residents. The Chicago City Council, acting with the support of community organizations and the city's police department, concluded that the ordinance adopted is the best approach to achieving that goal in the particular circumstances faced by a city that has been one of the most hard-hit by gang violence.

The gang loitering ordinance is not unconstitutionally vague. Because the ordinance applies only to those who

loiter for "no apparent purpose," it excludes from its scope those whose presence in a public place has as its purpose the expression of ideas protected by the First Amendment. Each of its key terms is carefully defined and has a meaning that is comprehensible to persons of ordinary intelligence and common sense. The term "loiter" is defined to mean "to remain in any one place with no apparent purpose." Pet. App. 61a. As we discuss below, that is not an unintelligible standard. Moreover, the ordinance imposes additional requirements for a conviction, including proof "that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member," *id.* at 11a, and—most significantly—proof that the defendant has received and disobeyed a police order to disperse. Taken together, those requirements are sufficient to give fair notice to persons subject to the ordinance how they may conform their conduct to the law.

The ordinance also contains standards that satisfactorily confine police enforcement discretion. It does not permit police to sweep the streets of persons whom they find undesirable or annoying, or to remove minority or disfavored groups from the City. Instead, in light of the careful definition of each of its terms and the further requirements in the general police order, it permits the police to apply the ordinance only in areas where gang activity has threatened the local community and only against persons who, by virtue of their membership in criminal street gangs or their participation in groups containing such members, pose a particular threat to the community. Even as to such persons, the ordinance simply prohibits them from loitering in groups, and it authorizes arrests only of individuals who disobey police orders to disperse. In short, the ordinance provides far more notice and precise standards for enforcement than did the standardless ordinances this Court found unconstitutionally vague in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), and *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), or the ordinance that this Court commented would be unconsti-

tutional in *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965).

The ordinance also does not violate substantive due process guarantees. It implicates two specific liberty interests—the interest of gang members in standing in groups on the streets and sidewalks and in other public places in designated areas of the city, and the interest of non-gang members in standing in public places with gang members in those designated areas. Those interests are not commensurate with any of the fundamental liberty interests—affecting the most intimate personal relations and the core of family life—whose infringement may be justified only if narrowly tailored to serve a compelling state interest. Moreover, the City's interest in public safety, which forms a part of the justification for the ordinance, has frequently been found sufficient to justify substantially more serious intrusions on personal liberty, such as pretrial confinement on the basis of future dangerousness. *United States v. Salerno*, 481 U.S. 739, 748 (1987). And the specific prohibitions of the ordinance are narrowly tailored to advance the purposes of the ordinance in returning the City's public spaces to law-abiding citizens and ultimately reducing the level of crime, fear, and violence in the specific areas of the City plagued with gang violence and intimidation.

ARGUMENT

I. THE GANG LOITERING ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE ON ITS FACE

A. The Ordinance Provides Reasonable Notice, In At Least A Wide Range Of Its Applications, Of What Conduct Is Prohibited

The vagueness doctrine is based on the proposition that, "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Laws that fail to provide that kind of notice “may trap the innocent by not providing fair warning,” *ibid.*, and they therefore fail to satisfy due process standards.

The fact that a law has some imprecision, however, is not sufficient to render it unconstitutional. “Condemned to the use of words, we can never expect mathematical certainty from our language.” 408 U.S. at 110. Moreover, the fact that the terms used in a statute have uncertain application to some conceivable conduct is insufficient to support a ruling, like that of the Illinois Supreme Court in this case, that the statute is unconstitutional on its face. Instead, under well-settled standards, facial invalidation is permissible only if the challenged law is “impermissibly vague in all of its applications.” *Village of Hoffman Estates v. The Flipside, Hoffman Estates*, 455 U.S. 489, 497 (1982). If the challenged law imposes reasonably intelligible standards in some factual settings, the law may constitutionally be applied in those settings; vagueness questions that arise in other settings should be resolved if and when cases involving as-applied claims in those settings arise. See, e.g., *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (“Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.”); *United States v. Powell*, 423 U.S. 87, 92-93 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975).

1. Although the vagueness doctrine in general imposes only a modest restriction on the framing of criminal laws, “a greater degree of specificity” is required where the challenged law regulates expressive conduct protected by the First Amendment. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). Such laws require special treatment to avoid a chilling effect on expression that may be close to the line of illegal conduct. See *Village of Hoffman Estates*, 455 U.S. at 499; *Grayned*, 408 U.S. at 109.

The Chicago gang loitering ordinance does not in any meaningful sense limit expression protected by the First

Amendment and is therefore not subject to this more stringent test. If a group of people standing in a public place are engaged in expressive conduct protected by the First Amendment, such as picketing, holding a demonstration, campaigning for a candidate, or gathering signatures on a petition, the group’s message—and its purpose of conveying that message—will be apparent to outsiders. The ordinance’s definition of “loiter,” however, applies only to those who are standing in a public place “with no apparent purpose.” Pet. App. 61a. Therefore, the ordinance by its terms does not apply to those who are gathered for the purpose of engaging in protected expression.

Nor does the gang loitering ordinance limit the freedom of association. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), this Court explained that two different sorts of freedom of association have received constitutional protection. One sort relates to “choices to enter into and maintain certain intimate human relationships,” *id.* at 617, which generally involve “the creation and sustenance of a family” through “marriage, childbirth, the raising and education of children, and cohabitation with one’s relatives,” *id.* at 619 (citations omitted). Those rights, which are protected as “fundamental element[s] of personal liberty” protected by the Due Process Clause, *id.* at 618, are not implicated by the gang loitering ordinance.

The other sort of conduct that comes within the freedom of association involves “a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” 468 U.S. at 618. The Illinois Supreme Court correctly stated that the government may not “forbid, on pain of criminal punishment, assembly with others merely to advocate activity.” Pet. App. 12a (citing, *inter alia*, *Brandenburg v. Ohio*, 395 U.S. 444, 448-449 (1969)). But the gang loitering ordinance, as noted above, does not forbid such assembly, because those exercising this right of assembly have expressive activ-

ity—advocacy—as their purpose. The ordinance, by contrast, prohibits only association “with no apparent purpose.” The First Amendment does not include “a generalized right of ‘social association’ that includes chance encounters,” *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989), and the ordinance therefore is not subject to the heightened review for vagueness applicable to laws that affect First Amendment rights of expression.⁴

2. a. Under ordinary vagueness standards, the ordinance is constitutional. The ordinance defines the term “loiter” to mean “to remain in any one place with no apparent purpose.” That is not an unintelligible standard. As the Illinois Supreme Court indicated, application of the ordinance does not turn on the actual purpose of the group of suspected gang loiterers, but whether that purpose is “apparent to an observing police officer.” Pet. App. 10a. Moreover, the terms of the ordinance suggest that the “apparent purpose” inquiry is based on the apparent purpose for “remain[ing] in any one place.” Thus, a group that is talking or smoking while remaining in one place would not ordinarily have an apparent purpose, since it would rarely be apparent to an observer that the group’s purpose for remaining in that place—rather than walking or moving elsewhere—was to talk or smoke.⁵ Finally, the purpose simply to stand on a corner cannot be an “apparent

⁴ In the Illinois Supreme Court, respondents argued that the ordinance impinged on protected expression because those subject to the ordinance may be talking while they are loitering. See Defendants-Appellees Ill. Sup. Ct. Br. 13-14. The ordinance, however, does not prohibit or regulate talking. It merely requires those loitering with criminal street gang members to move on when ordered to do so.

⁵ It is a factual question in each case whether a group has an apparent purpose for remaining in one place. In some circumstances it may be apparent that a group’s purpose for remaining in one place is to smoke cigarettes—for example, where the group is smoking during business hours outside an office building in which smoking is known to be prohibited. Far from suggesting that the ordinance is vague, such examples demonstrate that the standard embodied in the ordinance may be intelligibly applied to a variety of factual circumstances.

purpose” under the ordinance; if it were, the ordinance would prohibit nothing at all.

In accordance with those standards, the statutory term “loiter” would likely include standing on a street corner or in front of a school or business and making no effort to enter a building or to engage in conduct conveying a message. On the other hand, the statutory term would not likely include attending a sporting event, waiting in line to enter a theater, or waiting at a bus stop until a bus arrives.⁶ The term “loiter” thus has a core meaning that distinguishes proscribed from permitted conduct.

In each of the four full trials conducted below, the “no apparent purpose” issue was resolved as a straightforward question of fact, insofar as it was litigated at all.⁷ In each case a police officer testified that he had observed the respondent standing in one place with no apparent purpose for a period of time.⁸ Three of the respondents testified, to the contrary, that they were arrested while they were walking to another location; the fourth did not testify or put on any evidence on the issue.⁹ The trial court credited

⁶ Contrary to the suggestion of the Illinois Supreme Court, Pet. App. 10a, the purpose of “a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower” will ordinarily be apparent to an observer.

⁷ The other two cases that resulted in convictions were tried on stipulated facts or stipulated testimony, which addressed this issue in conclusory terms. See Br. for Defendant-Appellant at 3, *Chicago v. Garvin*, No. 93-4356 (Ill. App. Ct., 1st Div.) (stipulated testimony that defendant was loitering); Br. for Defendant-Appellant at 3, *Chicago v. Jimenez*, No. 93-4351 (Ill. App. Ct., 1st Div.) (stipulated that defendant “knowingly remained at a known designated location for criminal street activity, after being informed by a police officer to disperse from this area.”).

⁸ *Chicago v. Gutierrez*, 4/12/94 Tr. 12, 15-16, 18-19; *Chicago v. Morales*, 9/20/93 Tr. 6-11; *Chicago v. Washington*, 7/14/94 Tr. 9-11, 17-19; *Chicago v. Renteria*, 9/29/94 Tr. 16-19, 21-24.

⁹ One respondent claimed that he was walking to meet his mother. *Chicago v. Gutierrez*, 4/12/94 Tr. 24-29. Another claimed that he was walking home from the hospital. *Chicago v. Morales*, 9/20/93 Tr. 17-18. A third said he was walking out of a store to rejoin a friend who had

the officer rather than the testifying defendants, indicating that if it had credited the defendants it would have acquitted them.¹⁰ The experience in trying cases under the ordinance thus shows no confusion or dispute about what constitutes an "apparent purpose," and shows that the term "loiter" has a core meaning that is sufficient to preclude a facial vagueness challenge. Possible unconstitutional applications, or questions about the interpretation of the ordinance's standard at the margins, should be resolved on an as-applied basis.

A comparison with the ordinance this Court held unconstitutionally vague in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), is instructive. The operative language in the ordinance in *Coates* prohibited three or more people from assembling on a sidewalk and "conduct[ing] themselves in a manner annoying to persons passing by." *Id.* at 611. Noting that "[c]onduct that annoys some people does not annoy others," *id.* at 614, the Court explained that therefore rather than "requir[ing] a person to conform his conduct to an imprecise but comprehensible normative standard, * * * no standard of conduct is specified at all." *Ibid.* Unlike the ordinance in *Coates*, the term "loiter" in the Chicago gang loitering ordinance does specify a standard of conduct. At least in combination with the other requirements of the ordinance, it is not unconstitutionally vague.

b. The Illinois Supreme Court acknowledged that "persons of ordinary intelligence may maintain a common and accepted meaning of the word 'loiter.'" Pet. App. 9a. But the court stated that "such term by itself is inadequate to inform a citizen of its criminal implications." *Ibid.* In the court's view, "[t]he infirmity" of the use of the

waited outside with a group of others. *Chicago v. Washington*, 7/14/94 Tr. 28-31. A fourth, Jose Renteria, did not testify, and did not otherwise claim that he had an apparent purpose in standing on the street.

¹⁰ *Chicago v. Gutierrez*, 4/12/94 Tr. 32; *Chicago v. Morales*, 9/20/93 Tr. 22-23; *Chicago v. Washington*, 7/14/94 Tr. 35; *Chicago v. Renteria*, 9/29/94 Tr. 36.

term "is that it fails to distinguish between innocent conduct and conduct calculated to cause harm and 'makes criminal activities which by modern standards are normally innocent.'" *Ibid.* (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972)). Even as defined by the ordinance, the court held, "[p]eople with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer." *Id.* at 10a.

The Illinois Supreme Court's reasoning is unsound. It is not the task of a court, in adjudicating a vagueness challenge to a statute, to determine whether the statute criminalizes only "conduct calculated to cause harm." It is up to the legislature to determine what conduct is likely to cause harm in a given community, and the City Council's determination that gang loitering is likely to cause harm in Chicago was fully supported by the record and should be conclusive. Nor does the constitutionality of an ordinance depend on whether it "makes criminal activities which by modern standards are normally innocent." Social problems—and tolerance of disorder—vary among different communities and even in the same community at different times. It is a part of the substantive due process inquiry, see pp. 22-30, *infra*, to determine whether a particular prohibition falls within a community's wide discretion to subject particular conduct to the sanctions of the criminal law. Judicial second-guessing of a community's determinations regarding conduct that should be criminalized is not, however, a part of the vagueness inquiry. If conduct is adequately defined in a criminal statute to give fair notice and avoid standardless discretion, the fact that it is "by modern standards * * * normally innocent," *Papachristou*, 405 U.S. at 153, is "not a defect of clarity." *Village of Hoffman Estates*, 455 U.S. at 497 n.9.

3. Conviction under the ordinance requires not only proof of loitering, but also proof of other requirements as well. The addition of those elements is sufficient to satisfy fair notice requirements, regardless of any indeter-

minacy that may inhere in the term "loiter," as defined by the ordinance.

a. As the Illinois Supreme Court recognized, proof of a violation of the ordinance requires proof "that the arresting officer have a reasonable belief that one person in a group of loiterers is a gang member." Pet. App. 11a. In at least a great many cases, persons subject to the statute can be expected to know whether they are loitering with gang members and whether the police officer issuing the order has a reasonable belief that gang members are present. Indeed, because it is important to the gang to assume visible control over an area, members of gangs often wear distinctive clothing, colors, and insignia, and employ distinctive hand signals;¹¹ and they frequently freely admit to their membership in the gang.¹² The intimidating effect of gang loitering—one of the primary evils against which the ordinance was directed—results precisely because gang members and affiliates loitering in public places make their status as gang members clear to onlookers. In addition, the gang's recruiting function—also a target of the ordinance—depends on easy recognition of the gang affiliation of a group of loiterers. See *id.* at 2a (City Council heard testimony that "gang members loiter as part of a strategy to claim territory, recruit new members, and in-

¹¹ In three of the four full trials resulting in convictions below, the police officers testified that respondents and/or others in the group with which they were loitering admitted gang membership. See *Chicago v. Gutierrez*, 4/12/94 Tr. 11-12; *Chicago v. Morales*, 9/20/93 Tr. 7; *Chicago v. Washington*, 7/14/94 Tr. 10, see also *id.* at 4. In the fourth case, although the police officer did not testify to an admission by the defendant himself, the officer stated that gang members "admit they are gang members and they are very proud of it." *Chicago v. Renteria*, 9/29/94 Tr. 13; see also *id.* at 11 (gang members "readily admit" membership).

¹² As a recent monograph published by a Department of Justice component noted in its definition of "street gang," "[t]he group frequently identifies with or claims control over specific territory (turf) in the community, wears distinctive dress and colors, and communicates through graffiti and hand signs." Bureau of Justice Assistance, *Urban Street Gang Enforcement* 30 (1997).

timidate rival gangs and ordinary community residents."). Accordingly, individuals may in most cases readily determine whether they are engaging in gang loitering subject to the ordinance.¹³

b. The ordinance also requires proof that the defendant failed to obey a police order to disperse. Even if fair notice were a close question based on the other requirements of the statute, this element would be sufficient to cure any problem. A person of ordinary intelligence and common sense who receives a police order to disperse under the ordinance should be in no doubt about "what is prohibited" and should easily be able to "act accordingly." *Grayned*, 408 U.S. at 108. Criminal statutes ordinarily are enforced with far less specific notice than occurs under the Chicago gang loitering ordinance. A person who fails to obey a police order to disperse under the ordinance cannot complain of lack of fair notice.

This Court's decision in *Colten v. Kentucky*, 407 U.S. 104 (1972), makes clear that the Chicago ordinance provides fair notice. In *Colten*, the statute under challenge prohibited "[c]ongregat[ing] with other persons in a public place and refus[ing] to comply with a lawful order of the police to disperse," when done "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof." See *id.* at 108. This Court rejected the

¹³ There may be cases in which a defendant can show that he had no way to determine whether or not a police officer could have had a reasonable belief that a gang member was present in a group of loiterers. If such a case arises, the question presented would be whether the other requirements of the statute—especially the requirement of an order to move on—were sufficient to have given the defendant "a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Regardless of the answer to that question, the existence of some such cases would not render the statute unconstitutionally vague on its face—i.e., incapable of application even where the gang affiliation of members of a group of loiterers is in no way unclear. Cf. *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

defendant's argument that the statute did not provide fair notice, explaining that a person who satisfies the other elements of the statute "should understand that he could be convicted under [the statute] if he fails to obey an order to move on." *Id.* at 110. The ordinance in this case requires the same police dispersal order as in *Colten*. Accordingly, as in *Colten*, "citizens who desire to obey the statute will have no difficulty in understanding it." *Ibid.*

The Illinois Supreme Court ignored *Colten* in its analysis of fair notice. Instead, that court relied on *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965), in which this Court noted that an ordinance that, without more, made it "unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on" would be unconstitutionally vague. The Illinois Supreme Court stated that "[t]he proscriptions of the gang loitering ordinance are essentially the same as the *Shuttlesworth* ordinance" and relied upon *Shuttlesworth* for the principle that "if the underlying statute is itself impermissibly vague, * * * then a conviction based upon failure to obey the order of a police officer pursuant to that statute cannot stand." Pet. App. 13a.

The Chicago gang loitering ordinance is not "essentially the same" as the ordinance in *Shuttlesworth*. The ordinance in *Shuttlesworth*, "[l]iterally read, * * * says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer." 382 U.S. at 90. That, together with the ordinance's "ever-present potential for arbitrarily suppressing First Amendment liberties," *id.* at 91, was the basis for this Court's ruling. In contrast, the Chicago gang loitering ordinance, especially together with the accompanying police order, has extensive definitions of its key terms that very substantially limit police discretion, see pp. 19-20, *infra*, and it does not substantially affect expressive activities protected by the First Amendment.

Shuttlesworth does not, as the Illinois Supreme Court stated, stand for the principle that a police order requirement can never help to cure a statute that might otherwise be impermissibly vague; at most it condemns a hypothetical statute that penalizes violation of a police order alone, without any standards to guide the issuance of the order. 382 U.S. at 90-91. The Chicago ordinance, however, contains both a requirement of a police order, and standards for issuing the order. In combination, these two elements save the statute from vagueness, whether or not either one alone would suffice. A statute taken as a whole may provide fair notice despite the fact that some of its elements, taken alone, fail to do so—and this is so even where the statute regulates expression, and is therefore subject to particularly stringent vagueness requirements. *Reno v. ACLU*, 117 S. Ct. 2329, 2345 (1997) ("Just because a definition including three limitations is not vague, it does not follow that one of those limitations, standing by itself, is not vague."). Similarly here, the ordinance as a whole—including in particular the police order requirement—provides fair notice of the conduct that it prohibits, so that individuals may conform their conduct to law.

B. The Ordinance Does Not Encourage Arbitrary And Discriminatory Enforcement

The "more important aspect of the vagueness doctrine" is "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). The ordinance satisfies that requirement.

1. As noted above, the key terms in the statute are carefully defined. The ordinance provides that individuals may be asked to move on only based on a reasonable belief that they are "loitering"—a defined term whose meaning has already been discussed—with one or more persons, at least one of whom is reasonably believed to be a gang member. A "gang" is defined as a group of three or more persons that has "as one of its substantial activities" the commission of enumerated serious criminal offenses, and

whose members commit, attempt to commit, or solicit the commission of those offenses, provided that they are committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members." Pet. App. 61a-62a. That definition substantially limits police discretion. In precise terms, it aims the statute's prohibitions at those who choose to affiliate with criminal organizations. Even as to those persons, it may not be used simply to arrest all members of such organizations, but simply requires them to move on when ordered to and continue their activities—whatever they may be—without loitering. Cf. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (holding unconstitutionally vague a statute making it a crime to be a gang member who has no occupation and has been convicted of a prior offense).

The Chicago ordinance does not suffer from the vices of the ordinance before this Court in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156-157 n.1 (1972). That ordinance included a list of crimes—including nightwalking, wandering about from place to place without any lawful purpose or object, loafing, living upon the earnings of one's wife—that was "so all-inclusive and generalized" that "those convicted may be punished for no more than vindicating affronts to police authority." *Id.* at 166-167. The fact that in *Papachristou* there were "no standards governing the exercise of the discretion granted by the ordinance," *id.* at 170, permitted police in effect to criminalize the failure by disfavored groups "to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts." *Ibid.* By contrast, no one is guilty of a crime under the Chicago ordinance merely because of lifestyle, and even those subject to the act are not made criminals, but are merely required to disperse when requested to do so by police under the ordinance.

2. This Court has frequently considered administrative enforcement guidelines in evaluating vagueness claims. For example, in *Village of Hoffman Estates*, the Court relied in part on "guidelines prepared by the Village

Attorney," 455 U.S. at 492-493 & n.3, in holding that the terms in a local drug paraphernalia ordinance were not unconstitutionally vague. *Id.* at 500-501 & n.18; see also *id.* at 504 ("The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance.").¹⁴

The police order in this case further limits the discretion granted the police. First, the general order provides that the ordinance "will be enforced only" within areas designated by district police commanders "in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community." Pet. App. 68a-69a. The order therefore limits the enforcement of the ordinance to specific areas of the city in which gang loitering poses a present threat and in which reasonably thorough and nondiscriminatory enforcement is a practical, achievable goal. That in itself vitiates the possibility that the ordinance could be used as a general license to trap or harass disfavored individuals throughout the city.

Second, the general order includes detailed instructions concerning how police officers may establish that an individual is a gang member. The order provides that such membership "must be substantiated by the arresting officer's experience and knowledge" and must be "corroborated by specific documented and reliable information." Pet. App. 67a. The order goes on to detail the types of information that would be sufficient in this regard (*e.g.*, an individual's admission of membership, the wearing

¹⁴ See also *Kolender v. Lawson*, 461 U.S. 352, 355 (1983) (court must "consider any limiting construction that a state court or enforcement agency has proffered") (emphasis added); *Parker v. Levy*, 417 U.S. 733, 754 (1974) ("[E]ven though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative * * * sources, further content may be supplied even in these areas by less formalized custom and usage."); *Ehlert v. United States*, 402 U.S. 99, 105, 107 (1971) (relying on "reasonable, consistently applied administrative interpretation" and "letter included in the briefs" from administrative authorities regarding "present practice").

of distinctive gang insignia or colors, the use of distinctive gang signs or symbols, or the identification of an individual as a gang member by a reliable informant, *id.* at 67a-68a), as well as some types of information that would be insufficient (*e.g.*, the wearing of "clothing available for sale to the general public," *id.* at 67a).

Taken together, the definition of the key terms in the ordinance itself and the further specifications in the police general order limit the enforcement discretion of police officers well within reasonable standards. The ordinance therefore does not suffer from the defect of the statute held unconstitutional in *Kolender*, which required individuals to provide "credible and reliable" identification to police officers on request, and which "contain[ed] no standard for determining what a suspect has to do in order to satisfy [that] requirement." 461 U.S. at 358. The ordinance also does not remotely resemble the wide-ranging ordinances that delegated virtually standardless discretion to the police in *Papachristou*, *Coates*, or *Shuttlesworth*, to stop and/or arrest anyone they wished.

II. THE CHICAGO GANG LOITERING ORDINANCE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS GUARANTEES

This Court has held that the Due Process Clause has a substantive component, which "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." *County of Sacramento v. Lewis*, No. 96-1337 (May 26, 1998), slip op. 5. The "core of the concept" of substantive due process is "protection against arbitrary action," and against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.* at 10, 11. It "specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v.*

Glucksberg, 117 S. Ct. 2258, 2268 (1997) (citations and internal quotation marks omitted).

A. The Ordinance Implicates Liberty Interests

1. This Court has noted that substantive due process analysis requires "a careful description of the asserted fundamental liberty interest." *Glucksberg*, 117 S. Ct. at 2268 (internal quotation marks omitted). The Illinois Supreme Court described a number of liberty interests it believed were at stake in this case. It stated that activities such as "loafing, loitering, and nightwalking" are "amenities of American life," and "[t]he freedom to engage in such harmless activities is an aspect of the personal liberties protected by the due process clause." Pet. App. 17a (citing *Papachristou*, 405 U.S. at 164). The court also referred to "the general right to travel, the right of locomotion, the right to freedom of movement, and the general right to associate with others." Pet. App. 18a (citations omitted). In the court's view, "[t]he gang loitering ordinance impedes upon [*sic*] all of these personal liberty interests." *Ibid.*

We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others. But characterization of the interests at that level of generality is of limited utility in this case, because in ordinary application the gang loitering ordinance does not deprive individuals of some of those interests (*e.g.*, the interests in traveling and moving) at all, and it deprives individuals of other interests (*e.g.*, standing in public places and associating with others) only to a limited extent and only in some circumstances. Although the justifications for the gang loitering ordinance may not justify depriving all citizens of Chicago of these interests in their entirety, the justifications are sufficient to justify the ordinance's much more limited effect. Accordingly, a more tailored description of the liberty interest at stake in this case is required.

2. The Chicago gang loitering ordinance implicates two distinct liberty interests. First, it implicates the interest of gang members in standing in public places with others in areas of the City designated pursuant to the police general order; gang members who do so “with no apparent purpose” may expect to receive police orders to disperse. See Pet. App. 61a (ordinance provides that police officer observing persons engaged in gang loitering “shall order all such persons to disperse and remove themselves from the area”) (emphasis added). Second, it implicates the interest of non-gang members in standing in public places with one or more gang members in designated areas of the City; non-gang members who do so “with no apparent purpose” are also subject to police orders to disperse.

The ordinance has a somewhat different effect on each of those liberty interests. With respect to gang members, the ordinance deprives them of a large part of their interest in standing in public places in the company of others. They may, of course, freely walk with whomever they wish.¹⁵ They may stand wherever they wish in areas of the city not designated by the police general order. Even in designated areas, they may stand where they wish, so long as they do so alone. And they may stand in public places with individuals of their choice in designated areas, so long as their apparent purpose in doing so is not merely to loiter—i.e., they may do so to attend a sporting event or concert, to exercise their First Amendment rights of expression, to wait for a taxi or bus, etc. But their ability merely to stand on the streets and sidewalks and in other public places in designated portions of the city and socialize with others is severely constricted by the ordinance.

¹⁵ The Illinois Supreme Court erred when it stated that “[p]ersons suspected of being in criminal street gangs are deprived [by the ordinance] of the personal liberty of being able to freely walk the streets and associate with friends.” Pet. App. 18a. The ordinance does not prohibit anyone from “freely walk[ing] the streets.” Its effect is limited to prohibiting standing with gang members in one place with no apparent purpose.

With respect to non-gang members, the ordinance imposes a much more limited restriction. Non-gang members may continue to stand with whomever they want, wherever they want, with one exception: they may not loiter with gang members in designated areas of the city. Of course, although that is a more limited restriction, it potentially affects a far larger number of people.

B. The Interests Supporting The Gang Loitering Ordinance Are Sufficient To Justify Its Limited Intrusion On The Identified Liberty Interests

The recognition of an interest as one encompassed within the meaning of the term “liberty” is only the first step in deciding whether a law violates substantive due process. It then must be determined, based on an objective analysis of “[o]ur Nation’s history, legal traditions, and practices,” *Washington v. Glucksberg*, 117 S. Ct. at 2268, whether the government’s justifications for overriding the liberty interests at stake are sufficient. The strength of the justification that is required depends upon the nature and character of the liberty interest at stake. See *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (liberty interest in refusing medical treatment must be balanced against the relevant state interests); *Williamson v. Lee Optical of Ok., Inc.*, 348 U.S. 483, 491 (1955) (state restriction affecting a person’s ability to engage in a business must merely be rationally related to a legitimate government purpose); *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) (infringement of certain fundamental liberty interests must be narrowly tailored to serve a compelling interest).

1. This Court has recognized that infringement of certain fundamental interests that go to the heart of personal privacy and autonomy may be justified only by a showing that the infringement is “narrowly tailored to serve a compelling state interest.” 507 U.S. at 302; *Glucksberg*, 117 S. Ct. at 2267. Such liberty interests “include[] the rights to marry, to have children, to direct the education

and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Glucksberg* at 2267 (citations omitted). The liberty interests at stake in this case do not fall within that category, and the Illinois Supreme Court did not suggest that they did.

2. That is not to denigrate the importance of the liberty interests that are at stake in this case. This Court recognized in *Papachristou* that the ability to stand on a sidewalk and meet one's friends and neighbors, or to sit on a sidewalk bench with others and watch the passing show, are "unwritten amenities [that] have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity." 405 U.S. at 164. In most circumstances, the American people treasure such innocent "amenities," and the government has little occasion or basis to interfere with them.

This Court, however, has "repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *United States v. Salerno*, 481 U.S. 739, 748 (1987). In *Salerno*, that interest was found sufficient to justify a complete deprivation of liberty—pretrial detention on the basis of future dangerousness. The record in this case demonstrates that the Chicago City Council had a sufficient basis to justify the far less severe restriction on liberty in the gang loitering ordinance.

a. The Illinois Supreme Court stated that the ordinance was "arbitrarily aimed at persons based merely on the suspicion that they may commit some future crime." Pet. App. 18a. That is incorrect. The ordinance itself defines a crime based on the present threat to public order caused by gang loitering. As the Preamble to the ordinance recites, the City of Chicago was "experiencing an increasing murder rate as well as an increase in violent and drug related crimes." *Id.* at 60a. The City Council, after holding extensive hearings, determined that "the continuing increase in criminal street gang activity * * *

is largely responsible for this unacceptable situation." *Ibid.* A key part of the problem was that "criminal street gangs establish control over identifiable areas * * * by loitering in those areas" and "intimidat[ing] many law abiding citizens." *Ibid.* Such loitering "creates a justifiable fear for the safety of persons and property in the area." *Ibid.* The City Council concluded that "[a]ggressive action is necessary to preserve the City's streets and other public places so that the public may use such places without fear." *Id.* at 61a.

Those findings were not only supported by the record before the City Council, but also are consistent with data gathered from many other communities. By the early 1990's, 95% of the nation's largest cities and 88% of smaller cities in the nation reported gang problems.¹⁶ Most prevalent in areas in which the population is economically disadvantaged, criminal street gangs have attracted a growing number of young people to a life of violence and crime. A component of the Department of Justice has identified more than 23,000 youth gangs in the nation, with more than 650,000 members.¹⁷ In 1994, criminal street gangs accounted for more than 1000 gang-related homicides in Chicago and Los Angeles alone.¹⁸ Gang in-

¹⁶ Office of Investigative Agency Policies, U.S. Dep't of Justice, *Reducing Violent Crime in America: A Five-Year Strategy* 4 (May 1996).

¹⁷ Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *1995 Nat'l Youth Gang Survey: Program Summary* 12, 15 (1997).

¹⁸ Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *OJJDP Fact Sheet #72* (1997). Chicago has been particularly hard-hit by gang violence. In 1995, Chicago's total of 33,000 gang members was second only to Los Angeles among American cities. *1995 Nat'l Youth Gang Survey* at 16. In 1994, there were 240 gang-motivated homicides in Chicago, an all-time high and a five-fold increase from the number in 1987. Ill. Criminal Justice Information Auth., *Research Bulletin* 4 (Sept. 1996). Between 1987 and 1994, 138 of the 956 gang-related homicide victims were not gang members, including 12 victims age nine or younger. *Id.* at 10, 13. Of the 956 homicides, 120 were drive-by shootings. *Id.* at 18.

timidation of witnesses makes prosecution of those homicides — as well as prosecution of the numerous other serious crimes committed by street gang members—particularly difficult.

b. Faced with that threat to public safety, the City adopted a reasonable approach. Once criminal street gangs obtained control of the streets in an area, the fear and intimidation they spawned deprived law-abiding citizens of the ability to meet with friends and neighbors in public places and otherwise enjoy these amenities of American life. The City's response was to take action so that the amenities discussed in *Papachristou* could be restored to the vast majority of the citizens in the troubled areas. That end, if reached, would lead to the reestablishment of social controls in those areas and a concomitant reduction in fear, gangs, and violent crime. See Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 578-585 (1997) (citing sources).¹⁹

The ordinance's substantial intrusion on the liberty interests of gang members is justified. Under the ordinance, a "[c]riminal street gang" is a group that has "as one of its substantial activities the commission" of one of a

¹⁹ While the precise form of the Chicago ordinance is novel, vagrancy and loitering statutes have a long history, as the Court noted in *Papachristou*, 405 U.S. at 161-162. See also Livingston, *supra*, at 595 (citing authorities for proposition that, prior to *Papachristou*, "[m]ost states had loitering, drunk and disorderly, and vagrancy statutes, in addition to laws prohibiting breaches of the peace, disorderly conduct, and specific forms of public disorder.") (internal quotation marks omitted). While some of those statutes are unconstitutionally vague under modern standards, the ubiquitousness of such statutes shows that the history and traditions of our people do not recognize the right claimed by respondents to loiter at will, regardless of the threat to lawful community life thereby created. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997) ("Our Nation's history, legal traditions, and practices * * * provide the crucial guideposts for responsible decisionmaking that direct and restrain our exposition of the Due Process Clause.") (internal quotation marks and citation omitted).

series of enumerated serious crimes, such as murder, aggravated battery, intimidation, armed robbery, arson, and drug offenses. Pet. App. 61a-62a. The members of such a gang must "individually or collectively engage in or have engaged in a pattern of criminal gang activity," requiring the commission of at least two offenses. *Id.* at 62a-63a. Criminal organizations of this sort pose a particular threat to the communities in which they operate. The City reasonably believed that denying control of the streets and public areas to gang members was an essential element of attacking that threat. The ordinance intrudes on the liberty interests of those who choose to join criminal street gangs to precisely the extent necessary to address the control of the streets by such gangs. In addition, gang members may remove this disability by discontinuing their membership in the gang.

The ordinance's somewhat lesser intrusion on the liberty interests of those who are not gang members is also justified. Their conduct is implicated only when they loiter with gang members. The City reasonably believed that, once a group of people loitering in a particular area becomes identified with a particular gang, the group itself poses the threats of intimidation of law-abiding citizens, coercive recruiting practices, inter-gang violence, and the like. Even if it were practical to identify all of the actual gang members in the group and then to require only the gang members to disperse, the City reasonably concluded that that would not solve the problem. In the eyes of onlookers—including both law-abiding citizens and rival gangs—the group's identity would persist and the threats to public safety posed by the group would persist. Accordingly, the City reasonably concluded that, where gang members loiter in a group, the group itself had to be dispersed to eliminate the threat. The ordinance is tailored to intrude upon the interests of non-gang members only to the extent necessary to accomplish that goal.²⁰

²⁰ In addition, the City Council was aware of the threat posed by drive-by shootings and other gang-related violence. See Pet. App. 2a

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

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General*

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(City Council testimony "revealed that street gangs are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism."). As a result of that threat, anyone standing with a gang member on a street corner—especially someone who is unaware that the group contains gang members—is a potential casualty of stray fire as a result of inter-gang violence. The City has a strong interest in protecting non-gang members from such violence, and the ordinance's requirements that even non-gang members disperse when they are in a group containing gang members assists in achieving that goal.

Bruce/Tore -

I thought you
might find this

MEMORANDUM interesting - skip

Wednesday, October 1, 1997

The intro and go

straight to the

article (to appear
in Atlantic Monthly).

Elean

TO: Colleagues
FROM: Dan Kahan & Tracey Meares
RE: When Rights Are Wrong

Our project criticizes a conception of rights that is being invoked to block norm-shaping law-enforcement techniques in the inner-city. The attached, which is scheduled to be published in the *Atlantic Monthly*, can be considered a "beta" version of our article; the final product will be a fully developed academic treatment of the topic. We see the workshop as an opportunity to deepen our understanding of what it will take to get from where we are now to where we plan to end up.

Our basic claim is that civil-libertarian opposition to curfews, gang-loitering laws, building searches and the like reflects an anachronistic, "1960s conception" of rights. Aimed at counteracting the institutionalized racism of the pre-civil-rights era, this view prescribes searching judicial scrutiny of discretionary policing techniques to prevent harassment of vulnerable minorities. That model of rights, we argue, makes much less sense now that African Americans are meaningfully represented in the inner-city political process and are using their influence to force the police to attend to norms of order. In the climate of the 1990s, courts should afford more deference to *politically grounded* assessments of the appropriate balance between liberty and order.

By our own estimation, the current version of the argument is three conceptual steps from completion. The first step involves articulating the theory of constitutional interpretation that informs our position. We are implicitly arguing *against* any approach that purports to derive a timeless rendering of constitutional rights from some static source of meaning — whether the "original intent" of the framers or some abstract theory of moral philosophy. The approach we are arguing *for* is closer to Lessig's "fidelity" theory.¹ Lessig argues that readings of the constitutional text are inextricably connected to political contexts, and that as those contexts change, so too should courts' readings. The context presupposed by the 1960s conception of rights, we are arguing, was institutionalized racism; *that* context has now changed to the point where applying the 1960s reading of the text in fact frustrates the ends that conception of rights was meant to secure — namely, the dignity and autonomy of African American citizens.

The second step is to spell out in more detail the respective roles of courts and political institutions in what we are calling the "1990s conception" of rights. We

¹See, e.g., Larry Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993).

majority's valuations of liberty and order as reasonable? Insofar as even a small minority of residents objected to the CHA policy, it's obvious that some residents *experienced* the searches as more invasive than did the median resident. If the median resident values privacy less than some subcommunity of residents, can we fairly say that the larger community has internalized the burden that the search policy imposes on the members of *that* subcommunity? Why not ask whether the median member of the privacy-coveting subcommunity views the policy as reasonable? Or whether the median member of the subcommunity of residents engaged in criminal wrongdoing in their apartments does?

At bottom, the burden-internalization inquiry turns as much on normative criteria as on factual ones. We can say that the political community has genuinely internalized the burden associated with a particular policy only if we think that the median voter within that community is affected by the policy in a way that entitles her appraisal to respect. Once we have this normative standard of appraisal in place, moreover, we might not insist that there be a literal identity between the median voter and the actual target of the coercive policy in question. For example, we argue that the sense of "linked fate" among African American residents of the inner-city warrants respecting the median inner-city voter's appraisal of gang-loitering laws and juvenile curfews even though the median voter is neither a gang member nor a juvenile.

So how are we to know whether the median voter is affected in a way that warrants deference to her appraisal of the right balance of liberty and order? In the end, there's no algorithm or abstract theory that can be used for this purpose. All one can do is decide, based on a vivid and rich reconstruction of that actor's circumstances, whether one has confidence in the median voter's judgment. We think anyone who listens to project resident Alverta Munlyn's explanation of why she supported the CHA searches, or to Dallas mother Edna Pemberton's defense of youth curfews, or to the South Side residents' testimony in favor of Chicago's gang-loitering law, will come away with immense respect for their local knowledge. And we challenge anyone who has read Judge Andersen's opinion in the CHA case, or who has heard civil libertarians explain why they side with the suburbanites who opposed inner-city curfews in Washington, Dallas, and San Diego, to explain why we should respect their outsiders perspective more.

deadly and common occurrence in the gang-infested projects. When the ACLU filed suit, the elected representatives of 18 of CHA's 19 projects intervened to support the CHA. But Judge Andersen dismissed the residents' willingness to consent to building searches as evidence of the corrosive effect of poverty and crime on their own "self-respect."

Judge Andersen's ruling was certainly paradoxical. We ordinarily think of rights as belonging to individuals. Rights evidence the respect each of us is due as autonomous actors whose choices about how to secure our own well-being shouldn't be second-guessed by society at large. Yet in the CHA case, Judge Andersen invoked the residents' rights to *overrule* their choices on the ground that he knew better than they what policies treated them with respect.

But as strange as it seems, this story is no aberration. The CHA building searches are only one of many law-enforcement policies attacked by civil libertarians and invalidated by courts on the ground that they violate the rights of the very individuals who support them. Before it derailed the CHA's building searches, for example, the ACLU sued to block installation of metal detectors requested by project residents. It has also attacked youth curfews and gang-loitering provisions on the ground that these policies promote harassment of inner-city residents — even though residents of the inner-city have in fact been the driving political force behind many of these measures.

There are no easy solutions to the problems of inner-city crime. Reasonable people can disagree on whether building searches, curfews, anti-loitering ordinances and the like will work, and whether they'll work well enough to justify the burdens they impose on individual liberty. What's extremely unreasonable, however, is the assumption that the individuals most intimately affected by these policies aren't smart enough or don't value liberty enough to decide these issues for themselves.

Why do some civil libertarians and courts feel constrained to *override* these persons' freedom in the name of respecting their rights? The answer is that they subscribe to an anachronistic and unduly abstract understanding of individual rights — one fashioned to address political conditions that, by and large, no longer characterize American society. Contemporary political conditions require a *new* conception of rights — one that assures that the difficult choices surrounding building searches, curfews, anti-loitering

paid much less attention to violent crimes committed against minorities than to those committed against whites. In addition, overwhelmingly white police forces systematically disregarded more common "disorder" offenses in minority communities, dismissing prostitution, public drinking, gambling, and even simple assaults as "typically Negro." This toleration of crime and disorder helped to accelerate urban decay, driving critical commercial establishments, as well as working-class residents who had the resources to leave, out of poor inner-city neighborhoods.

It was against this background that the Warren Court fashioned its well-known array of procedural rights in criminal law. From the *Miranda* rule, to detailed search-and-seizure guidelines, to the "void for vagueness" doctrine, these guarantees were animated by two principles — "community distrust" and "discretion skepticism" — that together can be characterized as the "1960s conception of rights." Each of these principles in the Court's jurisprudence was clearly aimed at counteracting the distorting influence of institutionalized racism on America's criminal justice system.

The 1960s conception of rights showed distrust for communities insofar as it licensed relentless judicial second-guessing of democratic political institutions on the appropriate balance between order and liberty. In an important sense, all rights reflect community distrust because they protect the interests of vulnerable minorities from majority overreaching. What made the 1960s conception of rights uniquely distrustful was its extension of searching judicial scrutiny to basic neighborhood policing techniques that historically had been viewed as advancing the welfare of the community at large.

Institutionalized racism fully justified this suspicion of democratic politics. Those who led the struggle for civil rights in the 1960s highlighted the injustice of coercive neighborhood policing that had been long concentrated on blacks, who by virtue of their exclusion from the political process had little or no say on the justice of particular law-enforcement practices. Under these circumstances, democratic approval furnished no evidence that individuals most affected by an invasive procedure or law viewed its impact on liberty as justified by its contribution to order. That's what searching judicial review was meant to guarantee.

In a famous 1960 *Yale Law Review* article, Justice William O. Douglas leveled exactly this critique against anti-loitering laws, then a staple of American policing. It was naive to defer to the

representation. Never higher than 3% before 1970, the size of the African-American contingent in Congress grew to 9% by the mid 1990s — close to the proportion of African-Americans in the population. Between 1970 and 1983 the number of black state representatives doubled. The number of African-American mayors increased over five fold during the same period, and the number of city council members quadrupled. During the 1980's and 1990s, many of America's largest cities, including New York, Los Angeles, Chicago, and San Francisco, have been led by African-American mayors.

Growth in African-American political strength has also changed the faces of urban police forces. In Chicago, twenty-five percent of the city's officers are African-American, and in Washington D.C. a majority are. New York, Washington, D.C., and Los Angeles have all had African-American police chiefs who were accountable to African-American mayors. In short, it's no longer plausible to view the relationship between the police and minorities as an presumptively antagonistic one.

Crime in minority communities has also changed dramatically since the 1960s: it has grown substantially worse. While national crime rates have been steadily declining during the last decade, they have been *increasing* in the predominantly minority neighborhoods of America's inner-cities. Because most crime is intraracial, disproportionate victimization of minorities goes hand in hand with involvement of minorities in the criminal justice system: fully *one-third* of African-American men between 20 and 29 are on probation, incarcerated, or on parole.

The high proportion of African American men bearing criminal conviction records is as much a *cause* as a consequence of the inner-city crime problem. First, high incarceration rates likely undermine, rather than advance, deterrence in high crime communities: the greater the number of persons convicted of crimes, the less stigma attaches to law-breaking. Second, and perhaps more importantly, high incarceration rates destroy the fragile neighborhood social structures that prevent crime in poor communities. The higher the number of men incarcerated from these communities, the greater the number of single mothers, whose own economic struggles deprive them of the time needed to shield their children from the pressures that draw them into crime. High incarceration rates also fuel the perception that African-American men are disproportionately involved in crime; the resulting distrust and suspicion of *all* African-American men puts even law-abiders at a disadvantage in the employment market — an obvious disin-

the grievances of these very citizens, who demanded effective action to rid their neighborhoods of drive-by shootings, fighting, and open-air drug dealing. The ordinance was passed by an overwhelming margin in the Chicago City Council, with key support from Aldermen representing the city's most impoverished, crime-ridden districts, and predominantly minority districts.

The claim that the ordinance invited arbitrary or discriminatory enforcement is also unfounded. In fact, the ordinance was accompanied by a carefully considered set of guidelines. For example, only a small number of officers in each police district were permitted to enforce the ordinance. They could do so, moreover, only in specified areas of a district with demonstrated serious gang activity. Before specifying enforcement "hot spots" district commanders were to consult with community residents.

What's more, it appears that the ordinance had succeeded in decreasing crime before being judicially overturned. Police data suggest that aggressive enforcement of the ordinance had led to substantial decreases in gang- and narcotics-related homicides and aggravated batteries in the districts with the most serious gang problems. In this setting, then, the 1960s conception of rights adds nothing to the political checks against law-enforcement abuses while it makes law-enforcement protection less effective.

Another effective law-enforcement policy that has fallen victim to the 1960s conception of rights is the youth curfew. Over half the major cities in the United States have enacted curfew legislation since 1990. They've been fought every step of the way by civil liberties advocates who argue that curfews interfere with the choices of individual teens and their parents, and invite racially motivated harassment by the police. Some (but not all) courts agree.

But again, the civil libertarian critique defies political reality. African-Americans, far from opposing curfews, have supplied much of the political energy behind their resurgence. Edna Pemberton — an African-American mother of 10 who spearheaded the campaign for the Dallas curfew — described the charge that curfews fuel racial harassment as "an ACLU scare tactic that polarized the community."

Even inner-city teens themselves generally favor curfews. One poll, for example, showed that 70 percent of African-American teens in Washington, D.C., supported that city's curfew.

The claim that curfews interfere with individual choice is naive. What it overlooks is how the decision of juveniles to partici-

Civil libertarians have an answer to these questions, too: no. The judgment and "self-respect" of inner-city residents, they maintain, has been deformed by social deprivation. Consequently, they lack the capacity to make critical assessments of curfews, gang-loitering ordinances, building searches, and similar policies.

This contention is ripe with self-contradiction. Civil libertarians usually take immense pride in their resistance to paternalism. Respecting individual dignity, they maintain, requires society to refrain from forcing an idealized set of values and preferences on its citizens. Yet upon discovery that inner-city residents favor policies that the ACLU believes violates these persons' rights, too many civil libertarians resort to the very kind of paternalism they should abhor. The support of inner-city residents for building searches, loitering ordinances, and curfews, they argue, should be ignored because it's a product of the debasing influences of crime and poverty. The appropriate way to show respect for *these* individuals is to enforce the rights they *would* value had they formed their preferences in a better environment. To treat *them* with dignity society must — in the words of notorious anti-liberal Jean-Jacques Rousseau — "force them to be free"!

But the civil-libertarian claim that inner-city residents lack critical judgment is not just paradoxical; it's manifestly false. When the ACLU filed suit in the building-search case, for example, CHA residents were vigorously debating the appropriateness of building searches: although many residents supported the existing CHA policy, many others advocated guidelines to restrict the searches to the hours immediately following a report of gunfire. The heated debate concerning the CHA building searches *among* CHA residents demonstrates that these individuals don't just accept what's given uncritically. Rather, like other self-respecting persons in a tough situation, they reflect, they complain, they demand, they argue, they fight, and they ultimately *decide* what the best course of action is — unless, of course, that power is taken away from them.

Indeed, perhaps the worst consequence of the ongoing commitment to the 1960s conception of rights is its *disempowering* effect on inner-city communities. Criminologists have long recognized that inner-city crime both creates and is sustained by atomization and distrust, forces that lower individuals' ability to engage in the cooperative self-policing characteristic of crime-free communities. A healthy democratic political life can help to repair these conditions. That's exactly what residents of the inner-city enjoy when they are free to decide for themselves whether to adopt

political representatives of these individuals, moreover, have unambiguously expressed their support for the searches. To be sure, not *everyone* who lives in the projects approves the tradeoff between submitting to this intrusive law-enforcement technique and the increased security it delivers. But because these individuals had every chance to voice their opposition in the political process, and because there is every reason to believe that the majority — whose members were affected in exactly the same way — gave due weight to the dissenters' interests, there's no good reason for courts to second-guess the community's determination that building searches strike a fair balance between liberty and order.

Gang-loitering ordinances and curfews likewise pass the burden-sharing test, albeit in a less straightforward fashion. These laws do indeed burden the liberty of only a minority — gang members in the one case, and juveniles in the other — many of whom might be disenfranchised. But this minority is by no means a despised one. Inner-city teens and even gang members are linked to the majority by strong social and familial ties. It is precisely because they care so deeply about the welfare of these persons that residents of the inner-city favor relatively mild gang-loitering and curfew laws as alternatives to draconian penalty enhancements for gang crimes, severe mandatory minimum prison sentences for drug distribution, and similarly punitive measures, which inner-city residents viewed as intolerably destructive of the whole community. The pervasive sense of "linked fate" between the majority of inner-city residents and the youths affected by curfews and gang-loitering ordinances furnishes a compelling reason *not* to second-guess the community's determination that such measures enhance rather than detract from liberty in their communities.

Indeed, there is a profound tension between individual liberty and judicial decisions striking down such laws. Many inner-city residents view gang-loitering ordinances and curfews as tolerably *moderate* ways to steer youths away from criminality. They realize that when courts prohibit crime-preventive measures such as these legislatures naturally attempt to compensate with longer prison terms for law-breaking. The kids whom the police can't order off the streets today are thus the same ones they'll be taking off to jail tomorrow. The self-defeating result of applying the 1960s conception of rights in the 1990s is a society that shows its respect for individual liberty by destroying ever greater amounts of it.

Now consider the principle of guided discretion. The 1960s conception of rights insists on hyper-specific rules based on the assumption that white political establishments can't be relied on to

The Tyranny of Legal Abstraction

In his 1960 *Yale Law Journal* article, Justice William O. Douglas complained that "a disproportionate part of the energies of [the legal] profession is devoted to the semantics of the law." "[T]he discourse with which we tend to preoccupy ourselves," he continued, "is pretty much in the pattern of theological discourse. The priests of the profession argue and debate about nice points of law that may seem important to those who lead smug lives in ivory towers but quite unimportant in the life of the nation." The specific targets of Douglas' fire were courts that had invoked colonial precedents to uphold anti-vagrancy laws.

Though civil libertarians view themselves as Douglas' heirs, they misperceive the forest of his critique for the trees. Douglas criticized vagrancy laws on the ground that the legal abstractions used to defend them were out of keeping with contemporary circumstances — namely, the discriminatory enforcement of vagrancy laws against effectively disenfranchised minorities. But circumstances have changed since 1960: today African-Americans exercise considerable political strength in our nation's inner-cities; and far from being terrorized by anti-loitering laws, curfews, building searches and the like, inner-city residents *support* these measures as potent weapons against the crime that drastically foreshortens their economic and social prospects.

The courts and civil libertarians who invoke the outmoded 1960s conception of rights are now the ones guilty of reducing law to a "theological discourse" divorced from "the life of the nation." Such scholasticism, moreover, has very real and painful consequences. Those who view themselves as the defenders of liberty can do much better.

THE WHITE HOUSE
WASHINGTON

July 27, 1998

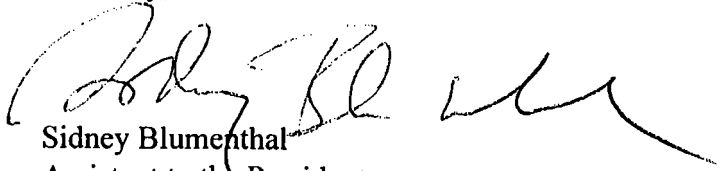
Ms. Tracey L. Mears
Mr. Dan M. Kahn
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1111 East 60th Street
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Dear Ms. Mears and Mr. Kahan:

Thank you for sending me a copy of your work. I have passed it along to Jose Cerda, Special Assistant to the President for Domestic Policy, who handles crime, drugs, and communities.

My best to Cass.

Sincerely,



Sidney Blumenthal
Assistant to the President

cc: Jose Cerda ✓

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July 21, 1998

Mr. Sydney Blumenthal
The White House
1600 Pennsylvania Avenue
Washington, D.C. 20502

Re: Curfews and Other Order-Maintenance Policies

Dear Mr. Blumenthal:

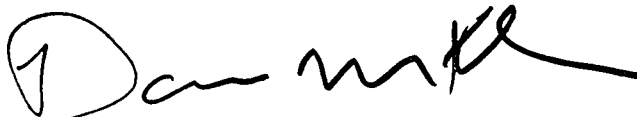
Cass Sunstein suggested that we send you the enclosed materials, which bear on the President's speech yesterday, which we read with great interest. Consistently with the President's remarks, our work tries to show that order-maintenance policies not only reduce crime but actually *enhance* the individual liberty of juveniles by dispelling widely resented social pressures. Indeed, this is an important theme in our amicus brief in the Chicago gang-loitering case, *City of Chicago v. Morales* (in which the United States, too, has filed an amicus brief in support of the City.)

If you think our work might ever be of use, we'd be delighted to discuss these issues with you or any other member of the White House staff.

Very truly yours,

A handwritten signature in black ink, appearing to read "Tracey L. Meares". The signature is fluid and cursive, with the first name "Tracey" being more prominent.

Tracey L. Meares
Assistant Professor of Law

A handwritten signature in black ink, appearing to read "Dan M. Kahan". The signature is bold and cursive, with the first name "Dan" being very large and prominent.

Dan M. Kahan
Professor of Law

Dan M. Kahan

Curfews Free Juveniles

The District's teen curfew is the latest to fall victim to a campaign being waged by two influential groups. On the one side are criminologists, who ridicule curfews as empty gestures that do little to address the root causes of juvenile delinquency. On the other are civil libertarians, who attack such laws as violating the rights of inner-city teens and their parents. Federal District Court Judge Emmet Sullivan credited these arguments when he invalidated the District's curfew last month.

The judge shouldn't have been convinced. Curfews not only reduce crime but also increase liberty by freeing juveniles from social pressures that push them toward law-breaking.

What causes juvenile delinquency? Obviously, many things, including truncated social and economic opportunities and lapses in law enforcement. But another important cause is easy to overlook: the mistaken belief among juveniles that their peers value criminality.

Nighttime street life can play an integral role in sustaining the misperceptions responsible for juvenile crime. Willingness to venture into the dangerous after-hours world can be seen as a sign of toughness among inner-city juveniles, the reluctance to do so as a sign of weakness. Under these circumstances, even juveniles who might prefer not to participate in such behavior can find themselves pressured to join in. Once on the street, moreover, they are exposed not only to risks of criminal victimization but to further social pressure to become criminal victimizers.

Curfews help to extricate juveniles from these pressures. Against the background of such laws, being out at night becomes a less potent means of displaying toughness for the simple reason that fewer of one's peers are around to witness such behavior. Likewise, staying off the street loses much of its sting once the street loses its vitality as a center of nighttime social life.

In these circumstances, fewer juveniles will feel compelled to venture out at night. As a result, fewer of them will be exposed to the social pressures that produce juvenile crime.

Indeed, many cities that have adopted curfews, including New Orleans, San Antonio and Dallas, have reported dramatic drops in both juvenile criminal activity and juvenile criminal victimization. The criminologists' skepticism is unwarranted.

So is anxiety over the effect of such laws on individual liberty. Juvenile crime is in large part the product of social pressures that most juveniles resent but are powerless to alter. Consequently, we should expect curfews and other policies that counteract these pressures to be welcomed by the very persons whose behavior they regulate.

In fact, they are. One poll, for example, showed that 70 percent of African American teenagers in the District supported a nighttime curfew. Inner-city parents—on whose behalf the ACLU often purports to speak when it attacks curfews—are frequently among the strongest supporters of these laws.

The reason they support them is that curfews are moderate ways to steer children away from criminality. Parents realize that when courts prohibit crime-prevention measures such as these, legislatures naturally attempt to compensate with longer prison terms for law-breaking. The kids whom the police can't order off the streets today are the same ones they'll be taking off to jail tomorrow.

Criminologists, civil libertarians and others are right when they point out the necessity of devising liberty-respecting policies that attack the social causes of juvenile crime. They are wrong, however, not to see that curfews are one means of doing exactly that.

The writer teaches constitutional law and criminal law at the University of Chicago.

No. 97-1121

In the Supreme Court of the United States

OCTOBER TERM, 1997

CITY OF CHICAGO,

Petitioner,

v.

JESUS MORALES, ET AL.,

Respondents

On Writ of Certiorari
to the Supreme Court of Illinois

BRIEF AMICUS CURIAE OF THE
CHICAGO NEIGHBORHOOD ORGANIZATIONS
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Chicago's gang loitering ordinance, which enjoys the overwhelming support of citizens who share in the burdens as well as the benefits of the law, and which was adopted because it has a significantly less destructive impact on gang members and their communities than do alternative law-enforcement policies, strikes a reasonable and constitutional balance between liberty and order.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*¹

Amici— collectively, “the Neighborhood Groups” — are 20 civic, religious, and other community associations from throughout Chicago.² Working closely with their elected representatives on the City Council, the Neighborhood Groups played a critical role in the design of the gang-loitering ordinance (“the Ordinance”). Because the Ordinance’s implementing regulations oblige the police

¹ The parties have consented to the filing of this brief. Copies of the consent letters have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

² *Amici* include: United Neighborhood Organization, a nonprofit organization whose focus is economic development, school reform, and civic participation; Southwest Neighbors Against Gangs, a southwest side community organization whose efforts include aggressive graffiti removal and active Nite Patrol; West Woodlawn Council of Block Clubs, representing roughly 75 block clubs in Woodlawn; Hegewisch Community Committee, a 60-year-old organization working to prevent juvenile delinquency; Chicago Roseland Coalition for Community Control, an economic development corporation of 24 years in Roseland; South Chicago Chamber of Commerce, representing 275 area businesses, churches, and school and community groups; Ravenswood Community Council, dedicated to housing, youth, senior programs, and community safety; Nobel Neighbors, an organization committed to improving living conditions in West Humboldt Park; Hermosa Community Organization, an organization addressing escalating neighborhood crime and providing tuition support for area children; Reach Out & Touch Ministries, working to provide at-risk youth in Englewood with job opportunities; West Humboldt Park Family & Community Development Council, a community-based group committed to housing, economic development, and neighborhood safety; Bethel New Life, working to increase the quality of life in East & West Garfield Park through crime prevention and economic development; Crime Stoppers, an Englewood organization directed at controlling conditions that foster crime; Lawndale Business & Local Development Council, representing 66 local businesses working to create jobs on Chicago’s west side; CARE, rehabilitating homes, removing graffiti, and promoting neighborhood safety; Near Westside Community Development Corporation, a “bottom up” planning movement aimed at neighborhood development and self-sufficiency; Edgewater Community Council, which focuses on housing and public safety issues; Emmaus Ministries, an outreach to young men involved in high-risk street activity including gangs, prostitution, and substance abuse; Walls Community Church, a west side church committed to urban life and the poor; Circle Urban Ministries, which operates youth development and shelter programs in the Austin community.

to consult with community associations, the Neighborhood Groups have also been intimately involved in determining where and how the Ordinance is enforced. Finally, the Neighborhood Groups have played an active role defending the Ordinance, filing *amicus* briefs in the Illinois Court of Appeals, the Illinois Supreme Court, and in support of the petition for certiorari.

The interest of the Neighborhood Groups can be simply stated: to be heard. No other group of citizens is in a better position to address the practical impact of the Ordinance. The Groups' members are the ones who daily face a heightened risk of criminal victimization from gang criminality, and who experience first-hand the destructive impact of gangs — and more severe means of abating gangs — on the lives of their communities. The Groups are the mothers and fathers, the sisters and brothers, and the neighbors and friends of the youths subject to the law. They support the Ordinance because it is a form of policing that secures order *without* destroying the lives of community youth who find themselves enmeshed in the complex social and economic forces that fuel gang criminality.

From the outset, those who have opposed the Ordinance have dismissed the unique perspective of the Neighborhood Groups' members as irrelevant. An exchange from the City Council hearings on the Ordinance typifies the critics' attitude. At the hearings, dozens of residents — from church leaders, to representatives of local neighborhood associations, to ordinary citizens — testified in favor of the proposed law. Harvey Grossman, Director of the Illinois ACLU, testified against it:

I am a lawyer, and I spend a great deal of time doing nothing more than reviewing ordinances and statutes, and it turns into a little bit of a long exam game. * * * We pick apart the statute. We focus on [a] word or [a] phrase, and we try to say why that phrase might or might not be constitutional.

Supp. R. II at 107. Alderman William Beavers, a Council member who represents a ward on Chicago's south side, objected to this bookish conception of how to appraise the constitutionality of the law. "I don't know if you are attuned to what's going [on] in these neighborhoods," he told Grossman. "Maybe I need to take you out there and show you what's really going on." *Id.* at 119. To which Grossman replied that that would not be necessary:

I think our ability to come together and to try to resolve issues [like this] really doesn't * * * depend on if I see what's happening in your neighborhood or you see what's happening in my neighborhood.

Id. at 120. Rather, what it does depend on, he stated (*ibid.*), is

empathy or ability to understand what's happening to other people and, two, some commitment, some intellectual integrity and some commitment to principle. And the principle that I am suggesting to you is inviolate. It doesn't change.

The Neighborhood Groups submit that this conception of how to assess the constitutionality of the Ordinance is just plain wrong. We do not deny that the Ordinance poses challenging issues. But we do deny, emphatically, that those issues — bearing as they do on the proper balance of liberty and order in *our* communities — can adequately be considered from the perspective of someone who does "nothing more" than "pick apart" statutes and ordinances for a living. We vehemently contest the suggestion that these issues can fairly be resolved by a formulaic application of "inviolat[e]" "intellectual" "principle[s]" that "do[n't] depend," "really," on "see[ing] what's happening in [our] neighborhood[s]." And most important of all, we indignantly resist the characterization of the complex issues in this case as one big "exam game." *Ibid.*

The fate of the Ordinance is *not* a "game" for members of the Neighborhood Groups. The goal of this brief is to show that their perspective *is* constitutionally relevant and to explain why, in their

view, the Ordinance strikes a constitutionally permissible balance between liberty and order.

SUMMARY OF ARGUMENT

I. Courts should adjust the level of constitutional scrutiny applied to a policing technique based on the breadth of its impact on liberty within the community. The proposition that courts should reserve the highest degree of scrutiny for laws that concentrate burdens on politically disempowered minorities figures prominently across a wide expanse of doctrines. The exacting scrutiny associated with this Court's Due Process vagueness jurisprudence reflects the assumption that communities never share in the burden on liberty associated with public order laws, the incidence of which is predictably concentrated on minority citizens.

That perception accurately captured the political reality of the 1960s and early 1970s, when this Court's leading criminal procedure precedents were established. Today, however, minority citizens are no longer so disenfranchised, and in fact exercise significant authority in the Nation's inner-cities. They are *using* their new-found political power to secure effective law enforcement in the form of anti-loitering laws, curfews, and order-maintenance policing.

It makes little sense to approach the constitutional questions posed by these laws as if they were the same ones posed by an earlier generation of public order provisions, the purpose and effect of which were to oppress minorities. Rather than subject all such laws to searching scrutiny, courts should consider whether the community at large is meaningfully sharing in the burden created by the challenged provision. If it is, courts should afford significant weight to the judgment of the community's political representatives that the subject law reasonably balances liberty and order.

II. The Ordinance affects members of the community at large in a meaningful way. Unlike the anti-loitering laws of an earlier

generation, the Ordinance is *not* a tool of repression being used by white majorities to reinforce the exclusion of minorities from the community's political and economic life. To the contrary, representatives of Chicago's poorest minority communities have played a key role in the adoption and implementation of this law. The residents of those communities, moreover, are linked by strong social and familial ties to the gang members against whom the Ordinance is enforced. It is precisely because they care so deeply about the welfare of these persons that residents favor the relatively mild gang-loitering law as an alternative to draconian penalty enhancements for gang crimes, severe mandatory minimum prison sentences for drug distribution, and similarly punitive measures. The pervasive sense of "linked fate" between the majority of these communities' residents and the youths affected by the Ordinance provides a compelling reason to respect the community's determination that such measures enhance rather than detract from liberty in their communities.

III. Evaluated under an appropriately deferential standard of review, the Ordinance strikes a reasonable balance between liberty and order. Like other forms of order-maintenance policing, the Ordinance promotes obedience to law primarily through its positive effect on community social norms. Suppressing visible displays of gang authority counteracts the social pressures that drive many youths to join or emulate gang members. It also provides assurance to committed law-abiders, who are more likely to cooperate with each other and with the police when insulated from relentless public intimidation by gang members. At the same time, the guidelines established by the Ordinance's implementing regulations, combined with the ongoing role of community organizations in overseeing its implementation, furnish potent safeguards against abusive enforcement. Indeed, the Ordinance represents a significantly *less coercive* alternative to conventional law-enforcement strategies for combating gangs, and even to other forms of order-maintenance policing, which afford police officers considerably more discretion in enforcement.

ARGUMENT

I. THE GENERALIZED IMPACT OF A POLICING TECHNIQUE ON MEMBERS OF THE COMMUNITY IS RELEVANT TO THE LEVEL OF JUDICIAL SCRUTINY

Applying this Court's decisions in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), and *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), the Illinois Supreme Court held that the Ordinance was unconstitutionally vague. We submit that the court fundamentally misconceived the rationale, and hence the proper reach, of those decisions. The exacting demand for statutory precision reflected in those cases is reserved for discretionary policing techniques the coercive incidence of which is concentrated on a politically disempowered minority. When the policing technique affects the community generally, in contrast, courts appropriately relax the degree of scrutiny in recognition of the community's own incentives to police its police.³

This Court commonly describes constitutional rights — particularly those that relate to criminal justice — as guaranteeing a reasonable “balance * * * between liberty and order.” *E.g.*, *Medina v. California*, 505 U.S. 437, 443 (1992). In determining whether the balance struck by any particular policy is reasonable, courts appropriately pay attention to how diffusely the impact of that policy is felt within the community. Where the coercive incidence of a particular policy is being visited on a powerless minority, popularly elected representatives lack adequate incentives to determine whether the order benefits of the law for the community at large truly outweigh the liberty costs to the few. See generally *United States v. Carolene Products Co.*, 304 U.S.

³ The court below also held that the Ordinance violated substantive due process. We dispute that ruling on the same ground — namely, that in undertaking to enforce its own conception of liberty, the court applied a degree of scrutiny inconsistent with the deference that is due when the law in question does not concentrate burdens on a disempowered minority but rather affects members of the community generally.

144, 152 n.4 (1938); J. Ely, *Democracy and Distrust* 73-104 (1980). This explains why courts strictly scrutinize policies that discriminate on the basis of race, restrict “dangerous” speech, or impose special obligations on account of religion. See M. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 Va. L. Rev. 747, 748-57, 760-63 (1991).

But when a community can be seen as *internalizing* the coercive incidence of a particular policy, courts are much less likely to second-guess political institutions on whether the tradeoff between liberty and order is appropriate. Thus, the Free Exercise Clause proscribes “prohibition[s] that society is prepared to impose upon [religious minorities] but not upon itself” (*Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 545 (1993)), but does not affect “neutral law[s] of general applicability” resulting from the normal “political process” in our “democratic government” (*Employment Division v. Smith*, 494 U.S. 872, 879, 890 (1990)). Likewise, this Court has readily sustained free speech challenges to taxes that “single[] out the press,” reasoning that “the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened” in such circumstances, while rejecting free speech challenges to taxes of general applicability, reasoning that there is little cause to “fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency.” See *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (invalidating a tax targeted at the press); *cf. Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (sustaining a generally applicable sales tax as applied to the press).

These principles apply broadly in constitutional law. For instance, in challenges to state laws pursuant to the Dormant Commerce Clause, the Court carefully scrutinizes laws whose “burden falls principally upon those without the state,” simply because such laws are “not likely to be subjected to those political

restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Hwy. Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938). Similarly, the Takings Clause principally "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)), but does not limit land-use regulations that impose equal burdens on all property owners (see *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 486 (1987)). Even the Court's standing cases reflect the notion that the generality of a burden is important in determining what role (if any) the judiciary should play in its redress. As the Court explained just a few days ago in *Federal Election Commission v. Akins*, 118 S. Ct. 1777, 1785 (1998), "where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."

The constitutional doctrines that regulate policing reflect the same emphasis on how burdens are apportioned. Normally, the police must obtain a warrant, supported by probable cause, before they can conduct a search. See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971). This requirement recognizes that law-enforcement officials are not likely to attach sufficient value to the liberty of individual criminal suspects, whose interests are generally a matter of indifference to the general public. See *ibid.*; cf. Ely, *supra*, at 96-97. Law-enforcement officials need not obtain a warrant or even have probable cause, however, to stop motorists at sobriety checkpoints (see *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1980)), or to search all persons entering airports or government buildings (see *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989)). Insofar as these policies burden average members of the community, there is far less reason for courts to doubt the determination of politically accountable officials that these policies strike a fair balance between liberty and order. See S. Wasserstrom

& L. Seidman, *The Fourth Amendment As Constitutional Theory*, 77 Geo. L.J. 19, 95-96 (1988).

If the burden of a law-enforcement policy falls on someone other than the average citizen, deference is still due so long as the political process can be viewed as sufficiently attentive to that party's interests. Thus, random drug-testing of student athletes is exempted from the warrant requirement not because *student athletes* exercise significant influence in the political process but because their *parents*, who naturally take their children's interests to heart, do. See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). Likewise, searches of regulated commercial enterprises, which exert considerable influence in the political process, and which pass the cost of regulation onto consumers, are exempt from the warrant requirement under the "administrative search" doctrine. See, e.g., *New York v. Burger*, 482 U.S. 691 (1987); W. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 Mich. L. Rev. 1016, 1044-45 (1995).

There is no reason to approach the Due Process constraints on policing any differently. The "void for vagueness" doctrine permits "reasonable breadth" in statutory drafting in order to accommodate the need for "flexibility" in law enforcement and the interest of citizens in avoiding "arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 109-10 (1972); see *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952) (Constitution demands only "a reasonable degree of certainty" in light of "untold and unforeseen variations in factual situations"). Just how precise the language of a statute must be to be "reasonable" should depend on how widely the burden of that law is likely to be felt within the community.

Papachristou and *Shuttlesworth* reflect the exacting degree of precision that courts appropriately demand when the burdens of community policing are being concentrated on politically disadvantaged minorities. Well into the 1960s, discretionary law enforcement authority was a central means by which communities

in both the North and South excluded minorities from economic and political life.⁴ *Shuttlesworth* and *Papachristou* both arose from this factual context, as did a variety of other landmark criminal procedure precedents.⁵ Because those arrested under the public order laws of the era typically came "from minority groups" with insufficient political clout "to protect themselves" and without "the prestige to prevent an easy laying-on of hands by the police," it would have been absurd, the author of *Papachristou* observed, for courts to defer to the judgment of the community's political institutions on whether those forms of policing embodied a reasonable balance of liberty and order. W. Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 13 (1960).

It would be a mistake, however, to assume that the conditions that informed *Papachristou* and *Shuttlesworth* are immutable. For one thing, as a result of the Voting Rights Act of 1965, 42 U.S.C. § 1971 *et seq.*, African-Americans are no longer so disenfranchised, and in fact exercise considerable political influence, particularly in the Nation's inner-cities.⁶ Nor is the relationship

⁴ See R. Kennedy, *Race, Crime, and the Law* ch. 3 (1997); C. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 839-40 (1994); D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 595-601 (1997).

⁵ At issue in *Shuttlesworth* was the application of a loitering ordinance to a "notorious" * * * civil rights" activist at a time when African-Americans were engaged in picketing and boycotting of businesses that discriminated on the basis of race. See 382 U.S. at 101-02 (Fortas, J., concurring). *Papachristou* involved the application of such a law to two interracial couples sitting in a parked car. See 405 U.S. at 158-59. See also *Cox v. Louisiana*, 379 U.S. 536 (1965) (invalidating conviction obtained under vaguely worded statute as applied to protesting civil rights demonstrators); *Bouie v. South Carolina*, 378 U.S. 347 (1964) (same). See generally K. Pye, *The Warren Court and Criminal Procedure*, 67 Mich. L. Rev. 249, 256 (1968), and Steiker, *supra*, at 844.

⁶ On the dramatic effects of the Act on minority registration, turnout, and representation, see *Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990* (C. Davidson et al. eds., 1994). On the increase of African-
(continued...)

between minorities and police marked by the unbridled animosity that furnished the backdrop for *Papachristou* and *Shuttlesworth*. Due in large part to the increased political representation of minorities, African-Americans today make up a significant percentage of all urban police departments.⁷ New York, Washington, D.C., and Los Angeles, for example, have all had black police chiefs accountable to black mayors.

Indeed, rather than shunning the police, African-Americans are now using their political strength to remedy the historic *under-enforcement* of law in their communities. In nearly every large American city, African-Americans have supplied the impetus for the revival of community policing. African-American community groups (including the Urban League) were the driving force behind the adoption of curfews in cities such as Miami, Dallas, San Diego, and Washington, D.C.⁸ African-American city council

⁶(...continued)

American representation in elected offices at all levels of government, see Joint Ctr. for Political & Economic Studies, *Black Elected Officials: A National Roster* (1993); Joint Ctr. for Political Studies, *Black Elected Officials: A National Roster* (1984); see also S. Lawson, *Running for Freedom: Civil Rights and Black Politics in America Since 1941*, at 170-182 (1991) (detailing progress of Black urban politicians and noting triumphs of candidates in Newark, Oakland, New Orleans, Atlanta, Detroit, and Gary among other cities).

⁷ Consider the "index of black representation," which is calculated by dividing the percent of African-American police officers in a department by the percent of African Americans in the local population of several major cities. Los Angeles's index increased from .55 to 1.00 between 1983 and 1992. Detroit's index increased from .49 to .70 during the same period. Chicago, San Diego, Dallas, and Phoenix posted indexes of .64, .80, .64, .77 in 1992, respectively, each an increase from 1982 levels. See Sourcebook of Criminal Justice Statistics Table 1.36 at 49 (K. Maguire et al. eds. 1994).

⁸ See *All Things Considered: Miami Curfew Gaining Support Among Many Black Groups* (National Public Radio broadcast, Feb. 24, 1994) (reporting that curfew ordinance sponsored by African-American County commissioner is supported by 70% of African-Americans in Dade County and by Greater Miami Urban League); *The Teen Curfew Works* (editorial), San Diego Union-Tribune, Aug. 7,
(continued...)

members, representing the city's most crime-ridden districts, were instrumental in the enactment of the Chicago's Ordinance. See pp. 14-16, *infra*. African-Americans have also strongly supported the use of anti-loitering laws in other cities, as well as the renewed attention to order-maintenance policing in New York.⁹

The relationship between the political supporters of these laws and those at whom those laws are aimed also distinguishes the new community policing from the old. Unlike the 1960s, today there is no natural antagonism between the supporters of community policing and those who bear the coercive incidence of curfews, anti-loitering laws, and the like. On the contrary, these two groups are intimately linked by strong emotional, social, and even familial ties. In fact, many inner-city residents support anti-loitering laws and curfews precisely because they see them as tolerably *moderate* alternatives to the draconian punishment of minor drug offenses.¹⁰

The idea that the resurgence of public order laws signals a return to the discriminatory and arbitrary policing that motivated *Papachristou* completely misconceives the political reality. These

⁸(...continued)

1994, at G2 (minority community support for San Diego curfew); B. Clements, *Views Differ on Dallas' Curfew, Which Spawned Tacoma's Plan*, News Trib. (Tacoma, Wash.), Oct. 17, 1994, at B1 (same, Dallas curfew); T. Locy, *D.C. Curfew Overturned in Federal Court*, Wash. Post, Oct. 30, 1996, at A1 (Washington, D.C. curfew sponsored by African-American council member and supported by African-American Mayor).

⁹ See Livingston, *supra*, at 623 ("Loitering legislation in the 1990s has often had broad community support, particularly in some predominantly minority communities plagued by street-level drug dealing."); B. Harden, *Letter from New York: "Ideal State of Cleanliness" Is Apple of Giuliani's Eye*, Wash. Post, Mar. 23, 1998, at A6 (reporting majority of city's African-Americans support Mayor Giuliani based on perception that his emphasis on "civility" is responsible for steep drops in crime in poor, minority neighborhoods).

¹⁰ See T. Meares, *It's a Question of Connections*, 31 Val. U. L. Rev. 579, 588-89 (1997); T. Meares, *Social Organization and Drug Law Enforcement*, 35 Am. Crim. L. Rev. 191, 211-17 (1998).

new public order laws "are not facially aimed at rendering some people, like racial minorities, transients, and the poor, outsiders to the community." Livingston, *supra*, at 594. Rather, they are part and parcel of minority communities' efforts to restore community organization. Meares, *Social Organization*, *supra*, at 224-26.¹¹

Because the circumstances surrounding the adoption and enforcement of public order laws can vary, constitutional doctrine should not presume that all such laws are of a piece. The most straightforward way for the Due Process vagueness doctrine to take account of the relevant differences in such laws is through the burden-internalization principle that informs constitutional jurisprudence in so many other settings. Thus, rather than subject all public order laws to the searching scrutiny embodied in *Papachristou* and *Shuttlesworth*, courts should first ask whether the community itself is sharing in the burden that that law imposes on individual freedom. Relevant indications are the purposes served by the law (see *Church of the Lukumi Babalu Aye*, 508 U.S. at 545-46), the relationship between supporters of the law and those to whom it is being applied (see *Vernonia School Dist.*, 515 U.S. at 649-50, 665), and the availability of administrative procedures aimed at guaranteeing effective political oversight of the exercise of discretion (see Livingston, *supra*, at 653-58). If, on this basis, a court concludes that a law's impact on liberty is being widely felt

¹¹ Not surprisingly, when civil libertarians challenge curfews, anti-loitering laws, and like forms of order-maintenance policing as inviting racial harassment, their lawsuits are frequently *opposed* by minority citizens themselves. See, e.g., Clements, *supra*, at B1 (quoting African-American mother who spear-headed support for Dallas curfew: claim that curfew would lead to racial harassment "was an ACLU scare tactic that polarized the community"); R. Conner et al., *Listen to the Voice of the Projects* (letter to the Editor), N.Y. Times, Apr. 15, 1994, at A30 (noting that residents of Chicago housing projects sought legal representation to oppose ACLU class action brought on residents' behalf); Sen. U. Curie, *The ACLU Pits the Civil Rights of Few Against the Common Good* (Letter to Editor), Wash. Times, Nov. 30, 1996, at A12 (comment of African-American legislator on ACLU opposition to curfews: "the ACLU seem[s] to be marching to music only it c[an] hear").

within the community, it should afford that law greater deference, in recognition of the community's own considered judgment that it appropriately balances liberty and order.

II. THE BURDENS ON LIBERTY ASSOCIATED WITH THE ORDINANCE AFFECT MEMBERS OF THE COMMUNITY GENERALLY

This Court's jurisprudence reserves the strictest scrutiny for police practices that concentrate burdens on individuals who are excluded from the political process and whose interests are not otherwise adequately represented by members of the community at large. That situation does *not* describe the Ordinance. Rather, the day-to-day impact of the Ordinance has been felt generally by the citizens of affected neighborhoods, who are intimately connected to the city's gang members, and who support the law because it is the *least coercive* means of protecting themselves, their children, and their neighbors from the scourge of gang criminality.

Unlike the public order provisions scrutinized by this Court in the 1960s, the Ordinance was not imposed on minorities by an alien political establishment; rather, it was enacted at the behest of those very citizens. Members of the Neighborhood Groups, as well as many other grassroots organizations from the poorest and most crime-ridden minority neighborhoods in the city, played a critical role in the Ordinance's adoption and implementation.¹² The Chicago City Council held two days of hearings on the Ordinance, replete with testimony of residents and community leaders registering support for its adoption. As numerous residents explained, when "[a] gang claims the neighborhood as its own," "[t]hey know where you live," "what time you leave, what time

¹² For example, the transcripts of the meeting of Chicago City Council Committee on Police and Fire on May 15, 1992, and May 18, 1992, demonstrate that there was widespread support for the Ordinance from neighborhood groups on Chicago's predominantly minority 7th, 8th, and 20th wards on the south side of the city.

you come home." Supp. R. I at 54, 66, 67. "You can't get on the bus * * * [or] go to church on Sundays," because "[w]hen you go to the bus stop, there is a group of people" waiting. *Id.* at 108. Residents of Chicago's poorer neighborhoods — those located in proximity to the expressways — also described the loitering of gang members and associates as designed to facilitate drug sales: individuals loiter on corners to advertise the wares of associates hidden in dark alleys and to warn their compatriots of the arrival of police. *Ibid.* As gang control solidifies, "people begin to hide behind locked doors, [and] the gang is free again to turn the community into open air drugstores and eventually a war zone." *Id.* at 54. Not surprisingly, when the proposed Ordinance was put to a vote, Aldermen representing the city's poorest, predominantly minority wards—*e.g.*, Alderman Ed Smith, representing Chicago's highest-crime police district—supplied the key support for its passage.

These communities continued to support the Ordinance after enactment. In fact, the City Council recently adopted a resolution supporting the invalidated Ordinance by a 3-to-1 margin. *Journal, City Council, Chicago*, May 20, 1998, at 70134, 70135. Significantly, representatives of predominantly African-American and Latino wards — especially those in which gang-related crime poses serious challenges to the daily lives of residents — voted in favor.¹³ In addition, the residents of these same wards have been actively organizing a petition drive in support of the Ordinance. To date, over 8,500 signatures have been collected throughout the City. *1998 Chicago Community Policing Convention Resolution Endorsing Chicago's Anti-Gang Loitering Ordinance*, on file with Office of City Clerk. Over *half* of these have been collected in the predominantly Latino communities of Pilsen, Little Village, Back

¹³ Alderman representing the predominantly African-American 2d, 7th, 8th, 17th, 20th, 21st, 27th, and 29th wards all voted in favor of the resolution. Similarly, Alderman Frias, Olivo, Solis, Suarez, and Colom, all of whom represent heavily Latino-influenced wards, voted in favor. *Journal, City Council, Chicago, supra.*

of the Yards, Marquette Park, and Gage Park, all wards with vexing crime problems. *Ibid.*

In short, any suggestion that the Ordinance was adopted as a cover for harassing minority youths is completely misguided. Indeed, Aldermen from high-income and exclusive areas *could not* have sought to have it applied in this way, since enforcement is expressly confined to neighborhoods suffering from a pronounced gang presence. Moreover, the City volunteered not to enforce the Ordinance in those wards in which the Alderman did not support it. See F. Spielman, *Anti-Gang Law Won't Be Abused*, *City Says*, *Chi. Sun-Times*, June 19, 1992, at 10.

Nor can it be credibly maintained that those citizens who supported the Ordinance did so to oppress minorities within their own neighborhoods. Although not every person in those communities faced a significant risk of being approached by the police under the Ordinance, even those who were never asked to "move along" felt its impact in a meaningful way. After all, those who were subject to the Ordinance were not "outsiders"; they were the sons and daughters, the brothers and sisters, and the friends and neighbors of the community's own residents. Indeed, residents who supported the Ordinance did so precisely because they saw it as an acceptably moderate way to steer their children and their neighbors' children away from the gang life.

The spirit that marked community support for the Ordinance reflects two larger currents of sentiment in inner-city communities. The first is an extended sense of empathy. Individuals in these communities tend to evaluate whether a policy benefits them individually by considering its impact not just on *themselves* but also on members of the groups to which they belong. University of Chicago political scientist Michael Dawson has referred to this decisionmaking process as "linked fate." M. Dawson, *Behind the Mule: Race and Class in African-American Politics* 75-84 (1994). Dawson has demonstrated through extensive use of public opinion

surveys that linked fate is especially prominent among African-Americans.

It was, in fact, this sense of solidarity with — and *not* any antagonism toward — the community's youth that motivated the grass-roots support for the Ordinance. Testifying at the City Council hearings, for example, Acasi Abey, President of the Brothers West Association, objected to law enforcement strategies that treat gang members as outsiders:

[I]t's a community problem. I think a lot of times we approach a gang problem as if these kids were from outerspace. They are next door neighbors. Some of them go to church. Some of them are in school. Some of them are in college.

Supp. R. I at 143. Mr. Neil Bosanko, head of *amicus* South Chicago Chamber of Commerce (an organization comprising 275 businesses, churches, and school and community groups), is a *parent* of a youth imprisoned for his involvement in a gang-style murder. He supported the Ordinance as a morally responsible way to steer community youth away from gang life and to counter the escalating number of young murder victims from his neighborhood and young lives wasted in prison.

The second common sensibility that motivated the grass-roots support for the Ordinance was resentment of "get tough" law enforcement strategies. These approaches, which feature severe prison sentences for drug-dealing and related "street" crimes, can in fact *undermine* inner-city communities' own capacity to resist crime. Empirical work in criminology (undertaken, significantly, in Chicago) demonstrates that institutions of community life such as friendship networks, shared adult supervision of teens, and informal associations are critical to a neighborhood's ability to control offenders. See R. Sampson, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *Science* 918 (1997); R. Sampson et al., *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 *Am. J. Soc.* 774 (1989). Widespread imprisonment in high crime neighborhoods breaks up

families, disrupts local employment markets, and generally enfeebles the community institutions that prevent crime. See T. Meares, *Social Organization*, *supra*, at 205-11. The “get tough” style of law enforcement is generally resented by minorities for precisely that reason. In sum, the residents of poor, minority communities favor “middle ground” solutions to crime — ones that furnish a reasonable prospect of relief from crime without severely disrupting their communities. See T. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 Buff. Crim. L. Rev. 137, 144-47 (1997) (documenting that African-Americans are more likely to support drug criminalization, but to oppose severe penalties for offenders, than are similarly situated whites).

Testimony at the hearings shows community residents’ awareness of the high costs that both gang criminality and severe prison terms visit on poor, minority communities. Imprisonment of youths such as Mr. Bosanko’s son destroys lives just as surely as does gang violence. The goal of the Ordinance, as one resident put it, was not “to hurt anyone,” but only to give the police the power “to clean these corners up.” Supp. R. I at 67. Given the unusual sensitivity of the residents of these neighborhoods to the individual and societal costs of invasive policing, their considered judgment that the Ordinance embodies a reasonable accommodation of liberty and order is entitled to substantial deference.

III. THE ORDINANCE REASONABLY BALANCES LIBERTY AND ORDER

Because the coercive incidence of the Ordinance is felt by members of the affected communities generally, this Court should afford considerable deference to the judgment of the residents’ political representatives that the Ordinance embodies a reasonable balance between liberty and order. See Part I, *supra*. Under this standard, the Ordinance passes muster under both procedural and substantive Due Process. The Ordinance is designed to protect the *whole* community — not just law-abiding citizens, but prospective

and current gang members as well — from the destructive impact of gang criminality. It does so, moreover, not by severely punishing gang members, who are also in significant ways *victims* of social conditions that they did not create. Rather, through a guided regime of discretion, subject to ongoing political monitoring, the Ordinance attacks the pathological social norms that fuel gang criminality and destroy the lives of gang members and non-gang members alike.

A. The Ordinance Substantially Promotes Order

1. *Gang criminality plagues inner-city neighborhoods.*

Gang criminality has made the inner-city neighborhoods of Chicago deadly places to live. Stories of innocent bystanders shot in gang-war crossfire have become staples of newspaper headlines and TV news in Chicago as elsewhere. *E.g.*, D. DeFotis, *Police Fret for Public after Gang Shootings*, Chi. Trib., June 2, 1998, at B1; S. Power, *Boy Headed to School Killed by Gang Member*, *Police Say*, Dallas Morning News, Jan. 29, 1998, at 21A.

Although criminal gangs have long been part of the urban landscape, they have taken a dramatic new direction in recent years, away from small-scale and localized activities to highly organized takeovers of entire neighborhoods based on the acquisition of lethal weaponry financed by lucrative trading in crack cocaine. See H. Covey, et al., *Juvenile Gangs* 101 (1992); S. Mills & D. Bunuel, *Small Gang’s Big Grip Troubles Neighborhood — The Saints Have Grown More Violent And More Diverse Since Forming In The 1960s*, Chi. Trib., Feb. 11, 1998, at B1. Brass knuckles and baseball bats are no longer the weapons of choice. See *There Are No Children Here*, Economist, Dec. 17, 1994, at 21 (“Now automatic and semi-automatic assault weapons are *de rigueur*”). Chicago and Los Angeles alone account for 1,000 gang homicides annually. OJJDP Fact Sheet, *supra*.

Street-level intimidation is one of the primary strategies by which gangs extend their influence. By stationing small groups of

gang members on the streets, gangs stake out and lay claim to turf, sell drugs to finance the procurement of arms, recruit new members (often coercively), serve as lookouts and intelligence gatherers, and intimidate neighborhood residents and passers-by. Intimidation takes many forms, including wearing gang colors and clothing, flashing gang signs, and plastering buildings with graffiti. See M. Genelin, *Gang Prosecutions: The Hardest Game in Town*, in *The Gang Intervention Handbook* 417 (1993). Street-corner squads of gang members also facilitate the commission of violent gang crimes. See M. Klein, *The American Street Gang* (1995); *Man Demanding Gang Affiliation Shoots Teen Standing on Street*, Chi. Trib., Feb. 17, 1998, at B3.

Law-abiding citizens are effectively imprisoned in their homes as a result of the mere presence of gang members on the streets. At the City Council hearings prior to passage of the Ordinance, residents vividly described their fear to walk their own streets in the face of loitering gang members for whom drugs, shootings, and vandalism constitute business as usual. See Supp. R. I at 53, 62, 93, 95, 110, 132, 138. Civil rights leader Jesse Jackson expressed the feelings of many when he stated, "Just to think we can't walk down our own streets, how humiliating." M. Johnson, *Crime: New Frontier*, Chi. Sun-Times, Nov. 29, 1993, at 4.

Children are particularly vulnerable to the intimidation of gang members congregating on the streets. Fear is the primary tool of gang recruitment. "[I]f you're [a child and] not in a gang," a Chicago anti-drug counselor told the Economist, "you're a target wherever you go." *There Are No Children Here*, *supra*. In Chicago, the heavy gang presence on the streets around the Robert Taylor housing project has resulted in "waves of fear-induced absenteeism" from neighborhood schools, prompting hundreds of volunteers to band together to shepherd children to school and the School Board to hire dozens of parents to serve as escorts. S. Braun, *Shepherds for a Flock in the Cross-Fire*, L.A.

Times, Jan 16, 1998, at A1; M. Martinez, *Parents Paid to Walk Line Between Gangs and School*, Chi. Trib., Jan. 21, 1998, at A1.

Gangs have focused their recruitment on increasingly younger children as the competition to control turf and drug markets has intensified. See P. Thomas, *Putting Children on the Front Lines*, Wash. Post, June 20, 1996, at A1; S. Mills & D. Bunuel, *Not Yet 13 — and a Murder Suspect*, Chi. Trib., Feb. 4, 1998, at A1; *There Are No Children Here*, *supra* (citing Chicago anti-gang counselor's estimate that 80% of boys aged 13 to 15 in the area where he works are involved in gangs). Moreover, whether or not they are gang members, children growing up in gang-dominated neighborhoods often show signs of post-traumatic stress disorder. A. Gonzalez et al., *Introduction to Gang Violence Prevention* 5-6 (1990). A study of children in Chicago day care centers found that 100% of them had seen a shooting by the age of five. P. Bennett, *Growing Up, Skewed, with Violence*, Bost. Globe, June 4, 1992, at 1. As one journalist reported several years ago, "many of the children emerge from the streets of Los Angeles more psychologically scarred than the young mujahedin who patrol the mountain passes of Afghanistan." A. Stanley, *Child Warriors*, Time, June 18, 1990, at 30.

Inner-city residents in Chicago and elsewhere are, in a very real sense, engaged in a battle to protect themselves from a deadly urban disease that victimizes both gang members and non-gang members. Their formidable challenge is to find a cure that does not itself threaten the well-being of their communities and children.

2. *The Ordinance is geared to reducing gang activity through its effect on social norms.* The disease of gang criminality has proven notoriously resistant to treatment. The conventional prescription is the "crack down" strategy of severe prison terms, which has done little to reduce gangs (see, e.g., W. Miller, *Why the United States Has Failed to Solve Its Youth Gang Problem*, in *Gangs in America* 263, 267 (C. R. Huff ed., 1990)).

while leaving a trail of broken lives and fractured communities in its wake (see Meares, *Social Organization, supra*, at 206-07).

The Ordinance employs a unique approach to combating gangs based on a distinctive theory of why they exist. Rather than trying to bludgeon gang members into submission through severe punishments, the Ordinance seeks to reform the *social norms* that drive individuals into crime and weaken the community's own crime-defense mechanisms.

The causes of gang criminality are subtle. Residents of gang-ridden neighborhoods are not invariably poorer than the residents of relatively gang-free ones. See Miller, *supra*, at 280-81. Nor is law-enforcement in gang-ridden neighborhoods invariably more lax. See *id.* at 267. Rather, the difference between these communities lies mainly in the attitudes of their residents toward gangs. Juveniles in gang-ridden neighborhoods do not necessarily look up to gang members. Indeed, they are just as likely as those in relatively gang-free neighborhoods to resent gangs as violent and destructive. See Louis Harris & Assocs., Inc., *Between Hope and Fear: Teens Speak Out on Crime and the Community*, table 5-2, at 104 (1995). Nevertheless, those in gang-ridden neighborhoods *are* much more likely to believe that a *majority of their peers* admire gang members: whereas only 19% of juveniles in relatively gang-free communities believe that, 66% of those in gang-ridden ones do. *Ibid.*

These perceptions can reinforce themselves and ultimately determine the level of gang activity in a particular community. In relatively gang-free neighborhoods, the belief that others devalue gang membership strengthens the aversion that individual youths have toward joining them. But the belief of juveniles in gang-ridden neighborhoods that their peers admire gang members can make joining one seem worthwhile even to those only weakly committed (or opposed) to gangs. See D. Matza, *Delinquency and Drift* 54-56 (1964). Notwithstanding their private reservations, moreover, the decision of such individuals to join gangs conveys

publicly that they, too, value membership, a signal that reinforces the pressure on other teens to do the same. See *id.* at 52-59. This "system of shared misunderstanding" is one mechanism by which social norms fuel criminal gang activity. *Id.* at 53.

Another is the effect of visible gang activity on emotional dispositions. In a community pervaded by gang activity, residents are more likely to form the aggressive disposition that gang members themselves prize. The apparent authority and status of gang members imbues their mannerisms with connotations of strength. Indeed, the failure to imitate their demeanor can make one appear weak and vulnerable. See E. Anderson, *Streetwise: Race, Class, and Change in an Urban Community* 177-79, 181 (1990); M. Jankowski, *Islands in the Street: Gangs and American Urban Society* 28 (1991). As a result, individuals face strong pressure to cultivate the aggressive bearing associated with gang membership. When numerous individuals cultivate that bearing simultaneously, more of them are likely to turn to crime, both because of the (mis)information those mannerisms impart about public attitudes toward gang membership, and because of the obstacles they create to interactions with law-abiders, who strongly devalue aggression. See Anderson, *supra*, at 177-78, 189.

This social-norm account not only helps to explain why gangs exist, but also identifies which policies are likely to abate them. The conventional suppression strategy does not, in part because policies that severely punish gang activity may actually reinforce the norms that promote gang membership. Delinquency is status-enhancing because juveniles often view willingness to break the law as a sign of strength and courage. See, e.g., W. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. Soc. Issues 5, 8-9 (1958). The more severe the penalty, the more strength law-breaking projects. Thus, the crackdown strategy is at war with itself.

A more effective approach is to attack the public signs and cues that inform juveniles' (mis)perception that their peers value

gang criminality. That is what Chicago is trying to achieve with the Ordinance. Other jurisdictions seek to produce the same effect through curfews or nuisance injunctions. See Livingston, *supra*, at 640-42. By preventing gangs from openly displaying their authority, these policing strategies counteract the perception that gang members enjoy a high status in the community. As that perception recedes, so does the reputational pressure to join them.

The suppression of open gang activity also positively influences the attitude and behavior of law-abiding members of the community. Like other forms of public disorder, gang activity drives some law-abiding citizens out of the community and others off the streets, thereby depriving the community of their stabilizing influence. See Anderson, *supra*, at 2-5, 58-59, 69-76; J. Jacobs, *The Death and Life of Great American Cities* 29-35 (1961). In addition, gang activity drives a wedge between the community and the police. When individuals understand gangs to be in control, they infer that cooperating with law-enforcement officials is likely to be both futile and dangerous. See G. Akerlof & J. Yellen, *Gang Behavior, Law Enforcement, and Community Values in Values and Public Policy* 173-84 (H. Aaron et al., eds., 1994). The reluctance of the community to turn on the gangs not only shields them from punishment but also legitimizes gang membership in the eyes of potential recruits. See Jankowski, *supra*, at 193-202. By counteracting perceptions that gangs control the community, gang-loitering laws and curfews give law-abiders the confidence they need to oppose gangs. Once the community withdraws its support for them, the perception of waning gang influence quickly becomes a reality. See *id.* at 201-02.

A growing body of evidence documents the effectiveness of the social-norm strategy for fighting gangs. Law-enforcement officials in Chicago, for example, report dramatic reductions in violent offenses in the neighborhoods where the Ordinance has been most vigorously enforced. See Meares, *Social Organization*, *supra*, at 225. Numerous other municipalities report the

effectiveness of curfews in reducing the incidence of juvenile victimization and juvenile crime. See Office of Juvenile Justice and Delinquency Prevention, U.S. Dept. of Justice, *Curfew: An Answer to Juvenile Delinquency and Victimization?*, Juvenile Justice Bulletin, April 1996, at 1, 3-9. Courts should respect the considered judgment of Chicago's lawmakers that the Ordinance embodies the most promising way to solve the persistent problem of gang criminality.

B. The Ordinance Places Minimal Restraints on Liberty

The Ordinance is carefully crafted to minimize any restraint on liberty. In fact, both because it serves as a substitute for severe punishments, and because it dissipates widely resented norms, the Ordinance may actually *enhance* liberty for many youths likely to be subject to the "move along" orders it authorizes. Moreover, both the Ordinance and its implementing regulations employ objective standards to limit police discretion and to provide gang loiterers with an opportunity to avoid any criminal sanction simply by obeying an order to move along.

1. *The Ordinance is liberty-enhancing for the community at large and for youths who resent pressure to join gangs.* In declaring that the Ordinance unconstitutionally abridges liberty, the Illinois Supreme Court focused *only* on the restraints that the Ordinance put on the behavior of gang members. As a result, it failed to consider the various ways in which the Ordinance actually *enhances* the liberty of the communities in which it is enforced. Cf. *Connecticut v. Doeher*, 501 U.S. 1, 11 (1991) (due process requires "due regard for any ancillary interest" of third parties).

First, the Ordinance enhances the liberty of community residents to use and enjoy their own streets. Gang crime and intimidation diminish the liberty not only of their victims, but also of community residents who must take costly and opportunity-sacrificing precautions to avoid becoming victims. Permitting gang members to camp out on city streets impedes the very liberties

FOREWORD

The Coming Crisis of Criminal Procedure

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Constitutional doctrines have life cycles. They are born of practical need, flourish in an atmosphere of general utility, and decline as changing conditions drain them of their vitality. When the contradiction between a doctrine and social necessity finally becomes too intense to be endured, the doctrine expires—sometimes peacefully, sometimes convulsively—and is superseded by another doctrine that is fated to enjoy the same career.¹

Our purpose in this article is to anticipate the imminent death of certain prominent doctrines of criminal procedure. These doctrines—in particular, the constitutional standards used to evaluate discretionary community policing—have outlived their utility. It's now time to construct a *new* criminal procedure, one uniquely fitted to the conditions that currently characterize American social and political life and that are likely to characterize it into the foreseeable future.

The need that gave birth to the existing criminal procedure regime was institutionalized racism. Law enforcement was a key instrument of racial repression, in both the north and the south, before the 1960's civil rights revolution. Modern criminal procedure reflects the Supreme Court's admirable contribution to eradicating this incidence of American apartheid. Supplanting the deferential standards of review that had until then characterized its criminal procedure jurisprudence, the Court, beginning in the 1960's and continuing well into the 1970's, erected a dense network of rules to delimit the permissible bounds of discretionary law-enforcement authority. Although rarely couched as such, the unmistakable premise of these doctrines was the assumption that communities could not be trusted to police their own police because of the distorting influence of racism.

The occasion for the current doctrine's demise, we predict, will be the political revolution that's now remaking urban law enforcement. From Los Angeles to Dallas, from Chicago to New York City, cities throughout the

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1. See generally Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

Nation are rediscovering curfews, anti-loitering laws, order-maintenance policing, and related law-enforcement strategies. On the surface, these community policing techniques bear a striking resemblance to the ones that communities used to reinforce the exclusion of minorities from the Nation's political life before the 1960's. But there is a critical difference in political context. Far from being the targets of these new law-enforcement strategies, inner-city minority residents are now their primary sponsors. Flexing their new-found political muscle, these citizens are demanding effective law enforcement. They support discretionary community policing both because they believe this strategy will work—a conviction shared by leading criminologists—and because they see this form of law-enforcement as morally superior to the regime of draconian punishments that has characterized American criminal law since the 1970's.

Viewed through the lens of existing constitutional doctrine, however, the new community policing appears indistinguishable from the old. In numerous cases, courts have invalidated new community policing strategies on the ground that they involve excessive police discretion. Although the civil liberties groups that have brought these cases purport to be enforcing the rights of inner-city minorities to be free from police harassment, their suits are frequently opposed by minority residents themselves. A body of doctrine designed to assure racial equality in law enforcement has now become an impediment to minority communities' own efforts to liberate themselves from rampant crime—a condition that is itself both a vestige of racism and a continuing barrier to the integration of African-Americans into the social and economic mainstream.²

This is a contradiction too fundamental to be endured for long. Indeed, the first signs of doctrinal collapse have already appeared. At the same time that many courts have been striking down new community policing techniques, others have been upholding them notwithstanding the evident tension between their holdings and the existing doctrine. The case law is characterized by disarray and confusion.

This state of affairs will persist until a new criminal procedure emerges to take the place of the existing one. The new doctrine must recognize the legitimate function of discretionary policing techniques in combating inner-city crime, and also the competence of inner-city communities to protect themselves from abusive police behavior. At the same time, the new doctrine must recognize the distinctive threats to liberty that these new political conditions themselves pose.

This is the coming crisis of criminal procedure. Our goal in this Article is to illuminate its contours and to identify just what it will take to surmount it.

2. See generally Tracey Meares & Dan M. Kahan, (Jan. 1, 1998) (unpublished manuscript on file with the authors).

I. YESTERDAY'S DOCTRINE IN YESTERDAY'S CONTEXT

Contemporary criminal procedure comprises a muscular body of interconnected doctrines. Many of these—including those governing the right to counsel,³ to trial by jury,⁴ to confront and cross-examine witnesses,⁵ and the like—regulate the conduct of criminal adjudications. But many others govern the everyday machinery of law enforcement. They tell individual police officers when and how they can interact with criminal suspects on the street.⁶ They minutely regulate the nature of police interrogations of suspects in custody.⁷ They spell out in detail the procedures that police must follow before they conduct searches or engage in related forms of surveillance.⁸ And they constrain, both in substance and in form, the authority of police to maintain public order.⁹ We'll refer to the doctrines that regulate police conduct in this fashion as the "modern regime of criminal procedure."

Although familiar, the doctrines of the modern regime are all of relatively recent vintage. The cases that established them—including *Mapp v. Ohio*,¹⁰ *Miranda v. Arizona*,¹¹ *Gideon v. Wainwright*,¹² and *Papachristou v. City of Jacksonville*¹³—were all decided between 1961 and 1972. Incursions into criminal procedure before 1960 were sporadic and doctrinally modest.¹⁴

Indeed, the dominant criticism of the modern regime focuses on its novelty. The "exclusionary rule," *Miranda* warnings, and like components of the modern regime have little basis in the expectations of the Framers.¹⁵ Because the Court could generate these doctrines only by "twist[ing] the text" and "manhandl[ing] the historical evidence,"¹⁶ the modern regime, it is said, lacks constitutional legitimacy.

3. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding Sixth Amendment right to counsel to be incorporated into Due Process Clause of Fourteenth Amendment); *United States v. Cronin*, 466 U.S. 648 (1984) (Sixth Amendment right to effective assistance of counsel).

4. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

5. See, e.g., *Maryland v. Craig*, 497 U.S. 836 (1990).

6. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 638-39 (1991) (describing interlocking maze of doctrines governing "consensual encounters," "investigatory stops," and "seizures of person").

7. See, e.g., *Davis v. United States*, 512 U.S. 452, 458-62 (1992) (describing multiple "prophylactic" rules designed to conform interrogation to right to counsel).

8. See generally 2-3 WAYNE R. LAFAYE, *CRIMINAL PROCEDURE: A TREATISE ON THE FOURTH AMENDMENT* (3d ed. 1996).

9. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Kolender v. Lawson*, 461 U.S. 352 (1983).

10. 367 U.S. 643 (1961).

11. 384 U.S. 436 (1966).

12. 372 U.S. 335 (1963).

13. 405 U.S. 156 (1972).

14. See generally WAYNE R. LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* §2.4 (discussing pre-selective-incorporation Due Process jurisprudence).

15. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997); Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J. L. REF. 465, 478-95 (1984).

16. AMAR, *supra* note 15, at 31.

This critique, however, misses the point. Fidelity to history wasn't the goal of the doctrinal innovations of the 1960's; adapting the law to immediate societal needs was. Like other doctrines of constitutional law, those associated with modern criminal procedure were fashioned in a particular social and political context. Before the doctrine can be understood, much less cogently criticized, the presuppositions of that context must be exposed.

The context that gave rise to modern criminal procedure was institutionalized racism. From the close of Reconstruction to the modern Civil Rights revolution, law-enforcement played a central role in maintaining the exclusion of African-Americans and other minorities from the Nation's political life. When suspected, however remotely, of wrongdoing, these citizens became the targets of sweeping and invasive tactics of investigation. And even when not, they remained subject to relentless official intimidation, particularly when they dared to take actions that challenged the white establishment's stranglehold over political power. That intimidation sometimes took the form of horrific state-sponsored violence, such as lynchings and the beatings and killings of civil rights activists. But even more frequently it came in the form of chronic, low-level harassment through the discriminatory enforcement of vagrancy ordinances and other "public order" laws.¹⁷

Nearly all the landmark criminal procedure cases of the 1960's and early 1970's arose from this context.¹⁸ In *Davis v. Mississippi*,¹⁹ a seminal Fourth Amendment case, the police arrested twenty-four African-Americans in a dragnet roundup after a rape victim identified her assailant as simply a "Negro."²⁰ In *Cox v. Louisiana*²¹ and *Bouie v. South Carolina*,²² officials had used vaguely worded statutes to arrest civil rights demonstrators.²³ *Duncan v. Louisiana*,²⁴ the landmark decision applying to state trials the

17. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* ch. 3 (1997); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 839-40 (1994); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 596-600 (1997); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5, 50 (1997).

18. See Steiker, *supra* note 17, at 838, 843-44. Indeed, so did many of the landmark Due Process "fundamental fairness" cases decided earlier in the century. See, e.g., *Powell v. Alabama*, 287 U.S. 45 (1932) (due process right to counsel); *Brown v. Mississippi*, 297 U.S. 278 (1936) (due process right against coerced confession). See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 94-107 (1997); Bennett Boskey & John H. Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. CHI. L. REV. 266, 283-86 (1946).

19. 394 U.S. 721 (1969).

20. See Steiker, *supra* note 17, at 844 (emphasizing role of race in motivating decision).

21. 379 U.S. 536 (1965).

22. 378 U.S. 347 (1964).

23. See Harold J. Krent, *Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause*, 3 ROGER WILLIAMS U. L. REV. 35, 56 (1997) (suggesting that racial context explains *Bouie*); John T. Parry, *Reasonable Reliance on Official Interpretations of Criminal Law: Entrapment by Estoppel, Mistake of Law, and the Risk Against Estopping the Government*, 25 AM. J. CRIM. L. (forthcoming 1997) (examining racial context as motivation for *Cox*).

24. 391 U.S. 145 (1968).

Sixth Amendment right to a jury, involved an African-American who had been convicted for an assault that arose from a dispute involving school desegregation. *Papachristou*, which delivered a staggering blow to anti-loitering laws, involved two interracial couples arrested in a parked automobile.²⁵

Although rarely acknowledged by the Court, the racial dimension of these cases was not lost on contemporary observers. "The Court's concern with criminal procedure," one wrote, "can be understood only in the context of the struggle for civil rights."²⁶ At a time when attacking racial discrimination in public and private institutions occupied a central place on both the Court's and Congress's agendas, "[i]t would have been . . . anomalous for [the] Court to ignore the clear evidence that members of disadvantaged groups generally bore the brunt of most unlawful police activity" as well.²⁷

One of the commentators who sounded this theme was Associate Justice William O. Douglas. In a famous 1960 *Yale Law Journal* article,²⁸ Douglas railed against the argument that anti-loitering laws were beyond constitutional reproach. It was naïve to trust contemporary communities to apply such laws evenhandedly, Douglas asserted, because those arrested under such laws typically came "from minority groups" with insufficient political clout "to protect themselves" and without "the prestige to prevent an easy laying-on of hands by the police."²⁹ When the Court did ultimately deem traditionally worded loitering laws unconstitutionally vague in *Papachristou*, Douglas wrote the Court's opinion.

Attention to context also explains the Court's own failure to be more forthcoming about the racial dimension of its criminal procedure cases. The Court, of course, played a conspicuous role in the movement to purge American institutions of the contaminating influence of racism in the 1950's and '60's. Indeed, the Court's leading race-equality cases, including *Brown v. Board of Education*³⁰ and *Baker v. Carr*,³¹ provoked intense political controversy. Confronted with a sustained attack on its own legitimacy, the Court changed its tactics. Rather than meet racism head on, the Court began to fight it indirectly through general constitutional standards that did not

25. See 405 U.S. at 158-59; see also Livingston, *supra* note 17, at 598-600, 607-08, 646-47 (linking *Papachristou* to concern that anti-loitering laws were being used as instrument of racial oppression).

26. *Shuttlesworth v. Birmingham* also overturned the application of a loitering ordinance to a " 'notorious' . . . civil rights" activist at a time when that law was being used against African-Americans engaged in picketing and boycotting of racially discriminatory businesses. *Shuttlesworth v. Birmingham*, 382 U.S. 87, 101-102 (1965) (Fortas, J., concurring).

27. A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968).

28. *Id.*

29. William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

30. *Id.* at 13.

31. 347 U.S. 483 (1954).

32. 369 U.S. 186 (1962).

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explicitly address race but that were nonetheless calculated to constrain racially motivated policies. Harry Kalven, in his classic *The Negro and the First Amendment*, documented the contribution that this strategy made to modern free speech jurisprudence.³² The Court's death penalty jurisprudence in the late 1960's and early 1970's, including its decisions in *Furman v. Georgia*³³ and *Coker v. Georgia*,³⁴ likewise reflected a (largely) unspoken concern with race.³⁵ The Court's criminal procedure jurisprudence fits this pattern.³⁶

This indirect strategy for controlling racism explains the two central features of the modern criminal procedure regime. The first is its authorization of exacting judicial scrutiny of routine policing functions. Before the 1960's, courts reviewed claims of police overreaching according to a deferential "shocks the conscience" test that placed only minimal constraints on investigatory procedures.³⁷ The intricate guidelines associated with contemporary doctrine under the Fourth and Fifth Amendments, in contrast, tightly constrain those procedures and subject them to stringent judicial monitoring.

Institutionalized racism fully justified this doctrinal shift. The deferential posture of the pre-1960's doctrines assumed that communities by and large had adequate incentives and opportunities to police their own police, and that judicial intervention was necessary only in extreme cases. But as Justice Douglas and other contemporary commentators emphasized, this equanimity rested on a naïve understanding of the prevailing politics of law-enforcement. The coercive incidence of law-enforcement, in both the North and South, was concentrated most heavily on minority citizens, who by virtue of their exclusion from the political process had no say about whether those policies were just. The result was the systematic devaluation of both the liberty of individual minority citizens and the well-being of minorities as a group. By insinuating courts deeply into the process of criminal-law enforcement, the federal constitutionalization of state police procedures was intended to correct this imbalance.³⁸

The second central feature of the modern criminal procedure regime is its

32. HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965). Kalven saw the positive influence of the civil rights movement on the Court's First Amendment jurisprudence as counteracting the negative influence of McCarthyism on it. *See id.* at 6 ("we may come to see the Negro as winning back for us the freedom the Communists seemed to have lost for us.").

33. 408 U.S. 238 (1972).

34. 433 U.S. 584 (1977).

35. *See McCleskey v. Kemp*, 481 U.S. 279, 330-32 (1987) (Brennan, J., dissenting) (suggesting race played a role in *Furman* and *Coker* decisions); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades Of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 376 (1995) (same).

36. We are indebted to Dennis Hutchinson for bring this parallel to our attention.

37. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 435-38 (1995).

38. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991).

hostility toward discretion. Before the 1960's, the enforcement of public order through generally worded anti-loitering laws and similar provisions was a routine policing practice.³⁹ But under the Due Process "void for vagueness" doctrine, and certain elements of the Court's Fourth Amendment jurisprudence, conventional order-maintenance policing became constitutionally suspect.⁴⁰

This jurisprudential innovation, too, took aim at institutionalized racism. While discretion advances the public interest by giving law enforcers the flexibility to respond to circumstances too numerous and diverse to be addressed in detail by legislative rulemakers, discretion also threatens the public good by giving law enforcers the latitude to abuse their power for personal ends.⁴¹ The primary check against such abuse, again, is the accountability of law enforcers to the community's political representatives. In the political context of the 1960's, however, law enforcement officials were accountable only to representatives of the white majority. Indeed, for precisely this reason, the police predictably used their discretion to harass and repress minorities. Insisting that law-enforcement authority be exercised according to hyper-precise rules was a device, then, for *impeding* the responsiveness of law enforcers to the demands of racist white political establishments. Such rules also made it much easier for courts to detect and punish racially motivated abuses of authority.⁴²

The contemporary doctrinal regime reflects the Warren and early Burger Courts' plan to cleanse law-enforcement of the stain of institutionalized racism. Those who criticize that regime today, then, must do more than tell us what the Fourth and Fifth Amendments meant to a generation of Constitution drafters who didn't feel the urgency of that objective. They must argue either that the goals that the contemporary doctrine is meant to serve are irrelevant—a morally benighted position⁴³—or that the doctrine, in today's context, no longer serves those goals. It is this latter possibility that we next explore.

II. YESTERDAY'S DOCTRINE IN TODAY'S CONTEXT

Viewed from a distance, the criminal procedure world of the late 1990's looks strikingly similar to that of the late 1960's. Municipal police departments, particularly those in the inner-cities, are once again aggressively enforcing anti-loitering laws, curfews, and even random public-housing searches. Civil liberties organizations are again bringing suit to block such

39. See Livingston, *supra* note 17, at 595.

40. See *id.* at 597-608; Livingston, U. Chi. Legal Forum (forthcoming 1998).

41. See generally CASS R. SUNSTEIN, *POLITICAL CONFLICT AND LEGAL REASONING* 112-13, 130-35 (1995).

42. See Livingston, *supra* note 17, at 646-47.

43. Cf. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

tactics, arguing that they expose inner-city minorities to harassment. And courts throughout the Nation—from Washington, D.C., to Chicago, to San Diego—are once more declaring discretionary law-enforcement techniques unconstitutional.

But examined close up, the appearance of similarity turns out to be an illusion. Both the political and the litigation dynamics surrounding discretionary policing techniques have changed dramatically. Whereas in the 1960's, such strategies were being used to reinforce the exclusion of minorities from the Nation's political life, today they are being adopted at the behest of those same groups, whose political representatives see them as essential to combating inner-city crime. Although civil liberties groups purport to be representing inner-city residents generally when they challenge community policing strategies, their lawsuits are often opposed by inner-city residents themselves.⁴⁴

Should these differences in social and political context make a difference, doctrinally? We will now try to show that they should, beginning with an examination of the nature of the new community policing and the political dynamics that underlie it. We'll then show how, in the context of the 1990's, the application of the modern regime of criminal procedure in fact defeats the goals that inspired that doctrinal framework.

A. THE NEW COMMUNITY POLICING

Throughout the Nation, cities are rediscovering community policing. Approximately three-quarters of the Nation's 200 largest cities now have curfew laws, many of which were enacted after 1990.⁴⁵ Anti-loitering laws are also enjoying a renaissance. Some specifically target individuals engaged in prostitution or petty drug dealing.⁴⁶ Others focus on gang members,⁴⁷ a

44. See, e.g., Barbara Clements, *Views Differ on Dallas' Curfew, Which Spawned Tacoma's Plan*, NEWS TRIBUNE, Oct. 17, 1994, at B1 (quoting African-American mother who spear-headed campaign for Dallas curfew: claim that curfew would lead to racial harassment "was an ACLU scare tactic that polarized the community"); Roger L. Conner & Rev. George Clements, *Listen to the Voice of the Projects* (Letter to the Editor), N.Y. TIMES, Apr. 15, 1994, at A30 (noting that residents of Chicago housing projects sought legal representation to oppose ACLU class action brought on residents' behalf); Sen. Ulysses Currie, *The ACLU pits the civil rights of few against the common good* (Letter to Editor), WASH. TIMES, Nov. 30, 1996, at A12 (comment of African-American legislator on ACLU opposition to Washington, D.C., and Maryland curfews: "As an African American, I have always been a staunch supporter of the ACLU. Indeed, the ACLU has been there for us when often no one else has. However, over the years there have been isolated incidents when the ACLU seemed to be marching to music only it could hear.").

45. See William Ruefle & Kenneth Mike Reynolds, *Curfews and Delinquency in Major American Cities*, 41 CRIME & DELINQUENCY 3473 (1995).

46. See Peter Kent, *County ready to take aim at loiterers*, ATLANTA J. & CONST., April 16, 1997, at 01J (Gwinnett County, Ga., ordinance); Jonnel LiCari, *Trading Liberty for Security?*, WISC. STATE J., Aug. 17, 1997, at 1A (Madison, Wisc.); Kenneth Hawkins, Jr., *Clover OK's \$3.1 million budget*, HERALD (Rock Hill, S.C.), July 16, 1997, at 5A (Clover, S.C.); Livingston, *supra* note 17, at 555 & n. 13 (various jurisdictions); Mack Reed, *Oxnard Loitering Law Left Hanging*, L.A. TIMES, Ventura County Edition, August 1, 1997, B5 (Oxnard, Calif.).

47. See, e.g., CHICAGO, ILL., MUNICIPAL CODE § 8-4-015 (1992).

strategy replicated in other jurisdictions through anti-nuisance injunctions.⁴⁸ Public housing officials have attempted to widen the authority of the police to conduct warrantless building searches in response to reports of random gun fire.⁴⁹ And police in still other communities, most famously New York City, have turned their attention to aggressive panhandling, public drunkenness, vandalism and other forms of public disorder.⁵⁰ We'll refer loosely to these discretionary policing strategies as the "new community policing."⁵¹

What explains this development? Like the old community policing of the pre-civil-rights era, the new community policing reflects political dynamics that center on race. But the relationship between community policing and racial politics is very different today from what it was then. No longer an instrument for reinforcing the exclusion of minorities from the Nation's political life, today's community policing is a testament to the growing political strength of African-Americans, particularly in the inner-city.

No civil rights law has succeeded as unambiguously as the Voting Rights Act of 1965. Black voter registration and turnout rates sky-rocked almost immediately upon passage of the law,⁵² and since then the representation of African-Americans in politics has steadily risen as well.⁵³ By 1990, the number of African-Americans in Southern congressional and state legislative delegations had jumped *eighty fold*.⁵⁴ Today in the South the percentage of black city council members matches that of African-Americans in the general population.⁵⁵ Similar progress in black political representation has taken place in the North, and during the 1980s and 1990s, many of America's largest cities, including New York, Los Angeles, Chicago, and San Francisco, have been led by African-American mayors.⁵⁶ Voting is not the only measure of political participation, of course. Involvement in community organizations, contact with government officials, and participation in

48. See, e.g., *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).

49. See Guy Gugliotta, *Clinton Lets Police Raid Projects*, WASH. POST, Apr. 17, 1994 at A1 (describing Clinton Administration plan to authorize searches and describing search policies in Chicago, Philadelphia, Baltimore, and Puerto Rico).

50. See generally GEORGE KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996).

51. See Livingston, *supra* note 17, at 558 (describing "new policing").

52. See PAUL KLEPPNER, *WHO VOTED: THE DYNAMICS OF ELECTORAL TURNOUT, 1970-1980* 116 (1982).

53. See Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1360 (1995) (book review).

54. See *id.* at 1367.

55. See *id.*

56. See Joint Center for Political Studies, *Black Elected Officials: A National Roster, 1993*; Joint Center for Political Studies, *Black Elected Officials: A National Roster 1984*; see also STEVEN E. LAWSON, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941* 170-182 (1991) (detailing the progress of Black urban political officials and noting the triumphs of candidates in Newark, Oakland, New Orleans, Atlanta, Detroit, and Gary among other cities).

community-based problem solving, among other activities, also count.⁵⁷ Since the mid sixties, these forms of African-American political participation have also increased. The enduring participation of African Americans in an active religious life also plays a key role in promoting African American access to politics.⁵⁸ While those in higher socio-economic groups tend to engage in political activity to a greater extent than those in lower groups, the sense of group-consciousness developed by African-Americans during the civil rights era, together with their widespread involvement in religious institutions, has tended to increase black political participation well above the level their socioeconomic status would predict.⁵⁹

This political transformation has made a critical impact on the Nation's police departments. Unlike the in the past, African-Americans today make up a significant percentages of all urban police departments.⁶⁰ New York, Washington, and Los Angeles have all had black police chiefs accountable to black mayors. Indeed, the election of black mayors in several major cities has led directly to racial diversity in the hiring of police officers.⁶¹

More effective law enforcement is, in fact, one of the primary ends to which African-Americans are putting their new-found political strength. African Americans devote a much larger proportion of political activity than do other groups to issues of crime, violence, and drugs.⁶² Their concern with these matters is understandable and not especially new.⁶³ Well into the 1960's, white political establishments withheld effective law enforcement from minority communities at the same time that they used the police to

57. See SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 30-31 (1987).

58. See SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 38-88, 455-58, 519 (1995).

59. See SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 252-259 (1987). See also SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 230 at n. 4 (1995) (listing several sources that confirm this point).

60. Consider the "index of black representation," which is calculated by dividing the percent of African American police officers in a department by the percent of African Americans in the local population of several major cities. Los Angeles's index increased from .55 to 1.00 between 1983 and 1992. Detroit's index increased from .49 to .70 during the same period. Chicago, San Diego, Dallas, and Phoenix posted indexes of .64, .80, .64, .77 in 1992, respectively, each an increase from 1982 levels. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS table 1.36 at 49 (Kathleen Maguire & Ann Pastore eds. 1994).

61. Examples include Richard Hatcher in Gary, Coleman Young in Detroit and Carl Stokes in Cleveland.

62. See SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 247-249 and table 8.6 (1995) (demonstrating that 25% of issue-based political activity among Black respondents animated by concern about crime or drugs compared to 7% among white respondents).

63. See FIELD SURVEYS V: A NATIONAL SURVEY OF POLICE AND COMMUNITY RELATIONS. *The President's Commission on Law Enforcement and Administration of Justice*, Washington, D.C.: U.S. Government Printing Office, January 1967.

oppress them.⁶⁴ Because crime, through a variety of social mechanisms, tends to reinforce itself,⁶⁵ the high crime rates that afflict minority communities today are directly related to this historical under-enforcement of criminal law. Indeed, because crime disrupts so many social institutions, many African-American citizens see rampant crime as one of the most substantial impediments to improving their economic and social status. This sentiment translates into a demand within the African-American community for higher levels of law-enforcement.⁶⁶

The new community policing is an outgrowth of this demand. In nearly every large American city, African-Americans have supplied critical support for community policing techniques. African-American community groups, including the Urban League, were the driving force behind the adoption of curfews in cities such as Miami, Dallas, San Diego, and Washington, D.C.⁶⁷ African-American city council members, representing the city's most crime-ridden districts, were instrumental to the enactment of Chicago's gang-loitering ordinance.⁶⁸ African-American residents strongly support the anti-gang injunctions in California and the renewed attention to order-maintenance policing in New York as well.⁶⁹

Broadly speaking, inner-city minorities support the new community policing for two reasons. First, they believe that it will work. Giving the police the authority to control low-level disorder is perceived as essential to deterring more serious crimes.⁷⁰

The most sophisticated recent work in criminology confirms this perception. Obviously, the incidence of crime cannot be reduced to one simple factor. Truncated social and economic opportunities and lapses in law enforcement play important roles. But so does the effect of visible disorder on social norms.⁷¹ When individuals observe visible gang activity, prostitu-

64. See KENNEDY, *supra* note 17, ch. 2.

65. See generally Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352-61 (1997).

66. See KENNEDY, *supra* note 17, at 11-12, 19-20, 71, 370-72.

67. See *All Things Considered: Miami Curfew Gaining Support among Many Black Groups* (National Public Radio broadcast, Feb. 24, 1994) (reporting that curfew ordinance sponsored by African-American county commissioner is supported by 70% of African-Americans in Dade County and by Greater Miami Urban League); *The Teen Curfew Works* (editorial), SAN DIEGO UNION-TRIBUNE, Aug. 7, 1994 (minority support for San Diego curfew); Barbara Clements, *Views Differ on Dallas' Curfew, Which Spawned Tacoma's Plan*, NEWS TRIBUNE (Tacoma, Wash.), Oct. 17, 1994, at B1 (same, Dallas curfew); Toni Locy, *D.C. Curfew Overturned in Federal Court*, WASH. POST, Oct. 30, 1996, at A1 (Washington, D.C., curfew sponsored by African-American council member and supported by African-American Mayor).

68. Meares & Kahan, *supra* note 2.

69. See Blaine Harden, *Letter from New York: "Ideal State of Cleanliness" Is Apple of Giuliani's Eye*, WASH. POST, Mar. 23, 1998, at A6 (reporting majority of city's African-Americans support Mayor Giuliani based on perception that his emphasis on "civility" is responsible for steep drops in crime in poor, minority neighborhoods).

70. See Kahan, *supra* note 65, at 393.

71. See generally James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY,

tion, public drunkenness and other forms of disorder, they infer that authorities lack the power or the resolve to control antisocial behavior. This inference emboldens potential law-breakers, whose decision to break the law reinforces the perception that crime is likely to be tolerated, and even respected, in the community at large. Disorder also frightens committed law-abiders. In a community pervaded by disorder, law-abiding individuals are likely to avoid the streets, where their simple presence would otherwise be a deterrent to crime. They are also more likely to infer that cooperating with police is both dangerous and futile. The law-abiders' fear of crime thus facilitates even more of it.⁷²

By focusing on public order, the new community policing reverses these dynamics. When citizens obey norms of orderliness—and when authorities visibly respond to those who don't—onlookers conclude that law-enforcers are likely to respond vigorously to more serious forms of criminality as well. Potential law-breakers are therefore less likely to infer that they can get away with crime, or that others will respect them for trying. The restoration of order also reassures law-abiders, inducing them to engage in patterns of behavior that themselves discourage crime.

Moreover, the new community policing does more than transform perceptions: it also reinforces the community structures that discourage crime. Again sophisticated work in criminology shows how.⁷³ The recent work reviving Shaw and McKay's social organization theory demonstrates that the prevalence of friendship networks, community-wide supervision of teen peer groups, and greater level of participation in formal organizations create "norm highways" that facilitate the promulgation and transmission of norms of orderliness.⁷⁴ Curfews can help to promote such community infrastructure by assisting adults in the community-wide monitoring of teens.⁷⁵ Enforcement of loitering laws and the restoration of order can help to promote friendship networks by encouraging community adults to engage in collective guardianship rather than solo efforts.⁷⁶ The effect of curfews, gang-

Mar. 1982, at 29; WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* (1990).

72. See Kahan, *supra* note 65, at 370-71.

73. See, e.g., Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social Disorganization Theory*, 94 AM. J. SOC. 774 (1989); Robert J. Bursik, *Political Decisionmaking and Ecological Models of Delinquency: Conflict and Consensus*, in *THEORETICAL INTEGRATION IN THE STUDY OF DEVIANCE CRIME: PROBLEMS AND PROSPECTS* 105 (S. F. Messner, M. D. Krohn and A. E. Liska ed., 1989); Robert J. Sampson & William Julius Wilson, *Toward a Theory of Race, Crime, and Urban Inequality*, in *CRIME AND INEQUALITY* 37-54 (J. Hagan and R. Peterson ed., 1995).

74. See Tracey L. Meares, *Place and Crime*, CHICAGO-KENT L. REV. (forthcoming 1998) (defining the concept of "norm highways"); see also Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

75. See Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 591-93 (1997).

76. See Meares, *Social Organization*, *supra* note 74.

loitering, laws, order-maintenance policing in restoring norms of order in the inner-city thus deserves a critical share of the credit for the decline of crime rates in the 1990's.⁷⁷

The second reason that minority residents of the inner-city support the new community policing is more subtle. It is that they view it as the *least destructive* effective form of law-enforcement.

The attitude of inner-city minorities toward the criminal law is suffused with ambivalence. They obviously resent their exposure to disproportionate criminal victimization, and expect relief. But unlike many whites who also strongly resent crime, they have *not* renounced their concern for the very individuals who are, or who are likely to become, criminal victimizers. Rather, law-abiding residents of the inner-city are likely to feel a strong sense of "linked fate" with inner-city law-breakers, with whom they are intimately bound by social and familial ties.⁷⁸ These competing pulls of interest and affection explain, for example, why African-Americans strongly favor the criminalization of drugs but resent stiff drug sentences, which are viewed as having a singularly destructive effect on both the individuals on whom they are imposed and the communities from which these individuals come.⁷⁹

The new community policing comes much closer to negotiating this ambivalence. It promises—and has delivered—effective relief from crime. And yet it does so at a much smaller cost, in terms of liberty, as well as dollars, than do severe prison sentences. As coercive as the enforcement of order on the streets can be, it pales in comparison to the destructive impact of the mass incarceration of young African-American men that has been the centerpiece of American criminal-law enforcement since the 1980's.⁸⁰

But inner-city residents are not naïve. They realize that the new community policing can also threaten liberty. Indeed, along with more effective law-enforcement, African-American political leaders have demanded and

77. Dan M. Kahan & Tracey Meares, *Law and (Norms of) Order* (Mar. 1, 1998) (unpublished manuscript on file with authors).

78. See Tracey L. Meares, *It's a Question of Connections*, 31 VAL. U. L. REV. 579, 588-89 (1997); Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 211-17 (1998); Mary Patillo, *Sweet Mothers and Gangbangers: Managing Crime in a Black Middle-Class Neighborhood*, 76 SOCIAL FORCES 747 (1998) (explaining that gang members and drug dealers are incorporated into networks of law-abiding kin); Sudhir Alladi Venkatesh, *Cleaning up Chicago's public housing: a critique of "sweeps" and enforcement-based approaches in*, EIGHT ANNUAL INTERNATIONAL CONFERENCE ON DRUG POLICY REFORM, THE CRUCIAL NEXT STAGE: HEALTH CARE & HUMAN RIGHTS (1994) (same); Sudhir Alladi Venkatesh, *The Social Organization of Street Gang Activity in an Urban Ghetto*, 103 AM. J. SOC. 82-111 (1997) (noting the complex nature of mutual reliance between street gangs and the communities in which they are located).

79. See Tracey L. Meares, *Charting Race and Class Differences in Attitudes Toward Drug Legalization and Law Enforcement: Lessons for Federal Criminal Law*, 1 BUFF. CRIM. L. REV. 137 (1997).

80. See, e.g., MARC MAUER, *THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM* (1990) (finding one-third of African-American men between 20 and 29 years of age are either imprisoned, on parole, or on probation).

obtained more effective bureaucratic procedures for punishing police brutality.⁸¹ These procedures don't completely eliminate the risk of harassment associated with the new community policing. But the willingness of inner-city residents to support this form of law-enforcement nevertheless reflects their judgment that in *today's* political and social context, the continued victimization of minorities at hands of criminals poses a much more significant threat to the well-being of minorities than does the risk of arbitrary mistreatment at the hands of the police.⁸²

B. THE NEW COMMUNITY POLICING VS. THE OLD DOCTRINE

Whether those communities should even be allowed to make that judgment for themselves, however, is an open legal question. The constitutionality of the new community policing is at the heart of contentious litigation across the Nation.

Applying the doctrines of the modern criminal procedure regime, courts have already invalidated numerous important experiments in community policing. The Illinois Supreme Court struck down Chicago's gang-loitering ordinance as unconstitutionally vague,⁸³ a fate shared by numerous "loitering with intent" statutes around the country.⁸⁴ Curfews in Washington, D.C.,⁸⁵ San Diego,⁸⁶ and other cities⁸⁷ have likewise been deemed to abridge the Due Process rights of teens and their parents. The building-search policy of the Chicago Housing Authority was struck down on Fourth Amendment grounds.⁸⁸ In the view of the courts that decided these cases, the new community policing, no less than old, unreasonably subordinates individual liberty to public order and invites harassment of powerless minorities.

Not all courts agree, however. Anti-gang injunctions, which in form are nearly indistinguishable from Chicago's gang-loitering ordinance, have survived a challenge before the California Supreme Court.⁸⁹ Although not materially different from those in Washington, D.C., and San Diego, curfews

81. See Pildes, *supra* note 53, at 1377.

82. See KENNEDY, *supra* note 17, at 19-20.

83. See *City of Chicago v. Morales*, 687 N.E.2d 53 (1997), *cert. granted*, 66 U.S.L.W. 3474 (U.S. Apr 20, 1998) (NO. 97-1121-CSY).

84. See Peter Kent, *County ready to take aim at loiterers*, ATLANTA J & CONST., April 16, 1997, at 01J (Gwinnett County, Ga., ordinance); Jonnel LiCari, *Trading Liberty for Security?*, WISC. STATE J., Aug. 17, 1997, at 1A (Madison, Wisc.); Kenneth Hawkins, Jr., *Clover OK's \$3.1 million budget*, HERALD (Rock Hill, S.C.), July 16, 1997, at 5A (Clover, S.C.); Livingston, *supra* note 17, at 555 & n. 13 (various jurisdictions); Mack Reed, *Oxnard Loitering Law Left Hanging*, L.A. TIMES, Ventura County Edition, August 1, 1997, B5 (Oxnard, Calif.).

85. See *Hutchins v. District of Columbia*, 942 F. Supp. 665 (D.D.C. 1996), *aff'd*, 1998 U.S. App. LEXIS 10303 (D.C. Cir. May 22, 1998).

86. See *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997).

87. See, e.g., *City of Maquoketa v. Russell*, 484 N.W.2d 179 (Iowa 1992); *Ashton v. Brown*, 660 A.2d 447 (Md. 1995).

88. See *Pratt v. CHA*, 848 F. Supp. 792 (N.D. Ill. 1994).

89. See *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).

in Dallas,⁹⁰ and Miami⁹¹ have also survived review. The same goes for most, but not all, forms of order-maintenance policing.⁹² "The overall pattern of decisions" is no longer "resolutely arrayed against the constitutional validity of public order laws"; rather it is now "erratic, fractured, and confusing."⁹³

Who has got it right—the courts that have invalidated new community policing techniques or the ones that have upheld them? One way to answer that question would be to determine which courts' decisions are most faithful to the precedents that make up the modern criminal procedure regime. But as we have argued, those precedents themselves presuppose the social and political context of the 1960's. Another way to figure out who is right, then, is to determine whether the precedents that courts have relied on to invalidate curfews, gang-loitering laws, and other elements of the new community policing fit today's political and social context.

They don't. The politics behind community policing today, we've argued, are completely different from those behind community policing before the civil rights revolution. In this new setting, the two central features of the modern criminal procedure regime—its authorization of exacting judicial scrutiny for routine policing and its great hostility toward discretion—have been stripped of their practical grounding.

1. STRICT SCRUTINY AS SECOND GUESSING

The modern regime enables close judicial monitoring of law enforcement on the assumption that communities can't be trusted to police their own police. This made sense in an era in which the coercive incidence of law-enforcement was concentrated on a politically powerless and despised segment of the population. But African-American citizens are no longer excluded from the political process, and in fact exercise significant power in the Nation's inner-cities. They are *using* that power to obtain more effective law enforcement. Under these circumstances, the conclusion that new community policing is a cover for racial harassment displays a complete lack of comprehension.

Ironically, the Warren Court's doctrines are now being used to frustrate minority communities' own efforts to remedy the effects of the one feature of institutionalized racism that the Warren Court itself was powerless to attack—namely, the discriminatory *under-enforcement* of criminal law. Consider the dramatic facts of *Pratt v. CHA*. After the court certified a class action brought by the ACLU on behalf of all CHA residents challenging the CHA's building-search policy, the elected representatives of 18 of Chicago

90. See *Qutb v. Strauss*, 11 F.3d 488, 495 (5th Cir. 1993).

91. See *Metropolitan Dade County v. Pred*, 665 So.2d 252 (Fla. D. Ct. App. 1995).

92. See generally Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996).

93. Livingston, *supra* note 17, at 628.

19 projects intervened in support of the CHA.⁹⁴ In Washington, D.C. and in San Diego, the primary opposition to curfews, another staple of the new community policing, has come from white suburbanites, who fear that curfews are likely to be applied to their kids when they go into the city for entertainment, or individual business owners, who cater to the same.⁹⁵ Neither courts nor civil libertarians pause to consider why they should be siding with these groups, who obviously have much less at stake in the conditions in the inner-city than do the inner-city's residents.

Continued strict scrutiny of community policing can't be justified by the assumption that the inner-city residents themselves systematically undervalue the impact of such policing on individual liberty. Unlike the situation in the 1960's, there is no natural antagonism between the supporters of community policing and those who bear the coercive incidence of curfews, anti-loitering laws and the like. To the contrary, these two groups are intimately linked by strong emotional, social, and even familial ties.⁹⁶ Inner city supporters of the new community policing do not seek to exclude and cast out offenders; rather they seek policing methods that will assist them in the project of restoring community life. Their support of the new policing is, in fact, an outgrowth of their *concern* for their community's youth, not of hostility toward them. Because members of these communities are excruciatingly sensitive to the individual and societal costs of invasive policing, there's no basis for courts to presume that they are better situated than the members of these communities to determine whether community policing tactics embody a reasonable trade off between liberty and order.

Indeed, in at least two respects, it's clear that the judicial and civil libertarian critics of community policing have a less sophisticated understanding of what securing liberty entails than do these communities' residents. The first has to do with the relationship between individual liberty and norms. Individuals don't make choices in isolation; what one chooses to do (to carry a gun; to join a gang; to adopt an aggressive demeanor) can create pressures on others to choose the same. In certain circumstances, all or most individuals can feel constrained to abide by a social norm (such as joining a gang or carrying a gun or behaving aggressively) that all or most of them resent but that none individually is in a position to change.⁹⁷ Where that is so, a law that disrupts the norm can actually enhance liberty by creating a set

94. See *Pratt v. CHA*, 155 F.R.D. 177 (N.D. Ill. 1994).

95. See, e.g., *Hutchins v. District of Columbia*, 942 F. Supp. 665, 666-67 (D.D.C. 1996) (curfew opposed by movie theater), *aff'd*, 1998 U.S. App. LEXIS 10303 (D.C. Cir. May 22, 1998); *The Teen Curfew Works* (editorial), SAN DIEGO UNION-TRIBUNE, Aug. 7, 1994 (affluent families oppose, poor minority favor curfew).

96. See *supra* p. .

97. On joining gangs, see Kahan, *supra* note 65, at 374-75; on carrying guns, see Alfred Blumstein, *Linking Gun Availability to Youth Gun Violence*, 59 L. & CONTEMP. PROBS 5, 11 (1996); on aggressive behavior, see RICHARD E. NISBETT & DOV COHEN, *CULTURE OF HONOR: THE PSYCHOLOGY OF VIOLENCE IN THE SOUTH* 13-22, 92-93 (1996).

of choices that individuals value more than the ones they had when that norm was intact.

Curfews and gang-loitering laws enhance liberty in this way. Willingness to venture into the dangerous after-hours world can be seen as a sign of toughness among inner-city juveniles, the reluctance to do so as a sign of weakness. Under these circumstances, even juveniles who might prefer not to participate in such behavior can find themselves pressured to join in. Once on the street, moreover, they are exposed not only to risks of criminal victimization, but to further social pressure to become criminal victimizers. Curfews help to extricate juveniles from these pressures. Against the background of such laws, being out at night becomes a less potent means of displaying toughness for the simple reason that fewer of one's peers are around to witness such behavior. Likewise, staying off the street loses much of its reputational sting once the street loses its vitality as a center of night-time social life.⁹⁸ By depicting such laws as interfering with the choices of these same individuals, the critics of the new community policing naively overlook the contribution that such laws make to dispelling widely resented and *unchosen* norms.⁹⁹

The second defect in the critics' understanding of liberty has to do with the politics of law enforcement. If the goal is to maximize liberty, it's a mistake to ignore the pressure that a liberal criminal procedure jurisprudence creates on legislatures to enact illiberal substantive law. As William Stuntz has shown, legislatures naturally attempt to compensate for judicial restrictions on effective policing by adopting even longer prison terms.¹⁰⁰ Indeed, many inner-city residents support anti-loitering laws and curfews precisely because they see them as tolerably *moderate* alternatives to the draconian punishment of minor drug offenses.¹⁰¹ The kids whom the police can't order off the streets today, they realize, are the same ones they'll be taking off to jail tomorrow. The self-defeating result of constitutional decisions invalidating community policing is a society that shows its respect for individual liberty by destroying ever greater amounts of it.

2. SELF-DEFEATING DISCRETION SKEPTICISM

Hostility to discretion—the second prominent theme of the modern criminal procedure regime—also ill fits today's political and social context. Determining how much discretion to give the police necessarily involves a complex trade-off between the need for flexibility and the risk of arbitrary or oppressive enforcement. In a world in which the coercive incidence of

98. See Kahan, *supra* note 65, at 374-75.

99. See, e.g., *Poll Says 77% of Youths support District's Curfew*, WASH. POST, Nov. 7, 1995, at B1.

100. See Stuntz, *supra* note 17; Richard A. Posner, *The Most Punitive Nation*, TIMES LITERARY SUPP., Sept. 1, 1995, at 3, 4.

101. See Meares, *Social Organization*, *supra* note 74.

community policing was concentrated on a powerless and despised minority, it made perfect sense for courts to assume that communities would systematically overvalue the benefits of discretion and undervalue the costs of it. But again, that assumption makes much less sense in settings, such as today's inner-city, in which the citizens who support giving more discretion for the police are the same ones who are exposed to the risk that that discretion will be abused. Where that is so, courts again lack the basis for assuming that they are in a better situation than members of the affected community to decide whether a particular degree of discretion is optimal.

In fact, the citizens who are furnishing the support for the new community policing typically display a keen attention to the risks associated with excessive discretion. The Chicago gang-loitering ordinance, for example, was attended by enforcement guidelines that specifically defined who counted as a gang member, in which districts within the city the law could be enforced, and which officers were authorized to enforce the law.¹⁰² The guidelines also require police commanders to consult with "local officials" and "community organizations" before commencing enforcement of the ordinance.¹⁰³ It's conceivable that the degree of discretion that persisted under the law was excessive when measured against the judicial standard embodied in decisions like *Papachristou*. But given the incentives of the law's own supporters to consider both the costs and benefits of discretion, it's unclear why a standard that exacting was necessary.

Ironically, when courts invalidate a well-considered program of community policing, they frequently put a community in the position of tolerating policing strategies that involve even more discretion. A reasonably close substitute for Chicago's invalidated gang-loitering law, for example, would be New York's strategy of order-maintenance policing. The "public order" provisions at the base of that strategy—including laws against public drunkenness, prostitution, aggressive panhandling, jaywalking, and unlicensed street vending—are specific enough on their face to survive vagueness challenges.¹⁰⁴ Yet the officers who must enforce these laws retain considerable latitude about whether to enforce them at all, and if so, where and against whom.¹⁰⁵ Distinguishing legitimate from abusive police behavior is thus much more difficult when a police department engages in general order-maintenance policing than it would be under a gang-loitering ordinance like Chicago's, which is general on its face but which jealously guards against the diffusion of enforcement authority. Indeed, New York's order-maintenance policing has apparently generated a much higher volume of police-misconduct complaints than Chicago's gang-loitering law did.¹⁰⁶

102. See General Order of Chicago Police Department No. 92-4 (Aug. 7, 1992).

103. *Id.*

104. See Livingston, *supra* note 17, at 615-16.

105. See *id.* at 609.

106. See Dan Barry & Deborah Sontag, *Disrespect as Catalyst for Police Brutality*, N.Y. TIMES,

In sum, the decisions that have applied modern criminal procedure to invalidate the new community policing are riddled with contradictions. They purport to protect the rights of individuals who favor the very policies under attack; they seek to promote liberty by means that ignore individuals' real choices and that actually increase society's reliance on mass imprisonment; and they oppose discretion needlessly and on grounds that are ultimately self-defeating. The goals that the doctrine is meant to serve are vital ones. But they are goals that the doctrine in fact disserves in today's social and political context. No doctrinal regime can long survive practical embarrassments of this magnitude.

III. WHAT IS TO BE DONE?

It does more harm than good, we've argued, for courts to use the modern regime of criminal procedure to assess the new community policing. It doesn't follow, however, that we have no need for a criminal procedure regime of any kind. The desirability of new community policing depends on certain contextual conditions that might not always be present and that don't necessarily support all forms of the discretionary law enforcement. The task that now confronts jurists and theorists, we believe, is to construct a new regime of procedure that assures the best reconciliation between liberty and order in today's political context.

We now want to take a step, but no more than a step, toward that destination. We will try to identify what we regard as the objectives that the new doctrine must achieve. We will not, however, attempt to translate these objectives into a fully specified set of doctrines. We're skeptical that any useable doctrinal regime can be comprehensively imagined all at once, without the stimulus of real facts and the information gleaned from proceeding incrementally.¹⁰⁷ Factual necessity is the mother of doctrinal invention. It's not too ambitious, however, to imagine more concretely just what it is courts should be trying to invent as factual necessity yields opportunity for doctrinal reform. That is our more modest goal here.

The major development that has undermined the modern regime is the emergence of African-American political strength, particularly in the Nation's inner-cities. The foremost doctrinal question, then, is how judicial review of community policing strategies should be recast to take account of this development. The answer, we believe, lies in the adaptation of a *political process* theory of criminal procedure. In this section, we spell out what this theory entails, why it makes sense morally, and what it would take, legally, for such a doctrine to be administered in a reliable fashion.

Nov. 19, 1997, at A1 (connecting rising incidence of complaints of police brutality in New York to order-maintenance policing).

107. See generally Cass R. Sunstein, *The Supreme Court, 1995 Term —Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

A. POLITICAL PROCESS AND CRIMINAL PROCEDURE

It's common-place to describe constitutional rights—particularly those that relate to criminal justice—as guaranteeing a reasonable balance between liberty and order.¹⁰⁸ The political process theory, as articulated in the famous “*Carolene Products* footnote”¹⁰⁹ and developed primarily by John Hart Ely,¹¹⁰ determines how courts should go about determining whether the balance struck by any particular policy is reasonable. If the coercive incidence of a particular policy is being visited on a powerless minority, we expect courts to make an independent assessment of whether the order benefits outweigh the liberty costs. This explains why courts strictly scrutinize policies that discriminate on the basis of race, restrict “dangerous” speech, or impose special obligations on account of religion.¹¹¹

But when a community can be seen as *internalizing* the coercive incidence of a particular policy, courts are much less likely to second-guess political institutions on whether the tradeoff between liberty and order is worthwhile. This explains the deference courts afford to *generally applicable* laws under the Privileges and Immunities Clause,¹¹² the dormant Commerce Clause,¹¹³ and even the Free Exercise Clause.¹¹⁴ When courts defer to the political process in those contexts, they aren't saying that the majority gets to decide what rights minorities have, but rather that the willingness of the majority to bear a particular burden suggests that the policy in question doesn't embody the political undervaluation of liberty that “rights” are meant to prevent.

The political process theory already explains at least certain aspects of criminal procedure doctrine. Normally, the police must obtain a warrant, supported by probable cause, before they can conduct a search.¹¹⁵ This requirement recognizes that law-enforcement officials cannot be trusted to attach sufficient value to the liberty of individual criminal suspects, whose interests are generally a matter of indifference to the general public.¹¹⁶ Law-enforcement officials needn't obtain a warrant or even have probable cause, however, to stop motorists at sobriety checkpoints¹¹⁷ or to search all

108. See, e.g., *Kansas v. Hendricks*, 117 S. Ct. 2072, 2079-80 (1997).

109. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

110. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

111. See Klarman, *supra* note 38, at 747, 754-55, 760-61.

112. See ELY, *supra* note 110, at 83.

113. See *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938).

114. See *Employment Div. v. Smith*, 494 U.S. 872 (1990).

115. See generally 2 LAFAYE, *supra* note 8.

116. Cf. ELY, *supra* note 110, at 96-97.

117. See *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1980) (upholding sobriety checkpoints where uniformly administered to all passing motorists); cf. *Delaware v. Prouse*, 440 U.S. 648, 659-60 (1978) (invalidating random vehicle stops because they involved “standardless and unconstrained discretion”).

individuals entering airports or government buildings.¹¹⁸ This, too, make sense under a political process theory: insofar as these policies *do* burden average members of the community, there is much less reason for courts to doubt the determination of politically accountable officials that these policies strike a fair balance between liberty and order.¹¹⁹

In the new criminal procedure doctrine, this mode of analysis should be used to modulate the degree of judicial scrutiny afforded to all aspects of discretionary community policing. The uniformly relentless scrutiny associated with the modern doctrine rests on a presumption that communities never share in the burdens of law-enforcement techniques that restrict the liberty of African-Americans. That assumption made sense before the 1960's civil rights revolution, but makes much less sense today, given the political strength of African-Americans and their own concern to free themselves from the ravages of inner-city crime. So instead of subjecting all law-enforcement techniques to searching scrutiny, courts should now ask whether the community itself is sharing in the burden that a particular law imposes on individual freedom. If it is, the court should presume that the law does not violate individual rights.¹²⁰

The political process theory not only tells courts when they *should* relax the standard of review, but also when they *shouldn't*. Every state now has a law that requires sex offenders who've completed their prison sentences to report their presence to local authorities.¹²¹ These laws have been challenged on various constitutional grounds.¹²² The political process theory doesn't tell us whether these laws embody a reasonable balance between liberty and order, but it does tell us that courts shouldn't defer to the average citizen's judgment on that question: she isn't subject to that burden and likely despises those who are. Of course, the political process can at least sometimes be viewed as responsive to burdens borne by individuals other than the average citizen. Thus, random drug-testing of student athletes is exempted from the warrant requirement not because **student athletes** exercise significant influence in the political process but because their **parents**, who

118. See generally *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989).

119. See Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment As Constitutional Theory*, 77 GEO. L.J. 19, 95-96 (1988).

120. For evidence that the degree of scrutiny in such cases makes a difference, see *Hutchins v. District of Columbia*, No. 96-7239, 1998 U.S. App. LEXIS 10303 (D.C. Cir. May 22, 1998). Assessing the constitutionality of a curfew enacted by Washington, D.C., the three-judge panel in *Hutchins* divided three ways on the proper degree of scrutiny under the Due Process Clause. Compare *id.* at *65 (opinion of Rogers, J.) (curfew invalid under "intermediate scrutiny") and *id.* at *72-74 (Tatel, J., concurring in judgment) (curfew invalid under "strict scrutiny") with *id.* at *79-83 (Silberman, J., dissenting) (curfew valid under "rational basis review").

121. See SCOTT MATSON WITH ROXANNE LIEB, *SEX OFFENDER REGISTRATION LAWS: A REVIEW OF STATE LAWS* 5 (Wash. State Inst. Pub. Pol. July 1996).

122. See *id.* at 8-9.

naturally take their children's interests to heart, do.¹²³ We should likewise expect searches that burden interests with disproportionate influence in the political system to be exempt from the warrant requirement, even if such searches don't directly affect the average citizen. And under the "administrative search" doctrine—which governs routine inspections of businesses—this turns out to be true.¹²⁴

Our purpose is to suggest a way for courts to approach criminal procedure rights generally, not to describe a fully specified approach for interpreting any particular constitutional guarantee. Nevertheless, it should be clear that the applicability of the political process theory varies across procedural rights.

It's likely to have selective relevance, for example, to Fourth Amendment search and seizure doctrine. An investigative procedure counts as a "search" for Fourth Amendment purposes if it invades "an expectation of privacy that society is prepared to consider reasonable."¹²⁵ Where a procedure systematically and meaningfully affects the average member of a community, and that community's political representatives support that procedure, that's strong evidence that the procedure violates no reasonable privacy expectation. Where, in contrast, the procedure doesn't affect the average member of the community, the political process theory suggests that courts must look outside the political process itself for evidence of whether that invasion is reasonable. Likewise, in deciding what counts as "probable cause" for a search, or what types of exigencies excuse complying with the warrant requirement—determinations that are again informed by societal norms of reasonableness¹²⁶—courts should be willing to credit political support for the search or not depending on how diffusely the burden of the search is distributed.

The political process theory is also likely to have selective relevance to the constitutional doctrines that govern discretionary community policing. The Due Process "void for vagueness" doctrine, for example, attempts to strike a reasonable balance between the need for flexibility in administering the law and the risk of arbitrariness.¹²⁷ Again, if the community at large is

123. See *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995).

124. See, e.g., *New York v. Burger*, 482 U.S. 691 (1987) (upholding warrantless searches of automobile salvaging businesses); *Donovan v. Dewey*, 452 U.S. 594 (1981). See generally *Wasserstrom & Seidman*, *supra* note 119, at 96; William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1044-45 (1995).

125. See, e.g., *United States v. Jacobson*, 466 U.S. 109, 113 (1984).

126. See generally *United States v. Davis*, 458 F.2d 819, 821 (D.C. Cir. 1972) ("Probable cause does not emanate from an antiseptic courtroom, a sterile library or a sacrosanct adytum, nor is it a pristine 'philosophical concept existing in a vacuum,' . . . but rather it requires a pragmatic analysis of 'everyday life on which reasonable and prudent men, not legal technicians, act.' " (quoting *Bell v. United States*, 254 F.2d 82, 85 (1958) and *Brinegar v. United States*, 338 U.S. 160, 175 (1949)).

127. See, e.g., *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952); ("A criminal statute must be sufficiently definite to give notice of the required conduct to one who

affected in a vital way by the discretionary policing strategy in question, then the approval of that policy by the community's representatives is compelling evidence that that strategy does not present the sorts of dangers that the void for vagueness doctrine is meant to avert. However, when police are able selectively to detain individuals suspected of wrongdoing—even under laws that are very precise on their face—there's no guarantee that the average citizen will be affected in a way that gives her sufficient incentive to police the police for abuse. Consequently, we don't believe that the political process theory would warrant dispensing with the requirement of *Terry v. Ohio*¹²⁸ that such stops be made only on the basis of "reasonable and articulable" suspicion.

In other criminal procedure domains, in contrast, the political process theory is likely to have little if any relevance. The average citizen faces only a very remote prospect, for example, of being a defendant in a criminal proceeding. Consequently, the political process can't necessarily be trusted to place sufficient value on the liberty secured by the guarantees that regulate criminal adjudications. Similarly, because the average citizen is unlikely to be the subject of a police interrogation, we believe the protections associated with *Miranda* and its progeny would also be largely unaffected were the political process theory to be melded into criminal procedure jurisprudence.

We believe that this political-process approach would vindicate the mainstays of the new community policing. Consider, for example, the CHA building-search policy. The burden of unannounced mass searches fell on everyone who lived in the projects, and not just on persons suspected of wrongdoing. The political representatives of these individuals, moreover, had unambiguously expressed their support for the searches.¹²⁹ To be sure, not everyone who lived in the projects approved the tradeoff between submitting to this intrusive law-enforcement technique and the increased security it delivers. But because these individuals had every chance to voice their opposition in the political process, and because there is every reason to believe that the majority—whose members were affected in exactly the same way—gave due weight to the dissenters' interests, there was no compelling reason for courts to second-guess the community's determination that building searches strike a fair balance between liberty and order.

Curfews and gang-loitering provisions also pass the political process test,

would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded."); *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972) (recognizing that doctrine is sensitive to need for "flexibility and reasonable breadth").

128. 392 U.S. 1 (1968).

129. See *supra* p. .

albeit in a less straightforward fashion. These laws do indeed burden the liberty of only a minority—gang members in the one case, and juveniles in the other—many of whom might be disenfranchised. But this minority is by no means a despised one. Inner-city teens and even gang members are linked to the majority by strong social and familial ties. It is precisely because they care so deeply about the welfare of these persons that residents of the inner-city favor relatively mild gang-loitering and curfew laws as alternatives to draconian penalty enhancements for gang crimes, severe mandatory minimum prison sentences for drug distribution, and similarly punitive measures.¹³⁰ The pervasive sense of “linked fate” between the majority of inner-city residents and the youths affected by curfews and gang-loitering ordinances furnishes a compelling reason *not* to second-guess the community’s determination that such measures enhance rather than detract from liberty in their communities.¹³¹

B. TRUSTING THE AVERAGE CITIZEN

As should be clear, the burden-internalization test ultimately turns on normative criteria rather than factual ones. We have suggested that at least some forms of the new community policing—including public-housing building searches, curfews, and gang-loitering laws—pass the test because the average inner-city resident is either directly affected by such policies or cares intimately about those who are. But the same obviously can’t be said of all laws, even ones that are generally applicable on their face. We wouldn’t accept the claim, for example, that a community has internalized the burden associated with a ban on subversive speech merely because all members of the community were subject to it: the average citizen doesn’t genuinely internalize the burden of that law because she has no desire to engage in such speech and cares little for those who do.¹³²

A court can conclude that a law or policing technique passes the political process test, then, only if the average citizen is affected by that law or policy in a way that entitles her judgment to moral respect. That doesn’t mean that a court has to conclude that the average citizen is right on the merits before it defers. But it does mean that it has to be convinced, based on a complete understanding of her capacities and her situation, that the average citizen is the one entitled to balance the relevant interests and values.

130. *See supra* p. .

131. *Cf. Vernonia School Dist.*, 515 U.S. at 649-50, 665 (recognizing that the school board, which made decisions with the support of parents, acted “as guardian and tutor of children entrusted to its care” in adopting random drug-testing policy for student athletes).

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

Moreover, this judgment must be a comparative one. The constitutional provisions that regulate community policing are designed to assure a reasonable balance between liberty and order. These provisions, however, are not self-executing; they require some institution—and consequently some *person*—to exercise moral judgment and *decide* whether the balance struck by any particular law or policing technique is reasonable. The civil libertarians and judges who maintain that the average inner-city resident is not competent to make that judgment are necessarily saying that *they* are.

The issue, then, comes down to one of perspective. From *whose* perspective should building searches, anti-loitering laws, curfews, and the like components of the new community policing be evaluated? Who should we trust to judge whether these policies reasonably balance liberty and order in the inner-city?

For two reasons, we believe the answer is the citizens who live there, and not judges or civil libertarians who don't. First, only the residents have *concrete, local knowledge*, which is essential to balancing liberty and order in a morally credible way. And second, only local residents are in a position to know whether the social norms that constrain individual choices are welcome or unwelcome.

1. LOCAL KNOWLEDGE

The most obvious reason to credit the average inner-city resident's assessment of the new community policing is that *she* is the one whose interests are most directly affected. She is the one who faces a heightened risk of criminal victimization and who lives with the destructive impact of crime on the economic and social life of those communities; and, at least with respect to the mainstays of the new community policing, *she* is the one who feels the pinch of these laws in a meaningful way. Consequently, she is in the best position, practically and morally, to decide whether the balance they strike between liberty and order is reasonable.

Those civil libertarians and courts that continue to adhere to the modern criminal procedure regime offer several justifications for overriding the decisions of inner-city residents, none of which is satisfying. One is that these individuals choose building searches, curfews, gang-loitering ordinances and the like only because society at large refuses to address the social inequities at the root of inner-city crime.¹³³ This argument is a non-sequitur; obviously, residents of the inner-city face unfairly truncated options, but that hardly justifies coercing them to accept the one option—rampant crime—that they prefer least.

Another version of this argument is strategic: courts shouldn't let the residents of the inner-city choose "quick-fix" law-enforcement policies

133. See, e.g., Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497, 546-47 (1983) (explaining resident support for housing searches this way).

because that reduces society's long-term incentive to remedy inequity. This is an exceedingly dubious claim.¹³⁴ Thirty years of real-world experience belie the idea that spiraling inner-city crime will somehow force powerful interests *outside* the inner-city to revitalize those communities. The only thing that can force such change is sustained community-level political organizing, which is hardly inconsistent with accepting curfews, building searches, or gang-loitering ordinances.

What's more, residents of the inner-city are acutely aware of the political dynamics that surround law enforcement. Indeed, many of them support the new community policing precisely because they see it as a politically feasible alternative to severe prison sentences for lawbreakers.¹³⁵ In determining whether these policies reasonably balance liberty and order, can't residents be trusted to take into account themselves how, and in what manner, the new community policing interacts with other policies aimed at improving the quality of life in the inner-city?

At least some courts and civil libertarians say they can't be. The judgment and "self-respect" of inner-city residents, they maintain, has been deformed by social deprivation. Consequently, they lack the capacity to make critical assessments of curfews, gang-loitering ordinances, building searches, and similar policies.¹³⁶

This contention is ripe with self-contradiction. Civil libertarians usually take immense pride in their resistance to paternalism. Respecting individual dignity, they maintain, requires society to refrain from forcing an idealized set of values and preferences on its citizens. Yet upon discovery that inner-city residents favor policies that the ACLU believes violates these persons' rights, too many civil libertarians resort to the very kind of paternalism they should abhor.

But the civil-libertarian claim that inner-city residents lack critical judgment is not just paradoxical; it's manifestly false. The deliberations that attend their support for the new community policing inevitably reflect both an intense commitment to individual liberty and a sophisticated awareness of the risks that the new community policing poses to it.¹³⁷ When the ACLU filed suit in the building-search case, for example, CHA residents were vigorously debating the appropriateness of building searches: although many

134. See, e.g. Harvey Grossman, *No: Police Sweeps Make Residents Second-Class Citizens*, 80 A.B.A.J (1994) (making this argument about housing searches).

135. See *supra* p. .

136. See, e.g., *Pratt*, 848 F. Supp. at 796-97 ("Many tenants within CHA housing, apparently convinced by sad experience that the larger community will not provide normal law enforcement services to them, are prepared to forgo their own constitutional rights. . . . Finally, this Court has faith that parents and grandparents living in and around CHA housing will reclaim their families and restore to their children self respect and respect for other human beings. If they do, government efforts will succeed; if they do not, all efforts of government, whether within or without constitutional restraints, will fail.").

137. [cites from curfews & CHA]

residents supported the existing CHA policy, some did not, and still others favored a modified search policy.¹³⁸ The heated debate concerning the CHA building searches *among* CHA residents demonstrates that these individuals don't just accept what's given uncritically. Rather, like other self-respecting persons in a tough situation, they reflect, they complain, they demand, they argue, they fight, and they ultimately *decide* what the best course of action is—unless, of course, that power is taken away from them by the courts.

Indeed, perhaps the worst consequence of the ongoing commitment to the modern regime of criminal procedure is its *disempowering* effect on inner-city communities. Criminologists have long recognized that inner-city crime both creates and is sustained by atomization and distrust, forces that lower individuals' ability to engage in the cooperative self-policing characteristic of crime-free communities.¹³⁹ A healthy democratic political life can help to repair these conditions. That's exactly what residents of the inner-city enjoy when they are free to decide for themselves whether to adopt building searches, gang-loitering ordinances, curfews and like policies.¹⁴⁰ Thus, in addition to standing in the way of potentially effective law-enforcement policies, the modern regime preempts deliberative experiences that reduce crime through their effect on public dispositions and habits.

The civil libertarians' critique of the residents' local knowledge also fails because they never tell us why we should trust their *outsiders perspective* more. Whereas the average citizen is immersed in the conditions that the new community policing tries to remedy, the average civil libertarian and judge are not. For them, the values at stake and the difficult tradeoffs that must be made are largely abstractions.

To illustrate, consider an exchange from the City Council hearings on the Chicago gang-loitering ordinance. At the hearings, dozens of inner-city residents—from church leaders, to representatives of local neighborhood associations, to ordinary citizens—testified in favor of the proposed law. Harvey Grossman, Illinois Director of the ACLU, testified against it:

I am a lawyer, and I spend a great deal of time doing nothing more than reviewing ordinances and statutes, and it turns into a little bit of a long exam game We pick apart the statute. We focus on [a] word or [a] phrase, and we try to say why that phrase might or might not be constitutional.¹⁴¹

He then proceeded to "pick apart" the gang-loitering ordinance, demonstrating the tension between it and various judicial precedents.

Alderman William Beavers, a Counsel member who represents a ward on

138. [cite]

139. See, e.g., Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918 (1997).

140. See Meares, *supra* note .

141. *Transcript of Meeting before Chicago City Council Committee on Police & Fire* 107 (May, 18, 1992, on file with the authors).

Chicago's south side containing several impoverished and crime-ravaged areas, objected to this bookish conception of how to appraise the constitutionality of the law. "I don't know if you are attuned to what's going on in these neighborhoods," he told Grossman. "Maybe I need to take you out there and show you what's really going on."¹⁴² To which Grossman replied that that wouldn't be necessary:

I think our ability to come together and to try to resolve issues [like this] really doesn't . . . depend on if I see what's happening in your neighborhood or you see what's happening in my neighborhood.

Rather, what it does depend on is empathy or ability to understand what's happening to other people and, two, some commitment, some intellectual integrity and some commitment to principle. And the principle that I am suggesting to you is inviolate. It doesn't change.¹⁴³

Again, there is no perspective-free way to determine whether the mainstays of the new community policing violate the Constitution. Some individual or set of individuals, judging the question in the light of her own experiences and values, must decide whether particular policies embody a reasonable balance between liberty and order.

The person entitled to make that call, we believe, can't possibly be someone who does "nothing more" for a living than "pick apart" statutes and ordinances. It can't possibly be someone who thinks empathy is motivated by "inviolable" "intellectual" "principles" and just "doesn't depend," "really," on "see[ing] what's happening in [inner-city] neighborhood[s]." And most important of all, the person to trust can't possibly be someone who conceives of this tough question as one big "exam game."

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

2. NORMS, LAWS, AND LIBERTY

The remoteness of judges from life in the inner-city does more than interfere with their capacity to *weigh* how the new community policing affects liberty and order. It also interferes with their perception of the contribution that such policing can make to *enhancing* individual liberty through reshaping social norms. Again, this is a phenomenon that the average inner-city resident, by virtue of her immersion in community life, is much better equipped to see.

In most contexts, it makes sense to see law as a constraint on individual liberty. By forbidding some action—whether an abortion, a political speech, or an assault—the law reduces the number of options from which individu-

142. *Id.* at 119.

143. *Id.* at 120.

als would otherwise be free to choose. For constitutional purposes, the question for a judge is whether such a constraint on liberty abridges a protected right and, if so, whether such an abridgment is justified by some important state interest.¹⁴⁴

The phenomenon of social norms, however, complicates this picture. In some circumstances, individuals may choose a course of action not because they value it intrinsically but only because others have chosen it. If some restaurateurs, for example, see that the vast majority of restaurants in an area refuse to serve African-Americans, they might feel obliged to follow suit in order to avoid being put at a competitive disadvantage. If some motorcyclists perceive that the vast majority of other cyclists don't wear helmets, they may decide to ride without them too in order to avoid being perceived as timid and unadventurous.¹⁴⁵

In these circumstances, a law forbidding the norm-driven conduct will have an ambiguous effect on liberty. Those who behaved consistently with the norm and who valued it will have lost an option. But those who behaved consistently with it and who resented it will *gain* one: they will now be able to choose the course of conduct that they valued most—providing nondiscriminatory service or riding with a helmet—unburdened by the consequences of acting contrary to norms. Whether liberty is increased or decreased on net can't be determined *a priori* but rather depends on how many individuals resented the norm and how intensely they resented it before the law went into effect.

Many forms of inner-city criminality are fueled by widely resented norms. In a school in which many students are armed, even ones who resent guns will choose to arm themselves.¹⁴⁶ In a neighborhood in which many juveniles hang out on the street corner at night, many will feel compelled to hang out so as not to be excluded from social life.¹⁴⁷ In a community in which gang activity is rampant, many individuals will choose to join gangs, not because they look up to gang members, but because they perceive (incorrectly) that a majority of their peers do and (correctly) that failing to join exposes them to a risk of predation.¹⁴⁸ Laws that interfere with these norms will decrease the liberty of those who intrinsically value carrying guns, hanging out at night, and joining gangs, but *increase* the liberty of those who

144. This "negative" conception of liberty—which posits a simple opposition between individual freedom and law—is the dominant conception of liberty in both modern liberalism, see Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969), and American constitutional law, see Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 486-87 (1997).

145. See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 963-69 (1995).

146. See Blumstein, *supra* note 97.

147. See Kahan, *supra* note 65, at 376.

148. See *id.* at 374-75.

want the option of *not* engaging in these activities without suffering the adverse consequences of acting contrary to prevailing norms.

The complicated interactions between law, norms, and liberty should make judges humble. They can't legitimately infer, for example, that curfews, gang-loitering laws, and other elements of the new community policing restrict liberty just because they interfere with individual choices. For those laws, through their effect on norms, may in fact be constructing options that individuals value and wouldn't otherwise have. The only way to figure out what their net effect on liberty is under such circumstances is to determine if the norms they regulate are welcome or unwelcome by a majority of the persons who are subject to them—an empirical question that the judge can't possibly answer through introspection.

But assuming the law is one that affects the average citizen in a meaningful way, she *can* determine through introspection whether the norms that fuel the regulated conduct are welcome or unwelcome. Indeed, the overwhelming support of inner-city residents for the elements of the new community policing is strong evidence that these laws are liberty enhancing on net. The complex interplay of norms, law, and liberty is thus another reason for judges to defer to the political process when assessing the constitutionality of such laws.

C. DISCRETION AND ACCOUNTABILITY

To perfect the political process theory of criminal procedure, the new doctrine will need better principles for assessing discretion. We have already noted that the modern regime insists on hyper-specific rules based on the assumption that white political establishments can't be relied on to punish—and can in fact be expected to reward—law enforcers who abuse discretion to harass minorities. That anxiety is less well founded now that law enforcers in America's big cities are accountable to political establishments that more fairly represent African-Americans. Uncompromising hostility to discretion is therefore inappropriate.¹⁴⁹

That doesn't mean, however, that the law should be completely indifferent to discretion. Even assuming political accountability, unbounded discretion creates a risk that individual law enforcers will be able to disregard the will of the community without detection. Indifference to discretion also creates the risk that officials will concentrate burdens on a powerless or despised segment of the community, thereby undermining the confidence that would otherwise be due to the political assessment of the tradeoff between liberty and order associated with a particular policy. The extreme hostility to discretion associated with *Papachristou* is now unwarranted, but courts should still satisfy themselves that communities are allocating authority in a manner that minimizes these risks.

149. See *supra* text accompanying notes 39-42, 103-106.

Instead of a presumption of hostility to law enforcement discretion, courts must develop constructive methods of guiding discretion of law enforcers in ways that establish and strengthen conduits of political accountability between residents of policed communities and law enforcers. Attention to guiding discretion, then, is an important aspect of insuring that the average citizen properly internalizes the costs of law enforcement. By guiding discretion rather than eschewing it, courts can help to insure that law enforcers are accountable to the average citizen whose decisions about liberty and order we've argued are critical to assessing the new policing.

Chicago's gang loitering ordinance furnishes an example of a community-policing technique that left room for discretion but that also shores up channels of accountability between the police and the policed. The ordinance empowered police officers to order groups including criminal street-gang members to disperse. Enforcement of the ordinance was implemented through regulations that clearly specified who counted as a "gang member," what kinds of behavior counted as "loitering," which officers could enforce the law, and in what neighborhood areas it could be enforced.¹⁵⁰ When evaluated against these regulations, misuse of the ordinance would have been easy to spot—clearly enhancing law enforcement accountability of the police. In addition, by limiting the areas in which enforcement was allowed, these regulations assured that police couldn't confine enforcement of the ordinance to those neighborhoods in which emotional and social connections between gang members and community residents were weak.

The regime of guided discretion erected by these regulations also enhanced accountability in another way: by explicitly involving community residents in a partnership with law enforcers in the project of community control. The ordinance was to be enforced only after consultation with "local leaders" and "community organizations"¹⁵¹—the representatives of the average citizen, whose decisions about the appropriate balance between liberty and order, we've argued, deserves greater respect. Given these safeguards, the Illinois Supreme Court should have upheld the gang-loitering ordinance whether or not it satisfied the demand for hyper-precision associated with *Papachristou*.

CONCLUSION

The endurance of the Constitution is a tribute to its powers of adaptation. Adaptation is the story, for example, of the Commerce Clause, which has grown in dimensions in step with the growing complexity of and integration of the national economy.¹⁵² It is the story, too, of the First Amendment's free speech guarantee, which broke free from its modest origins as a prohibition

150. See *supra* p. .

151. See General Order of Chicago Police Department No. 92-4 (Aug. 7, 1992).

152. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 S. CT. REV. 125 (1995).

on "prior restraints" to underwrite a historically unprecedented experiment in democratic self-government and social pluralism.¹⁵³

Adaptation stories of this character, however, don't have final chapters. They testify to our legal institution's sensitivity to social and political conditions, which are themselves perpetually in motion. As those conditions change, the enlightened doctrinal innovations of one generation can become barriers to social progress in the next.

We've argued that this is exactly what has happened to the Supreme Court's criminal procedure jurisprudence. The doctrines that make up that jurisprudence reflect the commitment of the Warren and early Burger Courts to combating institutionalized racism. They unquestionably were enlightened in their day. But the conditions that justified them—including the effective exclusion of African-Americans from the political process and the systematic use of law-enforcement resources to suppress them—have abated. Now, far from securing the equality of minority citizens, these same doctrines are holding back these citizens, whose economic and social prospects depend on liberating the inner-city from rampant crime. It's time for courts to adapt criminal procedure doctrine to these new conditions.

The way for them to do so, we've suggested, is to connect the doctrine to the political process theory of judicial review. On this account, judges would relax the degree of scrutiny they afford discretionary community policing when they are confident that the political community has meaningfully internalized the burden that such policing puts on individual liberty. This form of analysis, which is widely employed throughout constitutional law, could easily be adapted to criminal procedure and would reliably ground the determination of whether the law-enforcement techniques associated with the new community policing strike a reasonable balance between liberty and order.

The most important benefit of such a framework, however, is that it would connect constitutional doctrine to the values and insights of the communities in which such policing is taking place. The residents of these communities know first-hand just how bad crime is in the inner-city *and* how large a toll curfews, anti-loitering laws, housing searches, and the like exact on individual liberty. The new community policing poses many tough questions. A doctrine that listens to the answers of the citizens who have the most at stake would be the beginning of both wisdom and legitimacy for the new criminal procedure.

153. See LEONARD W. LEVY, *THE EMERGENCE OF A FREE PRESS* (1985).

invoked by the court below — to travel, to move freely, and to associate with others. People living in gang-infested neighborhoods who wish to walk along their streets and to associate with their neighbors have every right to do so free of threats, whether spoken or silent, and to expect the police to take measures to promote their safety and the integrity of their homes and businesses.

By seeking to prevent serious crime *before* it occurs, the Ordinance breaks the gangs' stranglehold on the streets, destroys their aura of invincibility, and disrupts their ability to commit more serious crimes. As the California Supreme Court recently observed, to forfeit the liberty of peaceful and industrious residents of a community "to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense." *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 618 (Cal.), cert. denied, 117 S. Ct. 2513 (1997).

→ *Second*, the Ordinance liberates *community youth* from the intense pressure that *they* feel to join gangs. The vast majority of individuals join gangs *not* because they value gang membership intrinsically, but because they perceive (mistakenly) that their peers value it and (correctly) that failing to join can lead to deadly repercussions. See p. 22, *supra*. These impressions are formed and transmitted through the intimidating presence of gang members on neighborhood streets. See pp. 22-25, *supra*. By vanquishing this presence, the Ordinance relieves the pressure that drives youths into self-destructive gang criminality. Thus, it should come as no surprise that over 1,500 youths in Chicago have registered support for the Ordinance. See 1998 Resolution, *supra*.

The Ordinance thus reflects a "combined interest in protecting both the community and *the juvenile himself* from the consequences of future criminal conduct." *Schall v. Martin*, 467 U.S. 253, 264 (1984) (emphasis added). It recognizes that society has a legitimate interest in protecting a juvenile from "the downward spiral of criminal activity into which peer pressure may lead the child." *Id.*

at 266. In that sense, it is liberty-enhancing, even with regard to many of the very persons likely to be its targets.

2. *The ordinance is a liberty-conserving alternative to conventional "crack down" strategies for combating gangs.* The Illinois Supreme Court's conclusion that the Ordinance exacts an unconstitutional toll on liberty also overlooks the liberty-destroying effects of severe punishment — the Ordinance's principal alternative. Legislatures commonly attempt to compensate for judicial restrictions on effective street-level policing by adopting even longer prison terms. R. Posner, *The Most Punitive Nation*, Times Literary Supp., Sept. 1, 1995, at 3, 4; W. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1 (1997). Indeed, many inner-city residents support anti-loitering laws precisely because they see them as tolerably *moderate* alternatives to draconian punishment of minor drug offenses. See p. 17, *supra*. The kids whom the police can't order off the streets today, they realize, are the same ones they'll be carting off to jail tomorrow.

The identity of the Ordinance as an alternative to long prison terms goes to the heart of the interest that the Neighborhood Groups have in this case. As coercive as enforcing order on the streets can be, it pales in comparison to the disproportionate impact of incarceration on young African-American and other minority men.¹⁴ The ironic consequence of judicial decisions invalidating the Ordinance and like forms of community policing would be a vast curtailment of individual liberty in the name of preserving it.

3. *Objective criteria and political monitoring furnish safeguards against abuse.* The Illinois Supreme Court held that the Ordinance was invalid *on its face*. A Due Process facial

¹⁴ See, e.g., M. Mauer & T. Huling, *The Sentencing Project, Young Black Americans and the Criminal Justice System: Five Years Later* 4 (1995) (finding one-third of African-American men are either imprisoned, on parole, or on probation).

challenge should be sustained only if “no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745 (1987). That is clearly not the case here: the objective enforcement criteria specified by the Ordinance itself and by the police department’s enforcement guidelines, combined with the community consultation procedures found in the regulations, reasonably constrain discretion. Considered against the backdrop of the community’s own internalization of the effects of the Ordinance, these safeguards clearly satisfy Due Process. See Part I, *supra*; *Livingston, supra*, at 650-70.

Significantly, the Ordinance incorporates an objective standard against which to test the propriety of an officer’s order to disperse. Such an order is authorized only if the officer “reasonably believes” that one or more members of a group of loiterers is a member of a criminal street gang. Pet. App. 61a. In addition, the terms “criminal street gang” and “loiter” are carefully defined to deter any over broad reading. *Id.* at 61a-62a. These provisions safeguard against any concerns about unfettered police discretion.

Such concerns should be further allayed by the Chicago Police Department’s implementing guidelines, specifically adopted “to ensure that the anti-gang loitering is not enforced in an arbitrary or discriminatory way.” Pet. App. 65a. Under those guidelines, the Ordinance may be enforced only by trained officers in certain “areas frequented by members of criminal street gangs” — as designated after consultation with community leaders and residents — thereby significantly limiting the scope of enforcement. Pet. App. 68a. Thus, the Ordinance and regulations permit criminal sanctions only based on “a prediction of future criminal conduct [that] is ‘an *experienced* one based on a host of variables’ that cannot be readily codified.” *Schall*, 467 U.S. at 279 (emphasis added). Finally, the guidelines oblige the police to consult with community groups concerning implementation of the Ordinance

(Pet. App. 68a), thereby assuring effective and ongoing *political* oversight of the exercise of police discretion.¹⁵

Should this Court uphold the lower court’s decision to invalidate the Ordinance, it will remit Chicago — not to mention other cities contemplating norm-focused strategies for combating gangs — to policing strategies that involve *even more* discretion. A reasonably close substitute for Chicago’s invalidated gang-loitering law, for example, would be New York’s strategy of order-maintenance policing. See generally G. Kelling & C. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* (1996). The “public order” provisions at the base of that strategy — including laws against public drunkenness, prostitution, aggressive panhandling, jaywalking, and unlicensed street vending — are specific enough on their face to survive vagueness challenges. See *Livingston, supra*, at 615-16. Yet the officers who enforce these laws retain considerable latitude about whether to enforce them at all, and, if so, where and against whom. See *id.* at 609. Teen curfews invite considerable discretion as well. Distinguishing legitimate from abusive police behavior is thus much more difficult when a police department engages in general order-maintenance policing than it is under a gang-loitering ordinance like Chicago’s, which, contrary to its apparent generality, jealously guards against the diffusion of enforcement authority. Indeed, New York’s order-maintenance policing reportedly has generated a considerable increase in police-misconduct complaints. See D. Barry & D. Sontag, *Disrespect as Catalyst for Police Brutality*, N.Y. Times, Nov. 19, 1997, at A1.

¹⁵ The court below disregarded the Police Department’s guidelines on the ground that they were not binding under state law. Pet. App. 16a. This was error. As this Court has made clear, courts can and should look to administrative constructions to determine, as a matter of federal constitutional law, whether a state statute is susceptible of valid applications sufficient to defeat a facial challenge. See, e.g., *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (“In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered”) (emphasis added).

CONCLUSION

Chicago's gang loitering ordinance represents a modest attempt to restore order to the city's streets while preserving the liberty of those most likely to bear the brunt of criminal law enforcement. The Ordinance enjoys the broad support of the communities where it is enforced, enhances the liberty of residents who lack other effective means of combating gang intimidation, and is responsibly crafted to constrain police discretion in its enforcement. To strike the Ordinance down on the basis that it is unduly "vague" or somehow interferes with Respondents' "fundamental right to loiter," as did the Illinois Supreme Court, would disserve the very communities the Due Process Clause of the Fourteenth Amendment was designed to serve.

The judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted.

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Los Angeles Courts Help Fight Gangs

Injunctions Give the Police a New Weapon Against Street Crime

By The New York Times

LOS ANGELES, June 19 — Inconspicuously close to some of this city's most affluent neighborhoods and a shell's throw from touristy Venice Beach and the azure Pacific, a gang war has played out over a decade, in which dozens have been killed and scores wounded.

The conflict, driven in part by racial differences and in part by the desire to control the drug trade in Venice Beach, began in earnest on Thanksgiving Day, 1993. Members of the mostly Hispanic Culver City Boys gang, whose main turf is in the Mar Vista neighborhood, firebombed the homes of black families in the Mar Vista Gardens housing project and set fire to the cars of at least 12 members of a black gang known as the Venice Shoreline Crips.

Now the two rival gangs have become the latest targets in the increasing use here of public nuisance laws to combat street gangs, after a series of court rulings backed the views of law enforcement over those of civil liberties advocates.

Los Angeles became the first city to use a civil injunction to combat gang crime in 1987, but six years passed before it secured a second. Now, as the city adds more lawyers dedicated solely to developing cases for court injunctions that would keep gang members from gathering in public, the authorities have sought and received six such court orders in the last two years. Two of them, including one covering 75 members of the Culver City Boys, have come in the last two months and a hearing on yet another, which would cover 38 members of the Venice Shoreline Crips, is scheduled for Thursday.

"Frankly, the Police Department has seen the results and likes this technique and is very supportive of it," said Jim Hahn, the Los Angeles City Attorney. "I think that's the reason we're doing more of it."

Unlike the broad Chicago ordinance struck down this month by the United States Supreme Court, which made it a crime to linger in the presence of a suspected gang member after the police had issued an order to move on, Los Angeles's injunctions name gang members and accuses them of being involved in gang activity. The court orders usually cover only the gang's neighborhood, and in addition to barring members from gathering in public, they prohibit them from warning others of approaching police officers or carrying pagers and impose a 10

P.M. curfew on them.

The injunctions also give the police members named in the court order at any time. Gang members found guilty of violating the injunctions can be ordered to pay fines or serve time in jail, and probationers can be returned to prison to serve the remainder of a sentence.

When the American Civil Liberties Union of Northern California challenged the injunctions on the ground that they were too broad, the California Supreme Court rejected the argument, in 1997. But while opponents continue to criticize the injunctions and question the authorities' asser-

Judges' rulings have strengthened the hand of law enforcement.

tions of success in using them to combat gangs, they acknowledge that their legal challenges have been unsuccessful so far.

"We certainly are concerned about the proliferation of gang injunctions here in Los Angeles, particularly since crime is way down, as it is in most places," said Ramona Ripston, the executive director of the American Civil Liberties Union of Southern California. "But legally, there doesn't seem to be much that one can do to stop this proliferation."

The murder rate in Los Angeles is the lowest in 20 years, but gang murders account for more than a third of the homicides here each year — perhaps unsurprising in a city with 400 gangs and 64,000 gang members, more than any other city in the nation, say experts on street gangs.

The city sought injunctions against the Culver City Boys and the Venice Shoreline Crips after 11 gang members and bystanders were killed in the summer of 1997. In an attempt to end the conflict, the orders bar each gang's members from being seen together on rival turf as well as on their own.

Several members of the Culver City Boys and representatives of the Venice Shoreline Crips declined to be interviewed for this article.

There are 22 unsolved slayings in which members of the Culver City

Boys are the lead suspects, according to court records. One member was a suspect in several killings and was charged in two. The charges were dropped after witnesses recanted, the police said. One man was beaten and kicked to death on Stauson Avenue by at least 10 Culver gang members in 1996; the police were not called for half an hour and no one was convicted of the killing.

In 1997, after the 11 gang-related deaths, the Los Angeles City Council offered \$10,000 rewards for information leading to an arrest in each homicide. Not a single reward has been collected.

Police statements filed in court in support of the injunction against the Venice Shoreline gang said gang and family life are sometimes so intertwined that some residents let members flee through their homes, closing the gates on police officers in pursuit. But the declarations also said that some residents were so fearful that their homes would be firebombed or that they would be shot by the Shoreline Crips that they did not answer the door when the police arrived to investigate a crime.

The authorities say they hope the injunction will eliminate intimidation of witnesses in the prosecution of gang crimes by making police officers the chief witnesses against gang members.

Mr. Hahn, the city attorney, said gang-related crime had decreased in every neighborhood where an injunction had been issued, sometimes by half. But critics say that can be attributed to the nationwide drop in crime rates and the addition of nearly 2,000 police officers in Los Angeles in the last five years.

Malcolm Klein, a professor emeritus at the University of Southern California and an expert on gangs, said the injunctions appear to strengthen the fabric of gang life.

About 50 members of the Culver City Boys sat quietly in a courtroom earlier this month as Judge Patricia Collins granted the injunction against them. Two days later, Mar Vista Gardens was covered in the gang's freshly spray-painted markings "CXC" and implied death threats against members of the Los Angeles Police Department and the District Attorney's office.

Sgt. Ruben Lopez said that gang members had told him they would not commit any more crimes.

"Collectively, we haven't been able to gauge that yet," he said.



As a way to combat street gangs, Los Angeles is increasingly turning to court injunctions. Steve Wills, left, and Jason Wagner recently patrolled at a housing project near Venice Beach, where an injunction was in force.

Washington's Teen-Ager Curfew to Start Soon

By The New York Times

WASHINGTON, June 19 — With school out for the summer, teen-agers nationwide can look forward to two months of freedom and carefree summer nights. But not here in Washington.

A Federal Appeals court ruled on Friday that teen-agers do not have an unrestricted right to roam the streets late at night and that a youth curfew is constitutional. The law, an effort to reduce crime, bars those under 17 from being in a public place unaccompanied by a parent or guardian between 11 P.M. and 6 A.M. Monday through Thursday, and midnight to 6 A.M. Friday to Sunday.

The United States Court of Appeals for the District of Columbia Circuit ruled that the Juvenile Curfew Act of 1995 does not infringe on the rights of children or the rights of parents to raise their children.

The appeals court's ruling lifts an injunction that has prevented Washington police from enforcing the law since 1996. Supporters of the curfew said enforcement was likely to begin soon.

Breaking the curfew could result in 25 hours of community service for

young offenders. Parents could be ordered to pay fines up to \$500 for allowing children to disobey the curfew. There are eight exceptions to the law, including errands sanctioned by parents or guardians, emergencies and certain kinds of employment.

Judge Lawrence H. Silberman wrote the opinion that was joined at least in part by eight others on the 11-member court. It found that although young people are generally afforded the same constitutional guarantees as adults, the state must account for their "unique vulnerability and immaturity."

"I feel ecstatic, vindicated and pleased," said Harold Brazil, a Democrat on the District Council, who sponsored the original law four years ago. "We have given police another tool to fight crime and protect youngsters. It is very timely in the wake of all this youth violence."

Other council members, however, did not share Mr. Brazil's enthusiasm. "I am a little bit disappointed," said Phil Mendelson, another Democrat on the Council. "As a government, we have to be circumspect about laws that curtail freedom. If

we want to cut crime we need to deal more with the problems associated with crime, not people being out of their homes."

Professor Jeffrey R. Henig of George Washington University, who specializes in urban policy and directs the university's Washington, Area Studies Center, says that the success of the law lies in the enforcement. "If the police choose to use it as a tool, it could have some positive effects," Professor Henig said. "But, having a law on the books with spotty and erratic enforcement could be worse than nothing at all."

The American Civil Liberties Union is critical of the law, viewing it as an infringement of free movement. In addition, the A.C.L.U. contends that the law intrudes on parents' rights to raise their children as they see fit.

"As long as people are not acting illegally and irresponsibly and they have their parents' permission, then they should be allowed to move freely," said a former A.C.L.U. president, Robert S. Plotkin. "The curfew presumes that all parents are making bad decisions and bad choices as a blanket rule."

Los Angeles Times

Broad Injunction Is Sought to Strike at Gang Stronghold

DATE: 8-4-92
PAGE: A-1

■ **Crime:** City, county action would aim at 300 members in 18th Street group in Pico-Union area. It would impose a curfew and bar those targeted from gathering.

By GREG KRIKORIAN and RICH CONNELL, TIMES STAFF WRITERS

Hoping to strike at the heart of one of the nation's largest and most violent street gangs, Los Angeles authorities are seeking a court injunction to hobble the 18th Street Gang in the stronghold of its birthplace.

The injunction covering the Pico-Union area west of downtown would target the most gang members over the widest area of any order officials have so far obtained.

At least 50 gang members who are named, and 250 still to be named, would be barred from engaging in a number of otherwise legal activities including standing, sitting, walking, driving, gathering or appearing anywhere in public in groups of three or more.

A multi-agency law enforcement task force, including LAPD officers and state parole officers, fanned out over the Pico-Union area this weekend to serve gang members with official notices about the injunction.

The proposed action is the most far-reaching in a series of injunctions aimed at gang members filed by both city and county prosecutors in recent years. It marks the first collaboration of the Los County district attorney's office and the Los Angeles city attorney's office, and is the most complicated of the measures by virtue of the sheer number of gang members authorities hope to harness.

An injunction approved by the courts last month was aimed at curbing the activities of 18 members of one of the gang's cliques in a 17-block area of Jefferson Park, a Southwest Los Angeles neighborhood that had been terrorized by the gang.

Like that injunction, the one now sought by officials would virtually ban all gang gatherings and bar the members from other activities including possessing pagers or cel-

lular phones in any public place or acting as lookouts who whistle, yell or otherwise signal anyone that police are on their way. The court order also would impose an 8 p.m. to sunrise curfew for any gang members under the age of 18 unless they were coming to or from work, a public event or errand, or were accompanied by a parent, guardian or a spouse who is at least 18 years old.

The one-square-mile Pico-Union area has almost 28,000 residents, most of them Latino, and is not only one of the most densely developed pockets in the county but among its poorest and most crime-ridden.

Not coincidentally, authorities allege, it also is the birthplace of the 18th Street group, a notorious gang that has sprawled and grown over the past 30 years.

"We are trying to get to the heart of the beast," said Michael Genelin, who heads the district attorney's hard-core gang division.

Within the Pico-Union area, authorities allege, the gang has for several years engaged in large-scale drug trafficking and wholesale extortion of residents and merchants—for everything from street protection to parking spaces.

"They are terrified of the gangs," said one law enforcement official. "They know the size of the gang. They know its capabilities. They know it controls the area."

Mayor Richard Riordan, Dist. Atty. Gil Garcetti, City Atty. James Hahn, acting LAPD Chief Bayan Lewis and Councilman Mike Hernandez, whose district includes Pico-Union, have scheduled a news conference today to discuss the civil lawsuit.

The officials are confident that the injunction to be sought in Los Angeles Superior Court will be approved. A dozen such orders have already been granted to curb gang activity in Los Angeles, Inglewood, Burbank, Pasadena, Long Beach and unincorporated portions of the county.

For several years, the concept of curtailing gang activities through injunctions has been an increasingly popular law enforcement tool. Just over a month ago, the U.S. Supreme Court, in a case testing the legality of such tactics, let stand a judge's order allowing San Jose officials to prohibit 38 young Latinos from gathering together on certain streets.

In the areas where the injunctions have been used, authorities say neighborhoods have become safer as even small groups of gang members avoid each other on the streets and have curtailed such activities as drug-dealing and tagging.

The injunction to be sought in Los Angeles is the most ambitious ever, said officials who declined to be identified.

Other injunctions, including the order granted last month against a smaller 18th Street clique in Jefferson Park, have involved far fewer defendants and been limited to small areas largely controlled by a single gang.

But in Pico-Union, dozens of warring gangs are jammed into the most densely populated neighborhood west of the Mississippi, battling block-by-block almost daily for tiny patches of turf and lucrative drug-dealing spots.

The Los Angeles Police Department counts several thousand gang members in the area, which is under the jurisdiction of the Rampart Division—a police station so busy it is ominously nicknamed the 911 Division.

Cont'd

There's a higher price, too, to build the fortress super-max prisons. In Illinois, for example, it will cost \$70 million to build the state's 500-bed super-max, which is scheduled to open in January 1998. That's \$140,000 per bed, or more than the cost to build a typical single-family house. The estimated cost to operate a super-max in Illinois is \$35,000 per inmate per year, which is about double what it costs to house an inmate in the general population.

In Texas, officials have fought to shave millions off the cost by enlisting inmate labor to build the prisons. Many of the prisoners are experienced masons, electricians or welders. Estelle

prison cost \$25.1 million to build.

Adding tighter security — such as computer monitoring — leads to the higher costs to build a super-max. But prison guards say the costs are worth it.

Assaults on Texas prison guards have been rising steadily for 10 years. Assaults jumped from 153 in 1990 to 918 last year. At the same time, the prison population rose dramatically. The high-tech design of Estelle prison includes doors that are opened by computer and cameras that monitor every movement on the cell blocks. As a result, there is little contact between inmates and guards.

"The population is hardening, we are seeing it," says David Nunnelee of the Texas Department of Corrections. He says guards are attacked every day in

Texas prisons. "You have people who are serving 40 years flat (no opportunity for parole) saying, 'Why should I follow the rules?' These are the kinds of people who think nothing of taking a swing at a corrections officer, or preying on another inmate."

Capt. George Webster, who heads the maximum-security wing of the Wynne Unit Prison across town, provides a blunt assessment of his charges. "These guys are a-holes plain and simple. They think nothing of, say, defecating in their hands, waiting for a guard to pass by and slinging it through the bars. That's the kind of person we are dealing with."

The extreme conditions of super-max prison are perhaps the last tools available to help change inmate behavior, says Estelle warden Fred Figueroa.

But not everyone supports having more prisoners exposed to this type of punishment. "What is not given a lot of thought to is what kind of individual society is going to get on the other side," says Tim Flannigan, author of *Longterm Imprisonment*, a book on prison conditions. "Nothing happens in these places other than confinement. There is no work, no education."

Todd Clear, associate dean of Florida State University's School of Criminology and Criminal Justice, believes the super-max building boom is a short-sighted solution to an "overblown" issue of guard security created by prison authorities.

"It's hard to imagine these places turning out anything other than a brutal person," Clear says. "But if the wardens and prison directors are wrong, who will ever know? They are building these places because they cannot afford to be wrong."

Jake Williams is the type of prisoner who might be a candidate for Estelle prison. Now in the Wynne prison's solitary unit, the 27-year-old Galveston man was sentenced to 99 years for robbery, assault and burglary. He has to serve 40 years before being eligible for parole.

He landed in solitary confinement last summer for assaulting another inmate with a weapon, an allegation he vigorously denies. But there is no denying that the year spent here is beginning to wear him down.

"I've reached a point a lot of the time where I just want to give up," he says. His alleged breach of the house rules has meant he must forfeit his right to even simple amenities like deodorant and toothpaste. And he's in solitary indefinitely.

"Behind these doors," he says, "I've lost everything."

Of the gang members living in the Rampart area, authorities say that about 2,100 are known to be affiliated with 18th Street. And in the nation's gang capital, investigators at the local station often tally more gang homicides than any other police division. In the last 18 months, authorities say, 18th Street members accounted for 32 of the Rampart homicides—either as suspects or victims.

Exacerbating the conflicts, 18th Street and its bitterest rival, the Salvadoran gang Mara Salvatrucha, feed off a violent system of "taxation" and extortion involving drug dealers and others involved in illicit activities on the streets, authorities say.

While that rivalry could be altered if a court order dilutes 18th Street's power in Pico-Union, authorities said they do not expect that the gang's possible decline to result in more power for Mara Salvatrucha.

For one thing, they note, the Salvadoran gang's strength is on the fringes of Pico-Union and it is not likely to increase significantly enough to stake out a new territory. "It is difficult for a gang to just sweep into a new area like that; it's not like an army," said one law enforcement official, who declined to be identified.

In addition, authorities noted, the increased police presence that would be necessary to enforce the court action would be a deterrent not only to 18th Street but any gang members in the area. If the action is as successful as hoped, said another official, the area should become a "dead zone" for significant gang activity.

And finally, according to another law enforcement official familiar with both gang activity and the aftermath of court orders against gangs, the proposed order could also deter other gang-related crime because it would allow both residents and merchants of the Pico-Union area time to regroup and reclaim their neighborhood.

"The gang injunction empowers residents and shop owners," the official said. "It gives communities some breathing space to take back

their streets."

The rise of 18th Street from its Pico-Union roots 30 years ago was chronicled last year in a Times series.

The gang, a loose-knit network of cliques bound together by visions of growth and street gang dominance, is regularly involved in murder, robbery, auto theft and drug dealing, authorities say. It has aggressively recruited young members in recent years, reaching across both jurisdictional boundaries and ethnic lines.

Cells of the gang are active in a majority of the LAPD's 18 divisions, as well as smaller cities in the southeast part of the county, the San Gabriel Valley, the South Bay, the Inland Empire and Orange County. Other branches of the gang have scattered from Oregon and Utah to Tijuana and Central America.

But the gang's biggest, most intractable stronghold has remained Pico-Union, where surging immigration, particularly from war-torn Central America in the 1980s, expanded the pool of potential recruits.

By some accounts, a falling-out with some of the new Salvadorans within 18th Street gave birth to the ruthless Mara Salvatrucha gang. For years, 18th Street and MS have waged a bloody struggle that has spilled out of Pico-Union and into Hollywood, the San Fernando Valley and many other communities.

Critics, including some street-level gang investigators, doubt the effectiveness of injunctions, saying they simply push gang problems to new areas.

LAPD officials often have emphasized that anti-gang injunctions are very labor intensive to secure and properly enforce. Whether additional staffing will be provided to the Rampart Division in the Pico-Union area, already one of the busiest in the city, is unclear.

AROUND THE BELTWAY

Encryption: Who Will Hold the Key?

Two Bills Reflect the Split Over Restrictions

By Elizabeth Corcoran
Washington Post Staff Writer

Area software companies and government agencies whose stock in trade is the ones and zeroes of data scrambling have their eyes trained on Capitol Hill this summer. There two conflicting bills are going head-to-head in an effort to set government policy toward the ever-more complex issue of privacy in the electronic age.

At issue: How tightly should the government regulate the digital means of protecting information, known as encryption technology?

One bill, emerging from the House of Representatives, champions loosening existing restrictions. The other, coming from the Senate, would promote a plan to provide law enforcement agencies with "spare keys" to unlock scrambled information after obtaining court orders. The agencies are fearful that criminals and terrorists will use the technology to cover their tracks.

The only sure bet is that there will be some surprising twists before the votes are counted. One occurred just last week: Dorothy Denning, computer science department head at Georgetown University and one of the few academics to defend the existing restrictions, released a study that has led her to express open doubts about the effectiveness of restricting encryption.

"Law enforcement is right," said Denning, whose report was disclosed by the San Jose Mercury News. "We're at the beginning of what will be a bigger problem" of criminals using encryption. That said, trying to push the use of "spare keys" may not solve the government's problem. Such solutions "could also be incredibly burdensome and costly, and involve a certain amount of risk to the people whose data is encrypted," she said.

"I still don't know what the right policy

move is on all this," Denning added.

Encryption is becoming a big business because in a world where information is as valuable as gold, people want to have some way to lock it up. The locks of this world are abstract mathematical formulas, called encryption algorithms, that make a digital message or file look like gibberish to those without the proper "key."

That's great for people who own information—and a potential headache for law enforcement and national security officers, who worry that terrorists, spies and thieves will use such technology to hide what they're doing.

For years the federal government has enforced rules restricting the export of encryption technology. Officials contend that this helps ensure that U.S. intelligence agencies will continue to be able to intercept foreign communications, a major consideration in national security.

Critics say those export controls are likely to be futile—software, which is easily transmitted over the Internet or on floppy disks, can't be controlled the way tanks or jet fighters can, they say.

While restricting foreign sales, the Clinton administration has long promised it would not restrict use of such technology within the United States, where there are strong legal protections for privacy. But the government hasn't been shy about trying to influence indirectly what happens domestically.

Export restrictions can affect what is sold here, industry executives say, because companies find it costly to offer separate products in different markets. So they've tended to sell the simpler, exportable products both within the United States and abroad.

And the administration has spent five years trying to wangle a deal with the industry and privacy groups that would preserve law enforcement agencies' ability to peek into computer files and electronic messages.

The way to do this, the government argues, is to keep spare "keys" to scrambled files in special places where government agents could get them when they suspect wrongdoing and have the proper court authorization. The keys would be held at "key recovery centers."

They would also be handy to organizations that scramble files, the government says. In case an employee forgets a key or gets hit by a truck, a spare would be available.

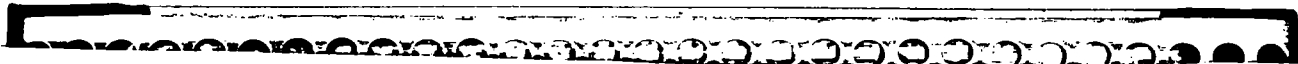
So far, there are few working examples of such key recovery centers. The firm furthest along in creating them is Trusted Information Systems Inc. of Glenwood, which has set up a key recovery center for Royal Dutch Shell in the Netherlands, and is working with a number of other companies.

Enter Congress. In the House, Rep. Bob Goodlatte (R-Va.) has proposed a bill that now has 253 co-sponsors—enough to win approval on the House floor. It would loosen the export restrictions. Companies

would be free to establish centers for storing spare keys but government would not take an active role in promoting them.

The bill says the real way to help law enforcement in this field is to encourage people to use strong encryption. Well-scrambled bank records, for example, would make it that much harder for electronic criminals to steal money. "If an ounce of prevention is worth a pound of cure, then an ounce of encryption is worth a pound of subpoenas," Goodlatte told a House subcommittee in May.

That bill worries the administration. In mid-June, Louis J. Freeh, director of the Federal Bureau of Investigation, told members of the Senate Judiciary Committee that if encryption technology without spare keys is widely used, it will "ultimately devastate our ability to fight crime and prevent terrorism."



Restraining Orders on Gang Activity

I spoke with Mark Moore, who informed me that his colleague up at Harvard, David Kennedy, is the appropriate person to talk to on this issue. I am still waiting for him to return my calls. However, because you wanted to begin looking at this asap, I pulled some information from Westlaw. Attached are: two significant cases (both from California); one significant law review article (primarily about California); and several news articles (almost all from California). Surprisingly, there is very little activity on this issue elsewhere in the country.

In addition, I've attached the few state statutes specifically related to gang activities and restraining orders that I was able to find.

CLEOs, etc.

Attached is a memo on the status of state criminal history record systems, and the BJS survey on state procedures, which contains some information on the CLEOs of the various states. Beau Biden is currently requesting a detailed list of CLEOs from the ATF--I offered to do this but he said he wanted to contact them himself.

Let me know if you need any follow-up, aside from speaking with David Kennedy, who I will continue trying to get in touch with.

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Los Angeles Sues for Peace

Court Asked to Bar Gang's Essence -- Hanging Out Together

By William Booth

Washington Post Staff Writer

Thursday, July 3, 1997; Page A01

The Washington Post

LOS ANGELES -- Sitting comfortably in his attorney's office far from the reputed lair of the Alsace clique of the notorious 18th Street gang, Efrain "Woody" Moreno says the police and prosecutor got it all wrong. "They are making me out to be some kind of godfather," Moreno complained. "That is a lie."

Moreno, 30, says he is a husband and father, a property owner and taxpayer. He has a steady job in a print shop, a freshly painted house and no criminal record.

The city attorney considers him a terror.

Yet Moreno is not being charged with any crime. Instead, he and 17 other alleged members of the 18th Street gang are named in a civil lawsuit brought by the city of Los Angeles that seeks to bar them not only from engaging in criminal acts but also any conduct that is "a precursor to criminal gang activities," such as using vulgar language, blocking the sidewalk, carrying spray paint or "riding a bicycle in any public place for the purpose of promoting or engaging in narcotics and any other unlawful activity."

Most important, and controversial, the alleged gang members would be barred from appearing in public together in the target area, a 17-square-block section of a rough-and-tumble neighborhood populated mostly by Hispanics, where Moreno grew up and still lives.

This is the brave new world in the fight against gangs. The

California Supreme Court, in a ruling known as the *Acuna* decision, endorsed the use of gang injunctions earlier this year. It said that the right of gang members to associate is less than a society's right to peace and quiet.

And so other municipalities around the country with gang problems are watching the California experiment closely and may soon attempt to exercise their own injunctions.

In March, the city launched the drive against the 18 members of the 18th Street gang by asking the court to permanently enjoin them from being public nuisances, including banning virtually all public gatherings of the gang. A hearing on the so-called nuisance abatement, or anti-gang, injunction will be heard July 11 in Superior Court. Judge Alan G. Buckner has signaled his intention to approve it.

The named gang members did not help their case when they appeared in court in May, flashing gang signs with their fingers (an "E" for Eighteenth Street) and later -- in front of news cameras -- rolling up their shirts and displaying their tattooed torsos. "Walking billboards of criminality," one prosecutor observed. Said Moreno of his friends: "That was really stupid."

City prosecutors here say such injunctions are an important new tool to control violent gangs.

Moreno and his associates, however, as well as the civil liberties groups, consider the injunctions an affront to the constitutional right to freely associate. Moreover, a recent study by the American Civil Liberties Union (ACLU) here on the effectiveness of earlier, less draconian gang injunctions concluded that the strategy does not work, and may make things worse.

"It's a cynical, political ploy that has little to do with crime and a lot to do with public relations," said Allan Parachini of the ACLU. "The injunctions move crime around. They don't solve the problem."

The city attorney's anti-gang unit contends that Moreno and his associates are all active members of a "set" of the 18th Street gang, a loose but violent syndicate that has terrorized a working-class neighborhood in the shadow of Interstate 10. According to police affidavits, the gang deals and uses PCP and crack cocaine, fires weapons into the air,

hosts roving all-night parties, urinates in public, scrawls graffiti to mark territory, and in general, intimidates the law-abiding citizens with threats and demands that they show the gang due respect.

While not as well known outside Los Angeles as the Bloods or the Crips, the 18th Street gang is perhaps the largest street gang in Southern California, with membership estimated between 5,000 and 20,000. The Alsace "set" has about 100 members.

"They're little punks, but they're capable of terrifying people," said Jule Bishop, the assistant city attorney who is an expert on injunctions. "What we're saying is this: 'We know who you are and what you've been doing and this must stop.'"

The city attorney and the Los Angeles Police Department have tried, unsuccessfully, to disrupt gang activities in the targeted neighborhood, Alsace, for years. There have been numerous arrests not only for violent crime and drug dealing, by both the LAPD and the FBI, but also by the police department's CRASH unit (Community Resources Against Street Hoodlums). The CRASH unit has saturated the area and made life difficult for the alleged gang members by writing them up for a variety of public nuisance charges, such as urinating in public and riding bicycles at night without lights.

"We've tried criminal proceedings, and it hasn't worked," Bishop said.

"I believe this clique will continue their reigns of terror in the neighborhood until their association is somehow broken," said LAPD CRASH officer Joenador Nepomuceno, whom the gang members call "Chino" and whom they say they despise because of his constant vigilance.

In his affidavit in support of the gang injunction, Nepomuceno stated that the most troublesome location in the neighborhood is a small apartment house at 2903 S. Cloverdale, which is owned by Moreno, who lives in a house across the street.

Here at 2903 S. Cloverdale, according to the police, at least one gang member lives. The gang uses the apartment to party and to sell crack cocaine. The gang is known for

its discounted drugs; a rock of crack cocaine that would sell for \$25 elsewhere sells for \$10 here, according to Nepomuceno.

Drive-by shootings and revenge killing in the neighborhood around the apartment building are common. In January, a police informant was found stabbed, burned and dead in an abandoned house near the gang headquarters. In a three-month period before the injunction was filed, there were 22 gang-related assaults in the neighborhood and three gang members were shot.

"Even by L.A. standards, this is a bad situation," Bishop said.

On a recent evening, after the injunction was filed, several neighbors who asked not to be identified by name said the area was infested with gang members, but they seemed to disagree about the threat to their own safety.

"I'm scared of them," said a young mother holding a baby on her hip. "They look at you like they're devils."

An elderly woman cracked open her door and whispered, "Go away. They can't see me talking to you." But a man working on his van said, "Sure, there's plenty of gang-bangers. This is the barrio. What do you expect?"

Asked if he felt afraid, the man said, "Personally? No. But they get to drinking and smoking drugs, and then they get loud and obnoxious. They're young and what they need to do is get a job and have families and they'll settle down."

After the request for an injunction was filed, gang gatherings and drug dealing in the neighborhood decreased, according to police and residents.

"What makes me think it's had an effect? It already has," said assistant city attorney Bishop. "The graffiti is gone. The scrutiny itself has already worked. This is what we call success. The citizens now feel secure enough to come out and say this is a problem."

Yet Bishop and the police know that the gang activities will return if the police do not keep the pressure applied. And the alleged gang members themselves are fighting the injunction.

Moreno said, yes, he once belonged to the gang and yes, he smiled, he did join in youthful high jinks: tagging graffiti, smoking a little dope, going on "beer runs" with his friends. But he said he retired several years ago when he got married.

Four of the 18 named members hired civil attorney Sean Ward, who gathered dozens of affidavits from family members and friends to support his clients.

Moreno's boss at the print shop where he works stated: "Efrain Moreno is a good and reliable worker. . . . He is pleasant, personable and gets along great with fellow employees."

Moreno too has gone on the offensive. He claims that police officers routinely harass alleged gang members and sometimes try to incite violence among the warring gangs. In court papers, Moreno charged that police have told him the gang members were doing the authorities "a favor" by killing each other.

"Just because we have bald heads and we're Latinos, we're all gang members," Moreno said. "If they think we're doing these crimes, why don't they arrest us?"

If the permanent injunction is granted this month, and if the alleged gang members continue to engage in prohibited activities, the city attorney's office can drag them back before the judge for violating a court order and they most likely would face criminal contempt proceedings.

Bishop, the anti-gang specialist in the city attorney's office, said she would not seek jail time, but more creative punishments, such as community service, cleaning up graffiti or a court order that the offender get his Graduate Equivalency Diploma, or GED.

"The issue has never been to find another way to put them in jail," Bishop said. "But to put them on notice." The message? "We are watching you."

@CAPTION: Tattoos signify membership in the 18th Street gang, the target of Los Angeles city lawyers.

@CAPTION: In South Central Los Angeles, an 18th Street gang member known as "Payasito" displays his signs of membership. The city seeks a court order against gang

members using vulgar language, blocking a sidewalk, carrying spray paint, selling drugs from bicycles and other activities.

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**PEOPLE ex rel. GALLO, Plaintiff and
 Respondent,
 v.
 Carlos ACUNA et al., Defendants and
 Appellants.**

No. S046980.

Supreme Court of California.

Jan. 30, 1997.

City sought injunctive relief against members of alleged criminal street gang. After temporary restraining order was granted, the Superior Court, Santa Clara County, No. 729322, Robert Michael Foley, J., entered preliminary injunction prohibiting gang members from engaging in certain behavior in neighborhood. Gang members appealed, and the Court of Appeal modified injunction and affirmed as modified. The Supreme Court granted review, superseding opinion of the Court of Appeal. Following review, the Supreme Court, Brown, J., held that: (1) provision of injunction barring gang members from appearing with other gang members did not violate First Amendment associational rights; (2) injunction was not overbroad or void for vagueness; (3) Street Terrorism Enforcement and Prevention (STEP) Act is not exclusive means of enjoining criminal street gangs, and does not preempt use of public nuisance statutes; and (4) conduct of gang members qualified as public nuisance and was proper subject of injunction.

Court of Appeal reversed.

Kennard, J., concurred in part and dissented in part and filed opinion.

Chin, J., concurred in part and dissented in part and filed opinion.

Mosk, J., dissented and filed opinion.

Opinion, 48 Cal.App.4th 641, 40 Cal.Rptr.2d 589, vacated.

[1] NUISANCE ⇨ 59

279k59

State has not only right to maintain a decent society, but has obligation to do so, and principal office of

centuries-old doctrine of public nuisance is maintenance of public order, including tranquillity, security, and protection, when criminal law proves inadequate.

[2] NUISANCE ⇨ 59

279k59

Public nuisance doctrine is aimed at protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which courts have vindicated by equitable remedies since beginning of 16th century.

[3] NUISANCE ⇨ 59

279k59

Public nuisance is offense against, or interference with, exercise of rights common to the public.

[4] NUISANCE ⇨ 59

279k59

It is community aspect of doctrine of public nuisance, as reflected in provisions of civil and criminal code, that distinguishes doctrine from its cousin of private nuisance, and makes possible use of public nuisance doctrine, by means of equitable injunction, to protect quality of organized social life. West's Ann.Cal.Civ.Code §§ 3480, 3481; West's Ann.Cal.Penal Code § 370.

[4] NUISANCE ⇨ 77

279k77

It is community aspect of doctrine of public nuisance, as reflected in provisions of civil and criminal code, that distinguishes doctrine from its cousin of private nuisance, and makes possible use of public nuisance doctrine, by means of equitable injunction, to protect quality of organized social life. West's Ann.Cal.Civ.Code §§ 3480, 3481; West's Ann.Cal.Penal Code § 370.

[5] NUISANCE ⇨ 59

279k59

Not every interference with collective social interests constitutes public nuisance, and to qualify as "public nuisance," and thus be enjoined, interference must be both substantial and unreasonable.

See publication Words and Phrases for other judicial constructions and definitions.

[5] NUISANCE ☞ 77

279k77

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See publication Words and Phrases for other judicial constructions and definitions.

[6] NUISANCE ☞ 62

279k62

Requirement of substantiality of interference with collective social interests which must be met for conduct to constitute public nuisance requires real and appreciable invasion of plaintiff's interests, and one that is definitely offensive, seriously annoying, or intolerable; measure is an objective one, and if normal persons in that locality would not be substantially annoyed or disturbed by situation, then invasion is not significant one. Restatement (Second) of Torts §§ 821F, 822.

[7] NUISANCE ☞ 59

279k59

Unreasonableness of given interference with collective social interests, for purposes of doctrine of public nuisance, represents judgment reached by comparing social utility of activity against gravity of harm it inflicts, taking into account handful of relevant factors; standard is an objective one, and question is not whether particular plaintiff found invasion unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Restatement (Second) of Torts §§ 821F, 822, 826-831.

[8] CONSTITUTIONAL LAW ☞ 70.1(7.1)

92k70.1(7.1)

Subject to overriding constitutional limitations, ultimate legal authority to declare given act or condition public nuisance rests with legislature, and courts lack power to extend definition of the wrong or to grant equitable relief against conduct not reasonably within ambit of the statutory definition; lawmaking supremacy serves as brake on any tendency in the courts to enjoin conduct and punish it with contempt power under standardless notion of what constitutes a "public nuisance."

[8] NUISANCE ☞ 77

279k77

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[9] NUISANCE ☞ 59

279k59

Acts or conduct which qualify as public nuisances are enjoined as civil wrongs, or prosecutable as criminal misdemeanors; characteristic derives not from status of acts or conduct as independent crimes, but from their inherent tendency to injure or interfere with community's exercise and enjoyment of rights common to public.

[9] NUISANCE ☞ 77

279k77

Acts or conduct which qualify as public nuisances are enjoined as civil wrongs, or prosecutable as criminal misdemeanors; characteristic derives not from status of acts or conduct as independent crimes, but from their inherent tendency to injure or interfere with community's exercise and enjoyment of rights common to public.

[10] APPEAL AND ERROR ☞ 954(1)

30k954(1)

Appellate court reviews order granting preliminary injunction under abuse of discretion standard; in other words, review is confined to consideration whether trial court in deciding whether to grant injunction abused its discretion in evaluating two interrelated factors of likelihood that plaintiff will prevail on merits at trial, and interim harm that plaintiff is likely to sustain if injunction were denied as compared to harm defendant is likely to suffer if preliminary injunction were issued.

[11] INJUNCTION ☞ 157

212k157

Order granting or denying interlocutory relief reflects nothing more than superior court's evaluation of controversy on record before it at time of its ruling, and is not adjudication of ultimate

merits of the dispute.

[12] CONSTITUTIONAL LAW ⇨ 91

92k91

Although First Amendment recognizes and shields from government intrusion limited right of association, it does not recognize generalized right of social association. U.S.C.A. Const.Amend. 1.

[13] CONSTITUTIONAL LAW ⇨ 91

92k91

Preliminary injunction which enjoined members of alleged criminal street gang from standing, sitting, walking, driving, gathering, or appearing anywhere in public view with any other member of gang did not violate gang members' First Amendment rights to freedom of association; gang was not association formed for purpose of engaging in protected speech or religious activities, and gang associations were not associations with intrinsic or intimate value protected by First Amendment. U.S.C.A. Const.Amend. 1.

[13] INJUNCTION ⇨ 138.78

212k138.78

Preliminary injunction which enjoined members of alleged criminal street gang from standing, sitting, walking, driving, gathering, or appearing anywhere in public view with any other member of gang did not violate gang members' First Amendment rights to freedom of association; gang was not association formed for purpose of engaging in protected speech or religious activities, and gang associations were not associations with intrinsic or intimate value protected by First Amendment. U.S.C.A. Const.Amend. 1.

[14] CONSTITUTIONAL LAW ⇨ 91

92k91

Two kinds of associations are entitled to First Amendment protection, those with "intrinsic" or "intimate" value, and those that are "instrumental" to forms of religious and political expression and activity; right to associations with intrinsic or intimate value is central to concept of liberty, and is exemplified by personal affiliations that attend creation and sustenance of family, while association instrumental to religious and political activity is composed of groups whose members join for purpose of pursuing wide variety of political, social, economic, educational, religious, and cultural ends. U.S.C.A. Const.Amend. 1.

[15] CONSTITUTIONAL LAW ⇨ 91

92k91

Constitutionally significant factors on which associational protection under First Amendment depends are not ones to be mechanically applied and ticked off, and at bottom, protected rights of association in the intimate sense are those existing along narrow band of affiliations that permit deep and enduring personal bonds to flourish, inculcating and nourishing civilization's fundamental values, against which even state is powerless to intrude. U.S.C.A. Const.Amend. 1.

[16] CONSTITUTIONAL LAW ⇨ 91

92k91

Freedom of association, in sense protected by First Amendment, does not extend to joining with others for purpose of depriving third parties of their lawful rights. U.S.C.A. Const.Amend. 1.

[17] CONSTITUTIONAL LAW ⇨ 91

92k91

Fact that members of alleged criminal gang may exercise some discrimination in choosing associates by selective process of inclusion and exclusion does not mean that association or its activities command protection under First Amendment. U.S.C.A. Const.Amend. 1.

[18] STATUTES ⇨ 47

361k47

Foundation of overbreadth doctrine is inhibitory effect contested statute may exert on freedom of those who, although possibly subject to statute's reach, are not before court.

[19] CONSTITUTIONAL LAW ⇨ 91

92k91

Preliminary injunction which enjoined members of alleged criminal street gang from standing, sitting, walking, driving, gathering, or appearing anywhere in public view with any other member of gang was not impermissibly overbroad in violation of First Amendment; only individuals subjected to injunction were named parties, who had received their day in court prior to injunction's issuance, and no risk existed that injunction could place at risk any protected conduct other than that of gang members themselves. U.S.C.A. Const.Amend. 1.

[19] INJUNCTION ⇨ 138.78

212k138.78

Preliminary injunction which enjoined members of alleged criminal street gang from standing, sitting, walking, driving, gathering, or appearing anywhere in public view with any other member of gang was not impermissibly overbroad in violation of First Amendment; only individuals subjected to injunction were named parties, who had received their day in court prior to injunction's issuance, and no risk existed that injunction could place at risk any protected conduct other than that of gang members themselves. U.S.C.A. Const.Amend. 1.

[20] CONSTITUTIONAL LAW ⇨ 90(1)
92k90(1)

Foundation of First Amendment overbreadth doctrine is perceived danger to constitutionally protected interests of those who, because they are not before court, lack judicial forum in which to litigate claims that statute sweeps within its ambit other activities that in ordinary circumstances constitute exercise of freedom of speech, and thus may inhibit such protected speech, and it is absent members of this unrepresented class who, sensitive to perils posed by indefinite language, avoid risk by restricting their conduct to that which is unquestionably safe, for whom overbreadth doctrine was fashioned. U.S.C.A. Const.Amend. 1.

[21] CONSTITUTIONAL LAW ⇨ 82(4)
92k82(4)

Although concepts of vagueness and overbreadth are related, there are important differences, and clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct. U.S.C.A. Const.Amend. 14.

[22] CONSTITUTIONAL LAW ⇨ 251.4
92k251.4

Unlike doctrine of overbreadth, which focuses on impact of statute on conduct of persons not before court, claim that law is unconstitutionally vague is not dependent on interests of absent third parties, and instead, underlying concern is core due process requirement of adequate notice. U.S.C.A. Const.Amend. 14.

[23] CONSTITUTIONAL LAW ⇨ 258(2)
92k258(2)

Due process requires that no one may be required at peril of life, liberty, or property to speculate as to meaning of penal statutes, and all are entitled to be informed as to what the state commands or forbids;

operative corollary is that statute which either forbids or requires doing of act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates first essential of due process of law and is void for vagueness. U.S.C.A. Const.Amend. 14.

[24] CRIMINAL LAW ⇨ 13.1(1)
110k13.1(1)

Law that is void for vagueness not only fails to provide adequate notice to those who must observe its strictures, but also impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory applications. U.S.C.A. Const.Amend. 14.

[25] CONSTITUTIONAL LAW ⇨ 251.4
92k251.4

While claim of overbreadth may succeed if it is shown that law at issue is substantially overbroad, or affects more than marginal group of those potentially subject to its sweep, claim that law is unconstitutionally vague can succeed only where litigant demonstrates not that it affects substantial number of others, but that law is vague as to him or her or impermissibly vague in all of its applications. U.S.C.A. Const.Amend. 14.

[26] CONSTITUTIONAL LAW ⇨ 274.1(5)
92k274.1(5)

picketing.

Preliminary injunction which enjoined members of alleged criminal street gang from standing, sitting, walking, driving, gathering, or appearing anywhere in public view with any other gang member fairly implied requirement that member have knowledge that person with whom he was associating was gang member, and thus when considered in context was not void for vagueness. U.S.C.A. Const.Amend. 14.

[26] INJUNCTION ⇨ 138.78
212k138.78

Preliminary injunction which enjoined members of alleged criminal street gang from standing, sitting, walking, driving, gathering, or appearing anywhere in public view with any other gang member fairly implied requirement that member have knowledge that person with whom he was associating was gang member, and thus when considered in context was not void for vagueness. U.S.C.A. Const.Amend.

14.

[27] CONSTITUTIONAL LAW ⇨ 82(4)

92k82(4)

In evaluating constitutional challenges based on claims of vagueness, particular context is all important, as contextual application of otherwise unqualified legal language may supply clue to law's meaning and give facially standardless language a constitutionally sufficient concreteness. U.S.C.A. Const.Amend. 14.

[28] CONSTITUTIONAL LAW ⇨ 251.4

92k251.4

No more than reasonable degree of certainty or specificity of statute can be demanded for purposes of determining whether statute is unconstitutionally vague. U.S.C.A. Const.Amend. 14.

[29] CONSTITUTIONAL LAW ⇨ 312(3)

92k312(3)

Preliminary injunction which enjoined members of alleged criminal street gang from confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any neighborhood residents known to have complained about gang activities, when considered in context, was not void for vagueness; injunction fairly implied requirement that member have knowledge that resident in question had complained about gang activity, and described prohibited conduct in sufficiently precise terms. U.S.C.A. Const.Amend. 14.

[30] NUISANCE ⇨ 77

279k77

Street Terrorism Enforcement and Prevention (STEP) Act is not exclusive means of enjoining criminal street gangs and abating gang behavior as public nuisance, and does not preempt use of general public nuisance statutes; STEP Act expressly provides that it is not exclusive remedy, and plainly contemplates remedies in addition to Act. West's Ann.Cal.Penal Code § 186.20 et seq.; West's Ann.Cal.Civ.Code § 3480; West's Ann.Cal.C.C.P. § 731.

[30] RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ⇨ 110

319Hk110

Street Terrorism Enforcement and Prevention (STEP) Act is not exclusive means of enjoining

criminal street gangs and abating gang behavior as public nuisance, and does not preempt use of general public nuisance statutes; STEP Act expressly provides that it is not exclusive remedy, and plainly contemplates remedies in addition to Act. West's Ann.Cal.Penal Code § 186.20 et seq.; West's Ann.Cal.Civ.Code § 3480; West's Ann.Cal.C.C.P. § 731.

[31] APPEAL AND ERROR ⇨ 854(2)

30k854(2)

Reviewing court will uphold judgment if it is correct for any reason and regardless of correctness of grounds, as it is judicial action and not judicial reasoning which is subject of review.

[32] NUISANCE ⇨ 61

279k61

Conduct enjoined by preliminary injunction which prohibited members of alleged criminal street gang from associating in public view with any other gang member, and from confronting, intimidating, or annoying any neighborhood residents known to have complained about gang activities, was "public nuisance," and was proper subject of injunction; gang members were not only routinely obstructing neighborhood residents from using their property, but were obstructing free passage or use of public streets, and conduct qualified as indecent or offensive to the senses. West's Ann.Cal.Civ.Code §§ 3479, 3480.

See publication Words and Phrases for other judicial constructions and definitions.

[32] NUISANCE ⇨ 80

279k80

Conduct enjoined by preliminary injunction which prohibited members of alleged criminal street gang from associating in public view with any other gang member, and from confronting, intimidating, or annoying any neighborhood residents known to have complained about gang activities, was "public nuisance," and was proper subject of injunction; gang members were not only routinely obstructing neighborhood residents from using their property, but were obstructing free passage or use of public streets, and conduct qualified as indecent or offensive to the senses. West's Ann.Cal.Civ.Code §§ 3479, 3480.

See publication Words and Phrases for other judicial

constructions and definitions.

[33] CONSTITUTIONAL LAW ⇨ 91
92k91

Provision of preliminary injunction which prohibited members of alleged criminal street gang from associating in public view with any other gang member burdened no more speech than necessary to serve significant government interest, and was permissible under First Amendment; provision sought to ensure that, within circumscribed area, gang members had no opportunity to combine, and to combat threat of collective conduct by loitering gang members, and had minimal impact on protected speech. U.S.C.A. Const.Amend. 1.

[33] INJUNCTION ⇨ 138.78
212k138.78

Provision of preliminary injunction which prohibited members of alleged criminal street gang from associating in public view with any other gang member burdened no more speech than necessary to serve significant government interest, and was permissible under First Amendment; provision sought to ensure that, within circumscribed area, gang members had no opportunity to combine, and to combat threat of collective conduct by loitering gang members, and had minimal impact on protected speech. U.S.C.A. Const.Amend. 1.

[34] CONSTITUTIONAL LAW ⇨ 90.1(1)
92k90.1(1)

Provision of preliminary injunction which prohibited members of alleged criminal street gang from annoying any neighborhood residents known to have complained about gang activities burdened no more speech than necessary to serve significant government interest and was permissible under First Amendment, as conduct prohibited was not constitutionally protected. U.S.C.A. Const.Amend. 1.

[34] INJUNCTION ⇨ 138.78
212k138.78

Provision of preliminary injunction which prohibited members of alleged criminal street gang from annoying any neighborhood residents known to have complained about gang activities burdened no more speech than necessary to serve significant government interest and was permissible under First Amendment, as conduct prohibited was not constitutionally protected. U.S.C.A. Const.Amend.

1.

[35] CONSTITUTIONAL LAW ⇨ 82(6.1)
92k82(6.1)

Physical violence and threat of violence are not constitutionally protected under First Amendment. U.S.C.A. Const.Amend. 1.

[36] CONSTITUTIONAL LAW ⇨ 90.1(1)
92k90.1(1)

Members of alleged criminal street gang could properly be subject to injunction prohibiting them from associating with other gang members within confines of neighborhood or from intimidating or threatening residents known to have reported crimes to police even without showing on part of gang members of specific intent to further unlawful group aims, as activities complained of were integral to public nuisance that was subject of injunction and did not implicate protected First Amendment rights. U.S.C.A. Const.Amend. 1.

[36] NUISANCE ⇨ 80
279k80

Members of alleged criminal street gang could properly be subject to injunction prohibiting them from associating with other gang members within confines of neighborhood or from intimidating or threatening residents known to have reported crimes to police even without showing on part of gang members of specific intent to further unlawful group aims, as activities complained of were integral to public nuisance that was subject of injunction and did not implicate protected First Amendment rights. U.S.C.A. Const.Amend. 1.

[37] INJUNCTION ⇨ 104
212k104

In proper case, organization and its individual members are enjoinable without showing of specific intent of members to further unlawful group aims.

*****282 **601 *1099** Amitai Schwartz, Antonio Ponvert III, Sara T. Campos, Edward M. Chen, San Francisco, Alan L. Schlosser, Daniel M. Mayfield, San Jose, Patricia Price, Amanda Wilson, San Mateo, Siner, Steinbock, Hofman & Pennypacker and Stuart D. Kirchick, San Jose, for Defendants and Appellants.

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(Cite as: 14 Cal.4th 1090, *1099, 929 P.2d 596, **601, 60 Cal.Rptr.2d 277, ***282)

as Amici Curiae on behalf of Defendants and Appellants.

Joan R. Gallo, City Attorney, George Rios, Assistant City Attorney, Carol C. Weinstein and Glenn D. Schwarzbach, Deputy City Attorneys, for Plaintiff and Respondent.

James K. Hahn, City Attorney (Los Angeles), Debbie Lew and Candice I. Horikawa, Deputy City Attorneys, George W. Kennedy, District Attorney (Santa Clara), Dale R. Sanderson, Deputy District Attorney, Gil Garcetti, District Attorney (Los Angeles), George M. Palmer, Brent Riggs and Deanne B. Ancker, Deputy District Attorneys, Berliner Cohen, Frank R. Ubhaus, Stacy L. Sietta, Robert Teir, Kent S. Scheidegger, Stephanie J. Finelli, Daniel J. Popeo, David A. Price, Sweeney, Mason & Wilson and Roger Mason as Amici Curiae on behalf of Plaintiff and Respondent.

BROWN, Justice.

At the request of the City Attorney of the City of San Jose (hereafter the City), we granted review to resolve an array of challenges to *1100 two provisions of a preliminary injunction entered by the superior court against individual members of an alleged "criminal street gang." The underlying action was instituted under the provisions of sections 731 of the Code of Civil Procedure and 3480 of the Civil Code, the operative core of California's civil "public nuisance" statutes.

The 48 declarations submitted by the City in support of its plea for injunctive relief paint a graphic portrait of life in the community of Rocksprings. Rocksprings is an urban war zone. The four-square-block neighborhood, claimed as the turf of a gang variously known as Varrio Sureno Town, Varrio Sureno Treces (VST), or Varrio Sureno Locos (VSL), is an occupied territory. Gang members, all of whom live elsewhere, congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency--openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fistfights and the sound of gunfire echoing

in the streets. Gang members take over sidewalks, driveways, carports, apartment parking areas, and impede traffic on the public thoroughfares to conduct their drive-up drug bazaar. Murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson, and theft are commonplace. The community has become a staging area for gang-related violence and a dumping ground for the weapons and instrumentalities of crime once the deed is done. Area residents have had their garages used as urinals; their homes commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti.

The people of this community are prisoners in their own homes. Violence and the ***283 **602 threat of violence are constant. Residents remain indoors, especially at night. They do not allow their children to play outside. Strangers wearing the wrong color clothing are at risk. Relatives and friends refuse to visit. The laundry rooms, the trash dumpsters, the residents' vehicles, and their parking spaces are used to deal and stash drugs. Verbal harassment, physical intimidation, threats of retaliation, and retaliation are the likely fate of anyone who complains of the gang's illegal activities or tells police where drugs may be hidden.

Among other allegations, the City's complaint asserted that the named defendants and others "[f]or more than 12 months precedent to the date of [the] complaint, continuing up to the present time ... [have] occupied [and] used the area commonly known as 'Rocksprings' ... in such a manner so as to constitute a public nuisance ... injurious to the health, indecent or *1101 offensive to the senses, [and] an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property by those persons living in the ... neighborhood."

After alleging the usual requisites for equitable relief--the prospect of "great and irreparable injury" and the absence of "a plain, adequate and speedy remedy at law"--the complaint prayed for a broad and comprehensive injunction against defendants' alleged activities in Rocksprings. The superior court granted an ex parte temporary restraining order enjoining all 38 defendants named in the complaint and issued an order to show cause (OSC)

why a preliminary injunction should not be entered.

Only five of the named defendants appeared in response to the OSC. Following a hearing, the superior court entered a preliminary injunction against the 33 defendants who had not appeared and continued the matter as to those 5 defendants who opposed entry of a preliminary injunction, leaving the temporary restraining order in force as to them. Eleven of the named defendants (the five who had originally appeared in opposition to the OSC, together with another six of the named defendants) moved to vacate the injunctions. After the matter was briefed and argued, the superior court entered a preliminary injunction. The multi-part decree, consisting of some 24 paragraphs, was the subject of an interlocutory appeal by these 11 defendants.

The Court of Appeal disagreed with the superior court, upholding only provisions of the preliminary injunction enjoining acts or conduct defined as crimes under specific provisions of the Penal Code. Although its premise is never clearly articulated, that ruling effectively limits the scope of permissible injunctive relief under California's public nuisance statutes to independently criminal conduct. The Court of Appeal also concluded many of the provisions of the preliminary injunction were void and unenforceable under either the First and Fifth Amendments to the federal Constitution as unconstitutionally vague or overbroad. Altogether, 15 of the 24 provisions of the trial court's preliminary injunction were partially or entirely invalidated. However, the City's petition only sought review of two provisions--paragraphs (a) and (k). We granted the City's petition and now reverse.

We consider first the scope of and conditions precedent to the exercise of the superior court's equitable jurisdiction to enjoin a public nuisance. We then assess defendants' challenges to paragraphs (a) and (k) of the superior court's preliminary injunction, challenges based on restraints inherent in the administration of equitable remedies, and those arising from constitutionally based limitations. Finally, we consider (and reject) defendants' arguments *1102 that the "STEP" Act [FN1] is the exclusive means of obtaining nuisance-based injunctive relief against a criminal street gang. We will conclude the two challenged provisions fall within the superior court's equitable power to abate

a public nuisance and neither runs afoul of rights secured to defendants by the federal Constitution.

FN1. The "Street Terrorism Enforcement and Prevention Act." (Pen.Code, § 186.20 et seq.)

I. Equitable Jurisdiction To Enjoin Public Nuisances

A. The Origin And Nature Of Actions To Enjoin Public Nuisances

Often the public interest in tranquillity, security, and protection is invoked only to be ***284 **603 blithely dismissed, subordinated to the paramount right of the individual. In this case, however, the true nature of the trade-off becomes painfully obvious. Liberty unrestrained is an invitation to anarchy. Freedom and responsibility are joined at the hip. "Wise accommodation between liberty and order always has been, and ever will be, indispensable for a democratic society." (Kovacs v. Cooper (1949) 336 U.S. 77, 89, 69 S.Ct. 448, 454-55, 93 L.Ed. 513 (conc. opn. of Frankfurter, J.)) There must be an irreducible minimum of reciprocity for civil society to function. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." (Wisconsin v. Yoder (1972) 406 U.S. 205, 215-216, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15.)

[1] The state has not only a right to "maintain a decent society" (Jacobellis v. Ohio (1964) 378 U.S. 184, 199, 84 S.Ct. 1676, 1684, 12 L.Ed.2d 793), but an obligation to do so. In the public nuisance context, the community's right to security and protection must be reconciled with the individual's right to expressive and associative freedom. Reconciliation begins with the acknowledgment that the interests of the community are not invariably less important than the freedom of individuals. Indeed, the security and protection of the community is the bedrock on which the superstructure of individual liberty rests. From Montesquieu to Locke to Madison, the description of the pivotal compact remains unchanged: by entering society, individuals give up the unrestrained right to act as they think fit; in return, each has a positive right to society's protection. Montesquieu describes this civil liberty as "that tranquillity of spirit which comes from the opinion

each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen." (Montesquieu, *The Spirit of the Laws* (U. Cambridge Press 1989) ch. 6, p. 157; and see Locke, *Two Treatises on Government* (U. Cambridge Press, student ed. 1988) §§ 122, *1103 140, 211, 227; Madison, *The Federalist* No. 51 (Rossiter ed. 1961) pp. 324, 325.) As we explain, a principal office of the centuries old doctrine of the "public nuisance" has been the maintenance of public order--tranquillity, security and protection--when the criminal law proves inadequate.

[2] There are few "forms of action" in the history of Anglo-American law with a pedigree older than suits seeking to restrain nuisances, whether public or private. Actions to abate private nuisances by injunction are the oldest of these apparent twins, which have almost nothing in common except the word "nuisance" itself. Unlike the private nuisance--tied to and designed to vindicate individual ownership interests in land--the "common" or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century.

[3] Originally, a public nuisance was an offense against the crown, prosecuted as a crime. The first known statute dealing with public nuisances--enacted in the 12th year of Richard II's reign--had as its subject the pollution of waters and ditches lying near settlements, and provided criminal liability for the offender. [FN2] The earliest public nuisance statute thus bore a feature that marks the entire field even today: public nuisances are offenses against, or interferences with, the exercise of rights common to the public. (See generally, Baker, *An Introduction to English Legal History* (3d ed. 1990) pp. 492-494.)

FN2. "If anyone cast dung etc. into Ditches, Water etc. which are next to any City, Borough or Town, he who will may sue forth a writ directed unto the Mayor or Sheriff or Bayliff of such Town etc." (The Stat. of 12 Rich. II, 1389, ch. 13.)

In this country, as in England, civil suits in equity

to enjoin public nuisances at the instance of public law officers--typically a state's Attorney General--grew increasingly common during the course of the 19th century, a trend that was not without critics. (See, e.g., 2 Story's *Equity Jurisprudence* (14th ed. 1918) § 1250, p. 597 ["In the case of ***285 ***604 public nuisances properly so called an indictment lies to abate them and to punish the offenders. But an information also lies in equity to redress the grievance by way of injunction. (Fn. omitted.)"]; *Mugler v. Kansas* (1887) 123 U.S. 623, 672-673, 8 S.Ct. 273, 302-03, 31 L.Ed. 205; cf. *State v. Ehrlick* (1909) 65 W.Va. 700, 706, 64 S.E. 935, 938 ["'If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court, which was intended to deal only in matters of civil right resting in equity....' Attorney General v. Insurance Co., 2 Johns. Ch. 378...."].)

*1104 With the publication of the Restatement Second of Torts in 1965, the law of public nuisances had crystallized to such an extent that its features could be clearly delineated. Section 821B of Restatement Second of Torts identifies five general categories of "public rights," the unreasonable interference with which may constitute a public nuisance: "the public health, the public safety, the public peace, the public comfort or the public convenience." (Rest.2d Torts, § 821B, subd. (2)(a).) A "public right," according to the Restatement Second, "is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured." (Id., com. g, p. 92.)

In California, the early common law categories of public nuisance, codified in 1872 and still applicable, define anything that is "injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway," as a nuisance. (Civ.Code, § 3479.) Civil Code sections 3480 and 3481 divide the class of nuisances into public and private. A public nuisance is one which "affects at the same time an entire community or

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neighborhood, or any considerable number of persons." (Civ.Code, § 3480.) Rounding out the taxonomy of the Civil Code, section 3491 provides that "the remedies against a public nuisance are: [¶] 1. Indictment or information; [¶] 2. A civil action; or, [¶] 3. Abatement."

Section 370 of the Penal Code mirrors these civil provisions, combining the characteristics of nuisances generally with a distinctly public quality: that a given activity "interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons." (Pen.Code, § 370, italics added.) In *People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 49, 130 Cal.Rptr. 328, 550 P.2d 600, we parsed these code provisions, remarking on "the substantial identity of definitions appearing in Penal Code section 370 and 371, and Civil Code section 3479 and 3480...." After quoting the text of section 370, we observed: "[T]he proscribed act may be anything which alternatively is injurious to health or is indecent, or offensive to the senses; the result [] of the act must interfere with the comfortable enjoyment of life or property; and those affected by the act may be an entire neighborhood or a considerable number of persons, and as amplified by Penal Code section 371 the extent of the annoyance or damage on the affected individuals may be unequal." (*People ex rel. Busch v. Projection Room Theater*, supra, 17 Cal.3d at p. 49, 130 Cal.Rptr. 328, 550 P.2d 600, original italics deleted, new italics added.)

*1105 [4][5] It is this community aspect of the public nuisance, reflected in the civil and criminal counterparts of the California code, that distinguishes it from its private cousin, and makes possible its use, by means of the equitable injunction, to protect the quality of organized social life. Of course, not every interference with collective social interests constitutes a public nuisance. To qualify, and thus be enjoined, the interference must be both substantial and unreasonable. We recently discussed these two requirements, albeit in the context of private nuisances, in *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 55 Cal.Rptr.2d ***286 **605 724, 920 P.2d 669. [FN3] Relying on the Restatement Second of Torts, we observed that " 'Life in organized society and especially in populous communities involves an

unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyance to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together.' " (13 Cal.4th at p. 937, 55 Cal.Rptr.2d 724, 920 P.2d 669, quoting rest.2d Torts, § 822, com. g, p. 112.)

FN3. As the editors of the second Restatement note, at common law the public nuisance involved "an interference with a right common to the general public. Little more than this in the way of a standard for determining what kinds of interferences constitute the crime of public nuisance was to be found in the cases." (Rest.2d Torts, § 821B, com. e, p. 89.) The development of the private nuisance tort action, however, "led to the application in public nuisance cases ... of an analysis substantially similar to that employed in the tort action for private nuisance." (Ibid.) By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance. (See id., at pp. 89-91.)

[6][7] The Restatement Second formulates the requirement of substantiality as proof of "significant harm," defined as a "real and appreciable invasion of the plaintiff's interests," one that is "definitely offensive, seriously annoying or intolerable." (Rest.2d Torts, § 821F, coms. c & d, pp. 105-106.) The measure is an objective one: "If normal persons in that locality would not be substantially annoyed or disturbed by the situation then the invasion is not a significant one...." (Id., com. d, p. 106.) The unreasonableness of a given interference represents a judgment reached by comparing the social utility of an activity against the gravity of the harm it inflicts, taking into account a handful of relevant factors. (See Rest.2d Torts, §§ 826-831; *San Diego Gas & Electric Co. v. Superior Court*, supra, 13 Cal.4th at p. 938, 55 Cal.Rptr.2d 724, 920 P.2d 669.) Here again, the standard is an objective one: "[T]he question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' " (*San Diego Gas & Electric Co. v.*

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Superior Court, *supra*, 13 Cal.4th at p. 938, 55 Cal.Rptr.2d 724, 920 P.2d 669, quoting Rest.2d Torts, § 826, com. c, p. 121.)

***1106 B. Expansion And Contraction Of "Criminal Equity"**

With the legitimacy of equitable relief to control public nuisances well established, American courts began to enlarge the jurisdiction of what has been called by some "criminal equity" and, by others, "government by injunction." (See Mack, *The Revival of Criminal Equity* (1903) 16 Harv.L.Rev. 389, 397; Fiss, *Injunctions* (1972) p. 580.) The highwater mark of this trend may have been reached in *In re Debs* (1896) 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092, where a strike by employees at the Pullman car works in Chicago paralyzed much of the nation's rail transportation and, with it, national commerce. The strike was broken by the entry of a public nuisance injunction--the controversial "Pullman injunction."

Whatever its merit as a question of commerce clause jurisprudence (see 8 Fiss, *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910* (1993) pp. 58-72), and whatever its place in the history of American labor strife, Justice Brewer's opinion for the court in *In re Debs*, *supra*, 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092, reads like a primer on the first duty of government by consent--maintenance of the public order--and the utility of the public nuisance injunction in fulfilling that aspect of the social contract. Justice Brewer rested the power of the courts to issue such an injunction on the "obligations which [government] is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare," a duty which the court's opinion said was "often of itself sufficient to give [the government] standing in court." (*Id.*, at p. 584, 15 S.Ct. at 906.)

*****287 **606** An end to this expansive trend, at least as it was reflected in the jurisprudence of this court, came with Chief Justice Gibson's opinion in *People v. Lim* (1941) 18 Cal.2d 872, 118 P.2d 472. Although we upheld the complaint as sufficient, our opinion in *People v. Lim*, *supra*, 18 Cal.2d 872, 118 P.2d 472, articulated an important limitation on the scope of the government's power to exploit the public nuisance injunction as an adjunct of general

legal policy. "[T]he tendency to utilize the equity injunction as a means of enforcing public policy is a relatively recent development in the law," the Chief Justice wrote. (*Id.*, at p. 877, 118 P.2d 472.) "This development has resulted in a continuous expansion of the field of public nuisances in which equitable relief is available at the request of the state." (*Ibid.*)

After identifying a division among the authorities "as to whether the expansion of the field of public nuisances in which equity will grant injunctions must be accomplished by an act of the legislature," the Lim court came down firmly on the side of legislative supremacy. (*People v. Lim*, ***1107** *supra*, 18 Cal.2d at p. 878, 118 P.2d 472.) "The courts of this state," we wrote, "have refused to sanction the granting of injunctions on behalf of the state merely by a judicial extension of the definition of 'public nuisance.' ... [They have] refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance." (*Id.*, at pp. 878-879, 118 P.2d 472, *italics added.*)

[8] Reflected in the light of our holding in *People v. Lim*, *supra*, 18 Cal.2d 872, 118 P.2d 472; two features of California's public nuisance scheme stand out. First, subject to overriding constitutional limitations, the ultimate legal authority to declare a given act or condition a public nuisance rests with the Legislature; the courts lack power to extend the definition of the wrong or to grant equitable relief against conduct not reasonably within the ambit of the statutory definition of a public nuisance. This lawmaking supremacy serves as a brake on any tendency in the courts to enjoin conduct and punish it with the contempt power under a standardless notion of what constitutes a "public nuisance." (See, e.g., *People v. Seccombe* (1930) 103 Cal.App. 306, 310, 284 P. 725 [Although defendant "followed the despicable calling of usurer" and had twice been convicted under the criminal statute, his conduct was not a public nuisance under the provisions of Civ.Code, § 3479 and was not enjoined].)

Second, our opinion in *People v. Lim*, *supra*, 18 Cal.2d 872, 118 P.2d 472, affirms the equal dignity, at least as far as the protection of equity is concerned, of private, property-based interests and those values that are in essence collective, arising

out of a shared ideal of community life and the minimum conditions for a civilized society. "Courts have held that public and social interests, as well as the rights of property," Chief Justice Gibson wrote, "are entitled to the protection of equity." (Id., at p. 877, 118 P.2d 472.) In a sense that cannot easily be dismissed, the availability of equitable relief to counter public nuisances is an expression of " 'the interest of the public in the quality of life and the total community environment.' " (People ex rel. Busch v. Projection Room Theater, supra, 17 Cal.3d at p. 52, 130 Cal.Rptr. 328, 550 P.2d 600.)

C. The Relation Between Crimes And Public Nuisances

As Justice Brewer noted in the Debs case: "A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interference, actual or threatened, with property or rights ... but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law...." (In *1108 re Debs, supra, 158 U.S. at p. 593, 15 S.Ct. at 909-10.) We made the same point in People v. Lim, supra, 18 Cal.2d 872, 879, 118 P.2d 472, quoting a West Virginia case: "We think the proper rule, therefore, and the one to which this state is committed is expressed in the following language from State v. Ehrlick [, supra, 65 W.Va. 700, 64 S.E. 935, 939]: 'It is also competent for the ***288 **607 Legislature ... to declare any act criminal and make the repetition or continuance thereof a public nuisance ... or to vest in courts of equity the power to abate them by injunction....' "

In the Ehrlick case itself, the West Virginia high court wrote that "the Attorney General may proceed in equity on behalf of the public to abate the nuisance, if it be one. Whether it be a criminal nuisance or not is wholly immaterial. If it is indictable as a crime, it does not bar the remedy in equity, because the citizen and the general public have an immediate right to the enjoyment of the thing interfered with. A criminal prosecution is inadequate in such case, because it does not prevent the doing of the unlawful act. It may ultimately correct the wrong, but, while the process of

correction is going on, the public is deprived of an important and valuable right, wherefore the injury is irreparable. In such cases it is not the criminality of the act that gives jurisdiction in equity, but the deprivation of personal and property rights interfered with, injured, destroyed, or taken away by the unlawful act." (State v. Ehrlick, supra, 65 W.Va. 700, 64 S.E. 935, 939; see also People v. Seccombe, supra, 103 Cal.App. 306, 314, 284 P. 725 [relying on State v. Ehrlick, supra, 65 W.Va. 700, 64 S.E. 935, 939]; Weis v. Superior Court (1916) 30 Cal.App. 730, 732, 159 P. 464; People v. Steele (1935) 4 Cal.App.2d 206, 208, 40 P.2d 959; Commonwealth v. McGovern (1903) 116 Ky. 212, 75 S.W. 261, 264; Nathan H. Schur, Inc. v. City of Santa Monica (1956) 47 Cal.2d 11, 300 P.2d 831 (semble); Armory Park v. Episcopal Community Services (1985) 148 Ariz. 1, 10, 712 P.2d 914, 923 ["We hold, therefore, that conduct which unreasonably ... interferes with the public health, safety, peace, comfort or convenience is a public nuisance ... even if that conduct is not specifically prohibited by the criminal law."]; cf. Rest.2d Torts, § 821B, com. d, p. 89 ["This [statement, i.e., that 'in order to be treated as a public nuisance, conduct must have been already proscribed by the state as criminal'] is too restrictive.... [T]here is clear recognition that a defendant need not be subject to criminal responsibility."].)

[9] The Court of Appeal was thus partly accurate in reasoning that "a public nuisance is always a criminal offense," for indeed it is. (See Pen.Code, § 372 [maintenance of a public nuisance is a misdemeanor].) It is the corollary to that proposition--that the superior court's injunction was valid only to the extent that it enjoined conduct that is independently proscribed by the Penal Code--that is flawed. Acts or conduct which qualify as *1109 public nuisances are enjoined as civil wrongs or prosecutable as criminal misdemeanors, a characteristic that derives not from their status as independent crimes, but from their inherent tendency to injure or interfere with the community's exercise and enjoyment of rights common to the public. It is precisely this recognition of--and willingness to vindicate--the value of community and the collective interests it furthers rather than to punish criminal acts that lie at the heart of the public nuisance as an equitable doctrine. We will return to this notion of the community and its collective

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values as the touchstone of the public nuisance doctrine later, when we assess the sufficiency of the superior court's interlocutory decree in light of the requirements laid down in *People v. Lim*, supra, 18 Cal.2d 872, 118 P.2d 472. Before doing so, however, we first consider defendants' challenges to the constitutionality of the preliminary injunction, challenges that the Court of Appeal found persuasive.

II. Defendants' Constitutional Challenges To Provisions (a) And (k) Of The Preliminary Injunction

A. Standard Of Review

[10][11] At this initial stage in the proceeding, the scope of our inquiry is narrow. We review an order granting a preliminary injunction under an abuse of discretion standard. (*King v. Meese* (1987) 43 Cal.3d 1217, 1227-1228, 240 Cal.Rptr. 829, 743 P.2d 889; *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286, 219 Cal.Rptr. 467, 707 P.2d 840.) Review is confined, in other words, to a consideration whether the trial court abused its discretion in " 'evaluat[ing] two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is ***289 **608 the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued.' " (*Cohen v. Board of Supervisors*, supra, 40 Cal.3d at p. 286, 219 Cal.Rptr. 467, 707 P.2d 840.) And although we will not ordinarily disturb the trial court's ruling absent a showing of abuse, an order granting or denying interlocutory relief reflects nothing more than the superior court's evaluation of the controversy on the record before it at the time of its ruling; it is not an adjudication of the ultimate merits of the dispute. (*Ibid*; see also *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1994) 7 Cal.4th 860, 879, fn. 10, 30 Cal.Rptr.2d 629, 873 P.2d 1224; *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527, 67 Cal.Rptr. 761, 439 P.2d 889.)

*1110 B. First Amendment Challenges

1. Associational Interests

The Court of Appeal held that paragraph (a) of the preliminary injunction, enjoining defendants from "Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant ... or with any other known 'VST' (Varrio Sureno Town or Varrio Sureno Treces) or 'VSL' (Varrio Sureno Locos) member," was invalid on associational grounds; that is, the provision infringed defendants' right to associate with fellow gang members, a right protected by the First Amendment. We disagree.

[12][13] In a series of opinions, the United States Supreme Court has made it clear that, although the Constitution recognizes and shields from government intrusion a limited right of association, it does not recognize "a generalized right of 'social association.' " (*Dallas v. Stanglin* (1989) 490 U.S. 19, 25, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18.) As we explain, neither does the First Amendment protect the collective public activities of the gang members within the four-block precinct of Rocksprings, activities directed in the main at trafficking in illegal drugs and securing control of the community through systematic acts of intimidation and violence.

[14] The high court has identified two kinds of associations entitled to First Amendment protection--those with an "intrinsic" or "intimate" value, and those that are "instrumental" to forms of religious and political expression and activity. Of the first, the court has said that it is "central to the concept of liberty" and is exemplified by personal affiliations that "attend the creation and sustenance of a family--marriage ...; the raising and education of children [citation]; and cohabitation with one's relatives." (*Roberts v. United States Jaycees* (1984) 468 U.S. 609, 619, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462.) Such affiliations, the court has remarked, "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things ... they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." (*Id.*, at p. 620, 104 S.Ct. at 3250.)

The second kind of association that merits First

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Amendment protection is composed of groups whose members join together for the purpose of pursuing "a wide variety of political, social, economic, educational, religious, and *1111 cultural ends." (Roberts v. United States Jaycees, supra, 468 U.S. at p. 622, 104 S.Ct. at p. 3252.) This instrumental right of protected association is directly related to the "individual's freedom to speak, to worship, and to petition the government for the redress of grievances" because, without it, these liberties themselves could scarcely exist, much less thrive. (Ibid.)

It is evident that whatever else it may be in other contexts, the street gang's conduct in Rocksprings at issue in this case fails to qualify as either of the two protected forms of association. Manifestly, in its activities within the four-block area of Rocksprings, the gang is not an association of individuals formed "for the purpose of engaging in protected speech or religious activities." (Board of Directors of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 544, 107 S.Ct. 1940, 1945, 95 L.Ed.2d 474, italics added.) Without minimizing the value of the gang to its members ***290 **609 as a loosely structured, elective form of social association, that characteristic is in itself insufficient to command constitutional protection, at least within the circumscribed area of Rocksprings. As the court pointed out in Dallas v. Stanglin, supra, 490 U.S. at page 25, 109 S.Ct. at page 1595, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down the street or meeting one's friends at a shopping mall--but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."

Defendants contend that if there is any doubt that association with other gang members "is afforded constitutional protection, the Supreme Court put the notion to rest in Dawson v. Delaware (1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309] ... where it held that association with a prison gang, the Aryan Brotherhood, is constitutionally protected." This argument misreads the court's opinion in Dawson. There, the court reversed a penalty jury's capital verdict on the ground that an abbreviated stipulation of the parties--reciting that the " 'Aryan Brotherhood refers to a white racist prison gang' " which originated in California in the 1960's " 'and now exist[s] in many state prisons including Delaware' " --lacked any relevance to the capital

sentencing issue before the jury. (Dawson v. Delaware (1992) 503 U.S. 159, 162, 165, 112 S.Ct. 1093, 1096, 1097-98, 117 L.Ed.2d 309.) Far from holding that "association with a prison gang is constitutionally protected," the vice condemned by the court in Dawson was the very "narrowness of the stipulation [that] left the Aryan Brotherhood evidence totally without relevance to Dawson's sentencing proceeding." (Ibid.)

[15] Nor do the circumstances in this case implicate the other associational form worthy of First Amendment protection--personal affiliations whose characteristics include "relative smallness, a high degree of selectivity in *1112 decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." (Roberts v. United States Jaycees, supra, 468 U.S. at p. 620, 104 S.Ct. at p. 3250.) We may assume the members of defendants' gang share common values and that group membership and the affiliations it engenders can be a source of personal "enrichment" to some or all of them. Defendants' organization may thus share one or two of the characteristics that define intrinsically valuable and constitutionally protected associations, lying somewhere this side of the anonymity of the Jaycees or a teenage dance hall. The constitutionally significant factors on which associational protection depends, however, are not ones to be mechanically applied and ticked off. At bottom, protected rights of association in the intimate sense are those existing along a narrow band of affiliations that permit deep and enduring personal bonds to flourish, inculcating and nourishing civilization's fundamental values, against which even the state is powerless to intrude.

[16][17] Freedom of association, in the sense protected by the First Amendment, "does not extend to joining with others for the purpose of depriving third parties of their lawful rights." (Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, ---, 114 S.Ct. 2516, 2530, 129 L.Ed.2d 593, hereafter Madsen.) We do not, in short, believe that the activities of the gang and its members in Rocksprings at issue here are either "private" or "intimate" as constitutionally defined; the fact that defendants may "exercise some discrimination in choosing associates [by] a selective process of inclusion and exclusion" (New York State Club Assn. v. New York City (1988) 487 U.S. 1, 13, 108 S.Ct. 2225, 2234, 101 L.Ed.2d 1) does not

mean that the association or its activities in Rocksprings is one that commands protection under the First Amendment.

2. "Overbreadth" Challenge

The Court of Appeal also invalidated paragraph (a) of the trial court's preliminary decree on the ground that these provisions were "overbroad," as that term has come to be understood and applied in the context of First Amendment litigation. It acknowledged that the reach of the overbreadth doctrine has been cabined in a series of high court opinions, e.g., *New York State Club Assn. v. New York City*, supra, 487 U.S. at ***291 **610 page 11, 108 S.Ct. at page 2233 (doctrine is a narrow exception and requires finding of " 'a realistic danger that the statute itself will significantly compromise a recognized First Amendment protection of parties not before the Court' "); *Broadrick v. Oklahoma* (1973) 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (overbreadth doctrine is "strong medicine" that is used "sparingly and only as a last resort"); and *Wisconsin v. Mitchell* (1993) 508 U.S. *1113 476, 487-88, 113 S.Ct. 2194, 2201, 124 L.Ed.2d 436. However, it did not consider one crucial fact: no one, apart from defendants themselves, is or can be subject to the prophylactic relief granted by the trial court.

[18][19] As we explain, the foundation of the overbreadth doctrine is the inhibitory effect a contested statute may exert on the freedom of those who, although possibly subject to its reach, are not before the court. It is out of a generous concern for a statute's effects on the activities of such third persons that the high court has permitted facial challenges on behalf of those who are not parties to the litigation. Thus, even litigants whose activities are not constrained by the statute at issue and who might, as the court wrote of the permit requirement in *Thornhill v. Alabama* (1939) 310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093, "have had a license for the asking may ... call into question the whole scheme of licensing when ... prosecuted for failure to procure it."

[20] Defendants do not attack the public nuisance statute itself, claiming that it suffers from the vice of overbreadth; instead, they attack the terms of the interlocutory decree as being unconstitutionally overbroad. The source of the high court's concern

in the overbreadth cases, however, and the foundation of the doctrine itself, is the perceived danger to the constitutionally protected interests of those who, because they are not before the court, lack a judicial forum in which to litigate claims that a statute "sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech" (*Thornhill v. Alabama*, supra, 310 U.S. at p. 97, 60 S.Ct. at p. 742), and thus "may inhibit the constitutionally protected speech of [such] third parties" (*City Council of Los Angeles v. Taxpayers for Vincent* (1984) 466 U.S. 789, 798, 104 S.Ct. 2118, 2125, 80 L.Ed.2d 772).

It is the absent members of this unrepresented class who, "sensitive to the perils posed by ... indefinite language, avoid the risk ... by restricting their conduct to that which is unquestionably safe" (*Baggett v. Bullitt* (1964) 377 U.S. 360, 372, 84 S.Ct. 1316, 1323, 12 L.Ed.2d 377), for whom the overbreadth doctrine was fashioned. (See also *Broadrick v. Oklahoma*, supra, 413 U.S. at p. 612, 93 S.Ct. at p. 2916 ["Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."]; *In re M.S.* (1995) 10 Cal.4th 698, 709, 42 Cal.Rptr.2d 355, 896 P.2d 1365 ["litigants may challenge a statute not because their own rights of free expression are violated, but because the very existence of an overbroad statute may cause others not before the court to refrain from constitutionally protected expression"].)

*1114 The high court recently identified a related and constitutionally significant difference between injunctions and statutes in the context of protected speech claims. In *Madsen*, supra, 512 U.S. 753, 114 S.Ct. 2516, the court pointed out that the narrow and particularized focus inherent in the nature of the injunction as an equitable remedy is also significant in evaluating the contention that features of a given decree suffer from constitutional overbreadth. Like the injunction in *Madsen*, the trial court's interlocutory decree here does not embody the broad and abstract commands of a statute. Instead, it is the product of a concrete judicial proceeding prompted by particular events--inimical to the well-being of the residents of the

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community of Rocksprings--that led to a specific request by the City for preventive relief.

As with any injunction, the preliminary decree here is addressed to identifiable parties and to specific circumstances; the enjoined acts are particularly described in the trial court's order. Unlike the pervasive **611 ***292 "chill" of an abstract statutory command that may broadly affect the conduct of an absent class and induce self-censorship, the decree here did not issue until after these defendants had had their day in court, a procedure that assures " 'a prompt and carefully circumscribed determination of the issue.' " (Kingsley Books, Inc. v. Brown (1957) 354 U.S. 436, 442, 77 S.Ct. 1325, 1328, 1 L.Ed.2d 1469.) In short, as one commentator has pointed out, "An injunction may be more effective at stopping the activity at which it is aimed, but it is also more narrowly confined. There is less risk of deterring activities beyond the adjudicated target of suppression--activities plainly outside the injunctive ban but arguably within the necessarily more general prohibition of a penal law." (Jefferies, Rethinking Prior Restraint (1983) 92 Yale L.Rev. 409, 429.)

Manifestly, the paradigm for an overbreadth challenge is not present in this case. Here there is no possibility that the concerns motivating the high court in its classic overbreadth opinions--the "chilling effect" of abstract, broadly framed statutes on the conduct of those not before the court (see, e.g., Dombrowski v. Pfister (1965) 380 U.S. 479, 487, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22)--could place at risk any protected conduct other than that of defendants themselves. The only individuals subject to the trial court's interlocutory decree in this case, including those features contested as "overbroad," are named parties to this action; their activities allegedly protected by the First Amendment have been and are being aggressively litigated. There is accordingly no basis, legal or factual, for the professed concern that protected speech or communicative conduct by anyone other than defendants might be endangered by the terms of the trial court's injunction. In that sense, defendants' claim of overbreadth, made with respect to paragraph (a) of the preliminary injunction, is not cognizable.

*1115 Our conclusion with respect to defendants' "overbreadth" claim does not mean they may not be

heard to complain that the provisions of the preliminary injunction--as applied to them and their conduct in Rocksprings--are broader than constitutionally sustainable. Rather, in this case that contention falls under the standard formulated by the court in Madsen, supra, 512 U.S. 753, 114 S.Ct. 2516--the requirement that the superior court's decree burden no more of defendants' speech than necessary to serve the significant governmental interest at stake. We will consider that distinct claim separately, when we come to evaluate the sufficiency of the injunction under the standard announced by the court in Madsen. (See, post, at pp. 295-298 of 60 Cal.Rptr.2d, at pp. 614-617 of 929 P.2d.)

C. Defendants' Fifth Amendment "Void-For-Vagueness" Challenge To Provisions (a) And (k)

[21] We consider next the claim of defendants that provisions (a) and (k) of the interlocutory injunction are "void for vagueness." (See, e.g., Note, The Void-for-Vagueness Doctrine In the Supreme Court (1960) 109 U.Pa.L.Rev. 67.) Here again, the Court of Appeal was persuaded of the merits of defendants' constitutional challenge to the preliminary decree, ruling that provisions (a) and (k) were unconstitutionally vague and thus unenforceable. Although, as we pointed out in Tobe v. City of Santa Ana (1995) 9 Cal.4th 1069, 1109, 40 Cal.Rptr.2d 402, 892 P.2d 1145, "[t]he concepts of vagueness and overbreadth are related," there are important differences. "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." (Grayned v. City of Rockford (1972) 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222, fn. omitted.)

[22][23] Unlike the doctrine of overbreadth, which focuses on the impact of a statute on the conduct of persons not before the court, the claim that a law is unconstitutionally vague is not dependent on the interests of absent third parties. Instead, the underlying concern is the core due process requirement of adequate notice. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (Lanzetta v. New Jersey (1939) 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, ***293 fn. omitted; see also People v.

(Cite as: 14 Cal.4th 1090, *1115, 929 P.2d 596, **611, 60 Cal.Rptr.2d 277, ***293)

Heitzman (1994) 9 Cal.4th 189, 199-200, 37 Cal.Rptr.2d 236, 886 P.2d 1229.) The operative corollary is that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (Connally v. General Construction Co. (1926) 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322.)

*1116 [24] In its more recent applications of the vagueness doctrine, the high court has also expressed a concern for the potential for arbitrary and discriminatory enforcement inherent in vague statutes. (See, e.g., Smith v. Goguen (1974) 415 U.S. 566, 574, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 ["We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement. (Fn. omitted.)"]; Kolender v. Lawson (1983) 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 [doctrine seeks to avoid "arbitrary and discriminatory enforcement."].) Thus, a law that is "void for vagueness" not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." (Grayned v. City of Rockford, supra, 408 U.S. at pp. 108-109, 92 S.Ct. at p. 2299, fn. omitted.)

[25] The scope of permissible challenges to a law based on grounds of vagueness differs in another important respect from challenges based on overbreadth. While a claim of overbreadth may succeed if it is shown that the law at issue is "substantially overbroad," that is, affects more than a marginal group of those potentially subject to its sweep (Broadrick v. Oklahoma, supra, 413 U.S. at p. 615, 93 S.Ct. at pp. 2917-18), a claim that a law is unconstitutionally vague can succeed only where the litigant demonstrates, not that it affects a substantial number of others, but that the law is vague as to her or "impermissibly vague in all of its applications." (Hoffman Estates v. Flipside, Hoffman Estates (1982) 455 U.S. 489, 497-498,

102 S.Ct. 1186, 1192, 71 L.Ed.2d 362, italics added; see also Parker v. Levy (1974) 417 U.S. 733, 755-757, 94 S.Ct. 2547, 2561-62, 41 L.Ed.2d 439; Tribe, American Constitutional Law (2d ed. 1988) § 12-32, p. 1036.)

[26][27] We begin our consideration of defendants' vagueness claims with a pair of principles endorsed by the United States Supreme Court as reliable guides for applying the doctrine in particular cases. The first principle is derived from the concrete necessity that abstract legal commands must be applied in a specific context. A contextual application of otherwise unqualified legal language may supply the clue to a law's meaning, giving facially standardless language a constitutionally sufficient concreteness. Indeed, in evaluating challenges based on claims of vagueness, the court has said "[t]he particular context is all important." (American Communications Assn. v. Douds (1950) 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925.) We recently made the *1117 same point in Tobe v. City of Santa Ana, supra, 9 Cal.4th at page 1107, 40 Cal.Rptr.2d 402, 892 P.2d 1145, when we said the "Court of Appeal erred in holding that the ordinance is unconstitutionally vague. The terms which the Court of Appeal considered vague are not so when the purpose clause of the ordinance is considered and the terms are read in that context as they should be." (Italics added.) This observation is particularly apropos here.

[28] The second guiding principle is the notion of "reasonable specificity" (Coates v. City of Cincinnati (1971) 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214, italics added), or "[r]easonable certainty." (People v. Victor (1965) 62 Cal.2d 280, 300, 42 Cal.Rptr. 199, 398 P.2d 391, italics added; see also In re Marriage of Walton (1972) 28 Cal.App.3d 108, 116, 104 Cal.Rptr. 472 [statute will not be held void for vagueness "if any reasonable and practical construction can be given its language or if its terms may be ***294 **613 made reasonably certain by reference to other definable sources"].) As the high court has pointed out, "few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limits the specificity with which legislators can spell out prohibitions. Consequently, no more than a

reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." (*Boyce Motor Lines v. United States* (1952) 342 U.S. 337, 340, 72 S.Ct. 329, 331, 96 L.Ed. 367.) In short, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." (*Grayned v. City of Rockford*, supra, 408 U.S. at p. 110, 92 S.Ct. at p. 2300, fn. omitted.)

In the Court of Appeal's view, provision (a)'s prohibition against associating with "any other known 'VST' ... or 'VSL' member" might apply to a circumstance in which a defendant was engaged in one of the prohibited activities with someone known to the police but not known to him to be a gang member. According to the Court of Appeal, such indefiniteness presented "a classic case of vagueness." We agree that in such a hypothetical case, the City would have to establish a defendant's own knowledge of his associate's gang membership to meet its burden of proving conduct in violation of the injunction. Far from being a "classic" instance of constitutional vagueness, however, we think the element of knowledge is fairly implied in the decree. To the extent that it might not be, we are confident that the trial court will, as the Court of Appeal did in *People v. Garcia* (1993) 19 Cal.App.4th 97, 103, 23 Cal.Rptr.2d 340, impose such a limiting construction on paragraph (a) by inserting a knowledge requirement should an attempt be made to enforce that paragraph of the injunction. With *1118 that minor emendation, the text of provision (a) passes scrutiny under the vagueness doctrine.

[29] The Court of Appeal found paragraph (k), enjoining defendants from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings' ... known to have complained about gang activities [,]" impermissibly vague in two respects. First, like paragraph (a), it speaks of persons "known to have complained about gang activities," without indicating how or even whether a defendant is to be charged with this knowledge. The discussion with respect to the knowledge requirement of provision (a) of the decree applies equally to this provision and, so construed, it too passes muster.

Second, according to the Court of Appeal, provision (k) fails to define sufficiently the words "confront," "annoy," "provoke," "challenge," or "harass"; it thus fails to provide a standard of conduct for those whose activities are proscribed. Yet similar words were upheld against claims of vagueness by the Supreme Court in *Madsen*, supra, 512 U.S. 753, 114 S.Ct. 2516. There, the high court affirmed injunctive relief prohibiting petitioners from engaging in similar--if not more broadly phrased--conduct: "'intimidating, harassing, touching, pushing, shoving, crowding, or assaulting persons entering or leaving.'" (*Id.*, at p. ---, 114 S.Ct. at p. 2522.) We find nothing in the context of this case, factually similar in many respects to the situation before the court in *Madsen*, that makes the same words, sufficiently definite there, somehow constitutionally infirm here.

Here again, "[t]he particular context is all important." (*American Communications Assn. v. Douds*, supra, 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925.) The words of provision (k) which the Court of Appeal considered irretrievably vague are simply not, at least in the constitutional sense, when the objectives of the injunction are considered and the words of the provision are read in context. Finally, the declarations filed by the City in support of preliminary relief leave little doubt as to what kind of conduct the decree seeks to enjoin. One Rocksprings resident recounted an incident in which gang members had threatened to cut out the tongue of her nine-year-old daughter if she talked to the police; she stated that other residents had been threatened as well. Another **614 ***295 resident reported her neighbor's property had been vandalized and the resident threatened after complaining to police that gang members had urinated in her garage. A police officer declared Rocksprings residents had told him gang members confront and threaten them with physical violence when asked to leave residential property. Others refused to furnish declarations, fearing for their lives if any gang member should discover their *1119 identities. We conclude neither of the two provisions should have been invalidated by the Court of Appeal on vagueness grounds.

III. Claim That The Step Act Is The Exclusive Means Of Abating Gang Behavior As A Public Nuisance

[30] Defendants contend that the STEP Act (Pen.Code, § 186.20 et seq.) is the exclusive means of enjoining criminal street gangs and preempts use of the general public nuisance statutes. We disagree. By express provision, the act is not the exclusive remedy for abating gang activity constituting a public nuisance. Under the STEP Act, a building or place used by members of a criminal street gang for specified illegal activities is declared a nuisance per se: "Every building or place used by members of a criminal street gang for the purpose of the commission of [specified] offenses ... and every building or place wherein or upon which that criminal conduct by gang members takes place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance." (Pen.Code, § 186.22a, subd. (a), italics added.) The act goes on to provide that "[n]othing in this chapter shall preclude any aggrieved person from seeking any other remedy provided by law." (Id., subd. (d).) It thus plainly contemplates remedies in addition to the act to abate criminal gang activities, including those made available by the general public nuisance statutes.

[31] In this case, the City expressly sought equitable relief, not under the STEP Act, but under the general public nuisance statutes. [FN4] Accordingly, we need not determine whether some or all of the conduct enjoined would also fall within the scope of the act or whether any of the defendants could be enjoined under its provisions.

FN4. Defendants concede that the People did not purport to seek injunctive relief under the STEP Act, but invoked the general public nuisance statutes; they argue, however, that the superior court erroneously relied on the STEP public nuisance provision. A reviewing court will uphold a judgment if it is correct for any reason " 'regardless of the correctness of [its] grounds....' [Citation.] 'It is judicial action and not judicial reasoning which is the subject of review....' " (United Pacific Ins. Co. v. Hanover Ins. Co. (1990) 217 Cal.App.3d 925, 933, 266 Cal.Rptr. 231, fn. omitted.)

IV. Evaluating The Limits Of The Preliminary Injunction

A. Substantive Limits

Having concluded that provisions (a) and (k) of the preliminary injunction are not unconstitutionally vague or overbroad and do not infringe defendants' constitutionally protected associational interests, we must complete our *1120 inquiry by considering the limitations on the scope of the interlocutory decree as a matter of both public nuisance and constitutional law. We must ask, in other words, two questions: First, whether the activity enjoined under these two provisions reasonably falls within the statutory definition of a public nuisance as construed in *People v. Lim*, supra, 18 Cal.2d 872, 878, 118 P.2d 472, and second, whether the two provisions comply with the constitutional standard announced by the Supreme Court in *Madsen*, supra, 512 U.S. 753, 114 S.Ct. 2516, that is, whether they "burden no more speech than necessary to serve a significant governmental interest." (Id., at p. ----, 114 S.Ct. at p. 2525.)

[32] That the conduct enjoined by the trial court meets the statutory definition of a public nuisance is clear from the account of conditions in Rocksprings recited at the outset of this opinion. To constitute a public nuisance under our Civil Code, conduct must be "injurious to health, ... indecent or offensive to the senses, ... an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct[] free passage or ***296 **615 use, in the customary manner, of any ... public park, square, street or highway." (Civ.Code, § 3479.) In addition, the conduct must affect "an entire community or neighborhood, or any considerable number of persons." (Civ.Code, § 3480.)

The many declarations filed with the superior court by the City in support of its request for injunctive relief meet these criteria. Gang members not only routinely obstruct Rocksprings residents' use of their own property--by such activities as dealing drugs from apartment houses, lawns, carports, and even residents' automobiles--but habitually obstruct the "free passage or use, in the customary manner," of the public streets of Rocksprings. It is likewise clear from this record that the conduct of gang members qualifies as "indecent or offensive to the senses" of reasonable area residents: the hooligan-like atmosphere that prevails night and day in Rocksprings--the drinking, consumption of illegal drugs, loud talk, loud music, vulgarity, profanity, brutality, fistfights and gunfire--

-easily meet the statutory standard. Nor is it difficult to see how threats of violence to individual residents and families in Rocksprings, murder, attempted murder, drive-by shootings, assault and battery, vandalism, arson and associated crimes obstruct the free use of property and interfere with the enjoyment of life of an entire community.

[33] Do provisions (a) and (k) of the superior court's preliminary injunction meet the constitutional test formulated by the Supreme Court in *Madsen*, supra, 512 U.S. 753, ---, 114 S.Ct. 2516, 2525 by "burden[ing] no more speech than necessary to serve" an important governmental interest? We *1121 conclude both provisions satisfy the constitutional test. As noted, provision (a) effectively forbids gang members from engaging in any form of social intercourse with anyone known to them to be a gang member "anywhere in public view" within the four-block area of Rocksprings. The provision's ban on all forms of association--"standing, sitting, walking, driving, gathering or appearing anywhere in public view"--does not violate the *Madsen* standard merely because of its breadth. The provision seeks to ensure that, within the circumscribed area of Rocksprings, gang members have no opportunity to combine.

It is the threat of collective conduct by gang members loitering in a specific and narrowly described neighborhood that the provision is sensibly intended to forestall. Given that overriding purpose, the prohibitions enumerated in provision (a) are not easily divisible. Permitting two or more gang members to drive together but not sit, or to stand together but not walk, would obviously defeat the core purpose behind the proscription. Moreover, given the factual showing made by the City in support of preliminary relief--the carnival-like atmosphere of collective mayhem described above (see, ante, at pp. 282-283, 296 of 60 Cal.Rptr.2d, at pp. 601-602, 615 of 929 P.2d)--we cannot say that the ban on any association between gang members within the neighborhood goes beyond what is required to abate the nuisance.

The effect of provision (a)'s ban on defendants' protected speech is minimal. To judge from the evidence placed before the superior court, the gangs appear to have had no constitutionally protected or even lawful goals within the limited territory of Rocksprings. So far as the record before the trial

court shows, the gangs and their members engaged in no expressive or speech-related activities which were not either criminally or civilly unlawful or inextricably intertwined with unlawful conduct. According to the declaration of Officer Niehoff, an eight-year veteran of the San Jose Police Department: "Illegal drug dealing by Sureno gang members, including VSL/VST, is a common practice, and the gang entity provides protection to the individual members, allowing them to establish areas where they can conduct their illegal activities. The protective shield of the gang has allowed individual members to commit crimes such as narcotic trafficking that result in personal gain. These crimes are committed in association with the gang because of the protection offered to the members by virtue of their gang affiliation. In the Rocksprings area, the fact that numerous narcotics transactions occurred is a direct result of the protective shield provided by ***297 **616 VSL/VST. Individuals who claimed membership in VSL or VST were at liberty to deal drugs in a veritable 'safe' zone."

Does provision (a)'s prohibition on a gang member associating with even a single fellow gang member within Rocksprings transgress the test of *1122 *Madsen*, supra, 512 U.S. 753, 114 S.Ct. 2516? Could not the restriction be limited to barring associations between, say, three other gang members? Two gang members? On such a highly particular question, we are compelled to defer to the superior knowledge of the trial judge, who is in a better position than we to determine what conditions "on the ground" in Rocksprings will reasonably permit. Outside the perimeter of Rocksprings, the superior court's writ does not run; gang members are subject to no special restrictions that do not affect the general population. Given the limited area within which the superior court's injunction operates, the absence of any showing of constitutionally protected activity by gang members within that area, the aggravated nature of gang misconduct, the fact that even within Rocksprings gang members may associate freely out of public view, and the kind of narrow yet irreducible arbitrariness that inheres in such line-drawing, we conclude that this aspect of provision (a) passes muster as well under the standard of *Madsen*, supra, 512 U.S. 753, 114 S.Ct. 2516.

[34][35] We reach a similar resolution with

respect to provision (k). That provision forbids those subject to the injunction from confronting, intimidating or similarly challenging--including assaulting and battering--residents of Rocksprings, "or any other persons" whom gang members know have complained about their conduct within the neighborhood. It has long been the rule, of course, that physical violence and the threat of violence are not constitutionally protected: "The First Amendment does not protect violence." (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 916, 102 S.Ct. 3409, 3427, 73 L.Ed.2d 1215, hereafter *Claiborne Hardware*.) Because the conduct proscribed by provision (k) consists of threats of violence and violent acts themselves, it "fall[s] outside the protection of the First Amendment because [such acts] coerce by unlawful conduct, rather than persuade by expression, and thus play no part in the 'marketplace of ideas.' As such, they are punishable because of the state's interest in protecting individuals from the fear of violence, the disruption fear engenders and the possibility the threatened violence will occur." (*In re M.S.*, supra, 10 Cal.4th 698, 714, 42 Cal.Rptr.2d 355, 896 P.2d 1365, italics in original.) "[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment." (*Wisconsin v. Mitchell* (1993) 508 U.S. 476, 484, 113 S.Ct. 2194, 2199, 124 L.Ed.2d 436.) By the same token, "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution." (*Milk Wagon Drivers v. Meadowmoor Dairies* (1941) 312 U.S. 287, 293, 61 S.Ct. 552, 555, 85 L.Ed. 836.)

B. Those Bound By The Preliminary Injunction

[36] Defendants contend that they may not be bound by the injunction except on proof that each possessed "a specific intent to further an unlawful *1123 aim embraced by [the gang]." The quoted language is the test formulated by the United States Supreme Court in *Claiborne Hardware*, supra, 458 U.S. at page 925, 102 S.Ct. at page 3432, as being required to sustain damages liability against individual members of a group. *Claiborne Hardware* is distinguishable on its facts. Defendants there were members of a local chapter of a national civil rights organization. Each was held liable in state court proceedings for business losses suffered

by the plaintiff merchants over the seven-year duration of a civil rights boycott sponsored by the organization. Although the boycott was for the most part peaceable and law abiding, there were sporadic incidents of violence by some members, resulting in economic losses to the plaintiffs.

Vacating the state court damages award, the high court held that "mere association with [the] group--absent a specific intent to further an unlawful aim embraced by that group--is an insufficient predicate for liability." (*Claiborne Hardware*, supra, 458 U.S. ***298 **617 at pp. 925-926, 102 S.Ct. at p. 3432.) The state courts, the Supreme Court reasoned, had "relied on isolated acts of violence during a limited period to uphold [plaintiffs'] recovery of all business losses sustained over a 7-year span.... The court's judgment 'screens reality' and cannot stand." (*Id.*, at p. 924, 102 S.Ct. at p. 3431, italics and fns. omitted.) Unlike the record in *Claiborne Hardware*, supra, 458 U.S. 886, 102 S.Ct. 3409, the evidence submitted by the City in support of the preliminary injunction here presents a portrait of gang affiliated youths whose collective activities, within the four-block area of Rocksprings, create and sustain the "urban war zone" described at the outset of this opinion. The precedents that control the reach of injunctive relief in such circumstances are *Milk Wagon Drivers v. Meadowmoor Dairies*, supra, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, and *Madsen*, supra, 512 U.S. 753, 114 S.Ct. 2516.

In *Milk Wagon Drivers v. Meadowmoor Dairies*, supra, 312 U.S. 287, 291, 61 S.Ct. 552, 554, 85 L.Ed. 836, (hereafter *Milk Wagon Drivers*), the trial court issued a preliminary injunction "restraining all union conduct, violent and peaceful," arising out of a labor dispute. The union protested, arguing the decree violated the First Amendment rights of its members by enjoining acts of peaceful picketing. The Illinois Supreme Court affirmed the broad scope of the interlocutory decree and directed that a permanent injunction, restraining peaceful as well as violent acts by union members, be entered as well. The United States Supreme Court upheld the injunction, framing the case as one where "the question ... is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed." (*Id.*, at p. 292, 61 S.Ct. at

p. 554.)

As in *Milk Wagon Drivers*, supra, 312 U.S. 287, 61 S.Ct. 552, here "the injunction is confined," encompassing conduct occurring within a narrow, four-block residential neighborhood. As in *Milk Wagon Drivers*, it "deals with this narrow area" *1124 precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity ... [and] ... must be read in the context of its circumstances." (Id., at p. 298, 61 S.Ct. at p. 557.) As in *Milk Wagon Drivers*, the high court in *Madsen*, supra, 512 U.S. 753, ---, 114 S.Ct. 2516, 2522, upheld an injunction directed against "congregating, picketing, patrolling, demonstrating or entering" within 36 feet of a health clinic in which therapeutic abortions were performed. That provision of the decree, along with another setting restrictions on noise, was directed not only at the anti-abortion organizations themselves, but at allied organizations and "their officers, agents, members, employees and servants, and ... all persons acting in concert or participation with them, or on their behalf." (Id. at p. ---, fn. 1, italics added 114 S.Ct. at p. 2521, fn. 1.)

[37] Both *Milk Wagon Drivers*, supra, 312 U.S. 287, 61 S.Ct. 552, and *Madsen*, supra, 512 U.S. 753, 114 S.Ct. 2516, thus stand for the proposition that, in a proper case, an organization and its individual members are enjoined without meeting the "specific intent to further unlawful group aims" standard applied in *Claiborne Hardware*, supra, 458 U.S. 886, 102 S.Ct. 3409. Certainly that proposition comprehends paragraphs (a) and (k) of the preliminary injunction, the only two provisions now before us. For we have already concluded that the conduct proscribed by those two provisions--appearing publicly in *Rocksprings* with others known to a defendant to be gang members, and harassing area residents known to a defendant to have complained to public authorities about gang activities in *Rocksprings*--are activities integral to the public nuisance that afflicts *Rocksprings* and do not implicate protected First Amendment conduct. (See *Claiborne Hardware*, supra, at pp. 918-920, 102 S.Ct. at pp. 3428-29.)

That being the case, the interim relief entered by the superior court is indistinguishable from time-honored equitable practice applicable to labor

unions, abortion protesters or other identifiable groups. Because such groups can act only through the medium of their membership, "... it has been a ***299 **618 common practice to make the injunction run also to classes of persons through whom the enjoined person may act, such as agents, servants, employees, aiders [and] abettors...." (*Berger v. Superior Court* (1917) 175 Cal. 719, 721, 167 P. 143; see also *In re Lennon* (1897) 166 U.S. 548, 554, 17 S.Ct. 658, 660, 41 L.Ed. 1110 ["To render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice."]; cf. Fed.Rules Civ.Proc., rule 65(d), 28 U.S.C. [injunction "is binding only upon the parties to the action, their officers, agents, servants, employees, *1125 and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise"].)

We see nothing in this case--where instead of naming the gang organizations themselves as parties, the City named as individual defendants all 38 gang members it was able to identify--that removes it from the usual rule applied in *Berger v. Superior Court*, supra, 175 Cal. 719, 167 P. 143, and many other cases. The City's evidence in support of preliminary equitable relief demonstrated that it was the gang itself, acting through its membership, that was responsible for creating and maintaining the public nuisance in *Rocksprings*. Because the City could have named the gangs themselves as defendants and proceeded against them, its decision to name individual gang members instead does not take the case out of the familiar rule that both the organization and the members through which it acts are subject to injunctive relief.

For present purposes, it is enough to observe that there was sufficient evidence before the superior court to support the conclusions that the gang and its members present in *Rocksprings* were responsible for the public nuisance, that each of the individual defendants either admitted gang membership or was identified as a gang member, and that each was observed by police officials in the *Rocksprings* neighborhood. Although all but three of the eleven defendants who chose to contest entry of the preliminary injunction--Miguel Moreno, Rafael

Ruiz, and Blanca Gonzalez--were shown to have committed acts, primarily drug related, comprising specific elements of the public nuisance, such individualized proof is not a condition to the entry of preliminary relief based on a showing that it is the gang, acting through its individual members, that is responsible for the conditions prevailing in Rocksprings. Additional proceedings will be required to enforce the specific terms of the preliminary injunction. Should contempt proceedings ensue, each individual defendant will have an opportunity to contest any claim by the City that he or she has violated specific terms of the preliminary injunction.

V. Conclusion

To hold that the liberty of the peaceful, industrious residents of Rocksprings must be forfeited to preserve the illusion of freedom for those whose ill conduct is deleterious to the community as a whole is to ignore half the political promise of the Constitution and the whole of its sense. The freedom to leave one's house and move about at will, and to have a measure of personal security is "implicit in the concept of ordered liberty" enshrined in the history and basic constitutional documents of English-speaking peoples. (Wolf v. Colorado (1949) 338 U.S. 25, 27-28, 69 S.Ct. 1359, 1361-62, 93 L.Ed. 1782; Palko v. Connecticut (1937) 302 U.S. 319, 325, 58 *1126 S.Ct. 149, 152, 82 L.Ed. 288.) Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the idle, the contentious, and the brutal that government was invented.

Writing in 1834 of the events that shaped the American Revolution, Alexis De Tocqueville remarked how the American struggle for independence was uniquely shaped by "a love for law and order." In this case we consider whether, after the passage of more than two centuries, we remain free to reaffirm those fundamental values of ordered liberty. We do.

The judgment of the Court of Appeal is reversed insofar as it invalidated paragraphs (a) and (k) of the preliminary injunction and ***300 **619 concluded that defendant Blanca Gonzalez was not subject to its terms. Because our grant of review encompassed only those two of the fifteen provisions invalidated

by the Court of Appeal, we do not address any other aspect of the preliminary injunction entered by the superior court.

GEORGE, C.J., and BAXTER and WERDEGAR, JJ., concur.

KENNARD, Justice, concurring and dissenting.

I concur with the majority in upholding the preliminary injunction's paragraph (k), one of the two paragraphs at issue in this case. Paragraph (k) enjoins defendants, all of whom are members of either of two gangs (Varrio Sureno Loco (VSL) and Varrio Sureno Treces or Varrio Sureno Town (VST)), from intimidating, harassing, threatening, provoking, or assaulting persons within a four-block area of San Jose known as Rocksprings. At trial, the San Jose City Attorney presented evidence that such conduct by the named defendants and/or other VSL and VST members obstructed the "free use of property" (Civ.Code, § 3479) within the Rocksprings area "so as to interfere with the comfortable enjoyment of life or property" (ibid.), and affected "at the same time an entire community or neighborhood, or any considerable number of persons" (Civ.Code, § 3480), and accordingly constituted a public nuisance (ibid.).

Because the prohibitions set forth in paragraph (k) of the preliminary injunction have the legitimate purpose of ridding the Rocksprings neighborhood of activities that interfered with the residents' comfortable enjoyment of life or property, paragraph (k) prohibits no more conduct than is necessary to abate the nuisance at hand and therefore is constitutionally permissible. Nor is paragraph (k) unconstitutionally vague. As the majority explains (maj. opn., ante, at pp. 293-294 of 60 Cal.Rptr.2d, at pp. 612-613 of 929 P.2d), the terms of paragraph (k), read within the context of the nuisance proven by the San Jose City Attorney, provide reasonable certainty and specificity. Due process requires no more.

*1127 I do not, however, join the majority in upholding the injunction's paragraph (a), which prohibits the named defendants from being in the company of any other VSL or VST member while "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" in the four-block Rocksprings area. The evidence presented in

this case falls far short of establishing that so drastic a restriction on the rights of defendants and other VSL and VST members to peacefully assemble is necessary to abate the public nuisance.

Under the First and Fourteenth Amendments of the federal Constitution, a state may not make criminal the exercise of the right of assembly simply because its exercise may offend some people. (*Coates v. City of Cincinnati* (1971) 402 U.S. 611, 615-616, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214.) Otherwise, the *Coates* court noted, "the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension" and the law would provide "an obvious invitation to discriminatory enforcement against those whose ... ideas, ... lifestyle, or ... physical appearance is resented by the majority of their fellow citizens." (*Ibid.*)

As I explained in a dissenting opinion in *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1995) 10 Cal.4th 1009, 1032, 43 Cal.Rptr.2d 88, 898 P.2d 402, when an injunction threatens to infringe on activity protected by the First Amendment, courts "apply a more stringent test than the standard used to evaluate the constitutionality of content-neutral statutes regulating the time, place, and manner of expression." Such an injunction must be " 'couched in the narrowest terms that will accomplish the pin-pointed objective' " of the injunction." (*Id.* at p. 1033, 43 Cal.Rptr.2d 88, 898 P.2d 402, quoting *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, ----, 114 S.Ct. 2516, 2525, 129 L.Ed.2d 593.) Applying this test to paragraph (a), I am not convinced that its prohibition of any public contact between defendants and other members of the VSL and VST gangs within the four-block Rocksprings neighborhood is couched in the narrowest terms possible to accomplish the ***301 **620 injunction's goal of restoring the residents' "comfortable enjoyment of life [and] property" (Civ.Code, § 3479).

There is no doubt that gang activity presents a serious threat to the peace and security of many a neighborhood. As I pointed out recently in *People v. Gardeley* (1996) 14 Cal.4th 605, 609, 59 Cal.Rptr.2d 356, 927 P.2d 713, which upheld sentence enhancement provisions of the Street Terrorism Enforcement and Prevention Act, also known as the STEP Act, the Legislature has

expressly declared that " 'California is in a state of crisis which has been caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes *1128 against the peaceful citizens of their neighborhoods.' " (Quoting Pen.Code, § 186.21.) When gang activity becomes a public nuisance, prosecutorial agencies may seek injunctive relief to abate the nuisance. (Code Civ.Proc., § 731.) But when a constitutionally protected interest is at stake, such as the right of peaceful assembly in this case, the injunctive relief must be narrowly tailored so as to minimally infringe upon the protected interest.

Here, paragraph (a) does not satisfy this test, for it prohibits defendants from "gathering or appearing anywhere in public view" in the Rocksprings neighborhood with any other member of the VSL and VST gangs. Paragraph (k), by contrast, enjoins no more conduct than is necessary to eliminate the public nuisance in the Rocksprings area, and therefore is constitutionally permissible.

The Court of Appeal in this case invalidated both paragraph (k) and paragraph (a) of the injunction. For the reasons set forth above, I join the majority in reversing that part of the Court of Appeal's judgment invalidating paragraph (k), but, unlike the majority, I would affirm that part of the Court of Appeal's judgment invalidating paragraph (a).

CHIN, Justice, concurring and dissenting.

I am in general agreement with the majority, and in particular with its conclusion that a court may enjoin as a public nuisance acts not in themselves crimes. I disagree with the majority, however, on one narrow, but important issue. I would hold that the evidence is insufficient to enjoin two of the thirty-eight named defendants: Rafael Ruiz and Blanca Gonzalez.

The legal principle at issue is quite simple. The law requires some link between each defendant who is subject to an injunction and the problem the injunction addresses. The majority argues that in this case gang membership and a one-time presence in Rocksprings is enough to establish this link. The majority reasons the trial court could have enjoined the gangs as a whole, and therefore it could enjoin individual gang members instead. (Maj. opn., ante, at pp. 299-300 of 60 Cal.Rptr.2d, at pp. 618-619 of

(Cite as: 14 Cal.4th 1090, *1128, 929 P.2d 596, **620, 60 Cal.Rptr.2d 277, ***301)

929 P.2d.) I agree that, in an appropriate case, a court may enjoin individuals based on group membership. (Cf. *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, ----, fn. 1, 114 S.Ct. 2516, 2521, fn. 1, 129 L.Ed.2d 593 (Madsen).) But the requirement of proof is no less rigorous in such a case. "For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 920, 102 S.Ct. 3409, 3429, 73 L.Ed.2d 1215, fn. omitted (Claiborne Hardware).) I do not believe the City of San Jose (the City) has met this standard with respect to Rafael Ruiz and Blanca Gonzalez.

1129** The majority relies on *Milk Wagon Drivers Union v. Meadowmoor Dairies* (1941) 312 U.S. 287, 291, 61 S.Ct. 552, 554, 85 L.Ed. 836 (Drivers Union), in which the trial court enjoined "all union conduct." But Drivers Union did not involve the issue whether a court may enjoin individuals based on group membership. Rather, at issue was whether a court may enjoin peaceful acts of picketing when those acts are "enmeshed with contemporaneously violent conduct." (Id. at p. 292, 61 S.Ct. at p. 554.) The United States Supreme Court upheld the injunction, but emphasized the factfinder's determination that the peaceful picketing "was set in a background of violence" and therefore had the character of a threat. (Id. at p. 294, 61 S.Ct. at p. 555.) The trial court in this case made **302** ****621** no similar finding with respect to the conduct of Rafael Ruiz and Blanca Gonzalez.

The majority also relies on *Madsen*, in which the trial court enjoined members of Operation Rescue (and other organizations) from impeding access to an abortion clinic in Melbourne, Florida. The United States Supreme Court again upheld parts of the injunction, but reaffirmed the necessity of a link between each defendant and the problem the injunction addresses. (*Madsen*, supra, 512 U.S. at p. ----, fn. 3, 114 S.Ct. at p. 2524, fn. 3.) Significantly, the high court did not even discuss the evidentiary showing necessary for including individual members of an organization within the scope of an injunction. The parties apparently did not raise the issue, perhaps because the record amply supported including organization members within the scope of the injunction.

The parties did, however, raise the issue in *Claiborne Hardware*, supra, 458 U.S. 886, 102 S.Ct. 3409. *Claiborne Hardware* concerned a boycott of certain White merchants in Claiborne County, Mississippi. The boycott turned violent at times, and the Mississippi Supreme Court upheld an award of damages against, among others, certain members of the National Association for the Advancement of Colored People who supported the boycott. The United States Supreme Court agreed Mississippi could impose tort liability when violence or threats of violence resulted in business losses. (Id. at p. 916, 102 S.Ct. at p. 3427.) But the high court added: "[T]he presence of activity protected by the First Amendment imposes restraints ... on the persons who may be held accountable for those damages." (Id. at pp. 916-917, 102 S.Ct. at p. 3427.) The court concluded: "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence." (Id. at p. 920, 102 S.Ct. at p. 3429.) "[M]ere association with [a] group--absent a specific intent to further an unlawful aim embraced by that group--is an insufficient predicate for liability." (Id. at pp. 925-926, 102 S.Ct. at p. 3432.)

Drivers Union and *Madsen* are perfectly consistent with the standard the high court announced in *Claiborne Hardware*. Whether a court can enjoin ***1130** individuals based on group membership depends on the nature of the group and the implications of membership under the circumstances. In the case of some groups, membership evidences a common purpose. If one purpose or activity of the group is the creation of a public nuisance, a court may enjoin both the group and its members. But the Sureno street gangs at issue in this case have fluid membership, no organizational structure, and no express purpose except perhaps to compete with members of rival Norteno gangs. The fact that many Sureno gang members commit crimes in Rocksprings does not establish that the gangs have crime as a universal purpose, primary activity, or condition of membership. The Sureno gangs might have some subdivisions that are criminally inclined and others that are not. Obviously, courts cannot enjoin all Mexican Americans because some Mexican Americans contribute to the nuisance in Rocksprings. Gang membership is no different, absent some evidence that contributing to the

(Cite as: 14 Cal.4th 1090, *1130, 929 P.2d 596, **621, 60 Cal.Rptr.2d 277, ***302)

nuisance is an express or implied condition of membership.

The City's criteria for establishing Sureno gang membership do not include the intent to further the Sureno gangs' aims. Under these criteria, the City would consider a person to be a member of a Sureno gang if, for example, that person on two occasions wore baggy pants, blue clothes, or "Los Angeles Raiders" garments. The City also identifies persons who admit gang membership as gang members, regardless of the circumstances of their admission. As the declaration of Juan Pineda Hernandez indicates, people who are not gang members may assert membership for a variety of reasons, including youthful arrogance or a desire to be placed in protective custody. Thus, a person who merely claims membership in one of the Sureno gangs may not fully share that gang's aims. (See Burrell, Gang Evidence: Issues for Criminal Defense (1990) 30 Santa Clara L.Rev. 739, 750 ["Law enforcement officials admit that there are many different levels of [gang] membership. [Fn. omitted.] Thus, to simply identify a person as a 'gang member' conveys little about that ***303 **622 person's true level of involvement or activity. [Fn. omitted.]"].)

Accordingly, I do not agree the trial court was free to enjoin individual Sureno gang members simply because it could have enjoined the Sureno gangs as a whole. Moreover, the majority does not convince me the record in this case would have allowed the trial court to enjoin the Sureno gangs as a whole. As the majority emphasizes, the record paints an ugly picture of life in Rocksprings. Crime and contempt for authority are so pervasive that criminals would seem to be in charge. Sadly, despite all our technology and resources, utter lawlessness is the all-too-common mark of American urban life at the close of the 20th century. A society that is committed to protecting civil rights and civil liberties is not helpless to prevent such shameful *1131 atrocities. Dire problems demand bold solutions, and circumstances like those in Rocksprings warrant highly aggressive law enforcement. Nevertheless, the City must prove its case. A court's judgment may not stand on a visceral prejudice against street gangs or on a pervasive mood of public hysteria in the face of a law-and-order crisis; rather, that judgment must stand on evidence.

Though the majority refers to "48 declarations submitted by the City in support of its plea for injunctive relief" (maj. opn., ante, at p. 282 of 60 Cal.Rptr.2d, at p. 601 of 929 P.2d), most of this evidence establishes only that some gang members commit crimes in Rocksprings, contributing to the general state of lawlessness in the neighborhood. The evidence describing the nature of the Sureno gangs, and thus establishing a possible link between the gangs themselves (as opposed to gang members) and the nuisance in Rocksprings, consists primarily of the declarations of Officer Mikael Niehoff and Sergeant Richard Saito. Those declarations describe the Sureno gangs as "criminal street gangs," but the San Jose Police Department's definition of "criminal street gang" states nothing about the purpose or primary activity of the gang as a whole. Under its definition, any association of persons who individually engage in crime, even a sports team, would be a criminal street gang.

Of course, numerous declarations state the crime in Rocksprings is "gang related," but the San Jose police classify as gang related any crime a gang member commits. By that method of classification, much of the crime in Rocksprings might also be football related because the perpetrators of the crimes are football fans. The City's standard hardly establishes a logical link between the gang and the crime, particularly in light of the City's loose definition of gang member. Moreover, even under the City's over-inclusive standard, only 12 to 14 percent of documented crimes in Rocksprings during the year preceding the date of Sergeant Saito's declaration had indicia of being gang related. The City argues this percentage may actually be higher because it did not keep track of whether crimes were gang related. I agree. The percentage may actually be higher. But it may not be. The City did not keep track, so it has not proved its case.

Considering the record as a whole, I agree an assertion of Sureno gang membership is an indication of unlawful purpose. But I would not conclude that a person's assertion of gang membership and a one-time presence in Rocksprings is sufficient to establish the necessary link between that person and the nuisance in Rocksprings. Accordingly, I would uphold the injunction in the case of a person who is an actual gang member only if the record includes some corroborating evidence showing that person substantially contributed to the

nuisance in Rocksprings or intends to do so in the future.

***1132** The only evidence linking Blanca Gonzalez with the nuisance in Rocksprings is that she was in Rocksprings "wearing a black top and black jeans," which according to police was "consistent with members of Sureno criminal street gangs," and she claimed gang membership. This evidence is not sufficient to prove (even at the preliminary injunction stage) that she "held a specific intent to further [the gangs'] illegal aims," assuming the Sureno gangs have illegal aims. (Claiborne Hardware, supra, 458 U.S. at p. 920, 102 S.Ct. at p. 3429.) Thus, I agree with the Court of Appeal that the trial court should not have enjoined Blanca Gonzalez.

*****304 **623** The question is closer with respect to Rafael Ruiz. Ruiz also admitted gang membership. Moreover, some evidence indicates he committed a crime in Rocksprings, but this evidence is very thin. Ruiz was in a group that loosely matched the description of a group that had reportedly been selling drugs in the Rocksprings area. While I am sympathetic to the need for aggressive law enforcement, I conclude this evidence does not link Rafael Ruiz with the nuisance in Rocksprings sufficiently to support preliminary injunctive relief. Accordingly, I would hold that the trial court should not have enjoined him.

The gangs in question here are loosely organized associations of individuals with no express common purpose or central leadership. Some people may dress as gang members or claim membership in the gangs because of peer pressure or out of fear; the people primarily responsible for the public nuisance in Rocksprings may be a small minority of gang members. I do not discount the serious threat to community values that criminal street gangs pose. Nevertheless, we cannot turn a blind eye to the necessities of proof. I believe the majority has done so in the case of Rafael Ruiz and Blanca Gonzalez.

MOSK, Justice, dissenting.

No doubt Montesquieu, Locke, and Madison will turn over in their graves when they learn they are cited in an opinion that does not enhance liberty but deprives a number of simple rights to a group of Latino youths who have not been convicted of a

crime. Mindful of the admonition of another great 18th century political philosopher, Benjamin Franklin, that "[t]hey that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety," I would, unlike the majority, in large part affirm the judgment of the Court of Appeal.

I.

On February 26, 1993, the City of San Jose (hereafter the City) filed a complaint in the superior court seeking preliminary and permanent injunctive relief against 38 named and 100 unnamed individuals who were purportedly "validated" as active members of one of two street gangs, Varrio Sureno Loco (VSL) and Varrio Sureno Treces or Varrio Sureno Town (VST). The ***1133** complaint seeks to restrict their activities in a four-block residential area known as "Rocksprings." [FN1]

FN1. The City "validates" as a criminal street gang an association of three or more persons with a common name or symbol whose members collectively or individually engage in a pattern of criminal conduct, as defined by Penal Code section 186.22, subdivision (f). It does not, however, adhere to the statutory definition of a gang member. (Pen.Code, § 186.22, subd. (a) [gang member defined as "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang."].) Instead, to "validate" specific gang members, the City merely reviews police records to identify individuals who admit membership in a gang to a peace officer, probation officer, juvenile hall or youth ranch employee, or who meet two or more of the following conditions: wear clothing or tattoos indicating gang affiliation or use gang hand signs; are named by two or more members of a gang as a member; actively participate in a gang crime; are identified by a reliable informant as a gang member; or are observed associating with gang members two or more times. Using similar broad criteria, the Los Angeles Sheriff's Department has estimated that 47 percent of all African-American males between the ages of 21 and 24 are actual or suspected gang members. (Reiner (1992) Gangs, Crime and Violence in Los Angeles, p. 121.)

The complaint alleged that for more than 12 months, defendants "occupied" and "used the area commonly known as 'Rocksprings' ... in such a manner so as to constitute a public nuisance in accordance with Civil Code [sections] 3479 and 3480...." The "regular and continuous activities" alleged to constitute the public nuisance included: "homicide and attempted homicide, shootings, assault and battery with a vast array of weapons, vandalism, graffiti, sale and use of illegal narcotics, arson and theft ... [and] blocking of free ingress and egress to the street...." Defendants were also alleged to "have broken lights on private property, have shot at windows of buildings, have shot at rival gang members and innocent persons; have engaged in fights with other gangs and gang members; have caused, encouraged and/or participated in the drinking of alcoholic beverages by juveniles; have used loud profanities **624 ***305 amongst each other and directed at other neighbors; have caused, encouraged, or participated in the use, possession and/or sale of illegal drugs; have confronted, intimidated, annoyed, harassed, challenged and provoked the residents of the neighborhood by their activities and have placed the residents of the neighborhood in fear of their safety, lives and property."

The City submitted declarations from the San Jose Chief of Police, police officers, neighborhood residents, and others describing the gangs and detailing specific incidents in Rocksprings and elsewhere involving defendants. They explain that the VSL/VST gangs have approximately 150 to 200 members, most of whom are Latino youths between the ages of 14 and 23 who claim allegiance to Southern California (hence "Sureno," which is Spanish for "southern") or Mexico. The gangs claim as their insignia the number 13, the letter "M," and the color blue; they typically mark their turf *1134 with graffiti and tags that include the gang initials and variations on the number 13. The gangs lack a "structural hierarchy"; membership is "very fluid" and such that "many of its members did not know one another." Although their organization is loose and informal, gang members reportedly often cooperate with each other in drug selling and other illegal activities.

According to the declarations, drug dealing, fighting, and graffiti were constant problems in Rocksprings and occurred at all hours of the day and

night. Gang members threatened and intimidated residents. For example, a gang member warned a nine-year-old girl who had told police officers where some drugs were hidden that he would cut her tongue out if she ever again talked to the police. In another incident, gang members threatened a Rocksprings resident and vandalized her property after she called the police to report that some gang members had urinated in her garage. The declarations also stated, however, that fully 86 percent of the reports of criminal activity in Rocksprings do not indicate that they are related to VSL or VST gangs: only 12 percent of the reports are believed by the City to be gang related and 2 percent were deemed "possibly gang-related."

Moreover, under the City's criteria for "validating" VST and VSL members, no history of criminal or disruptive activity in Rocksprings or elsewhere is required for an individual to be identified as a Sureno gang member. Indeed, an individual may be so identified simply if he or she "admits" to gang membership, or merely was seen in association with another purported gang member on two occasions and wore clothing associated with the gang--including such ordinary apparel as baggy trousers and blue or black shirts or pants.

On February 26, 1993, the superior court granted the City's request for a temporary restraining order and issued an ex parte order to show cause, setting the case for further hearing on March 10, 1993. Five defendants appeared at the hearing. The superior court left the temporary restraining order standing against those defendants and issued an order granting a preliminary injunction against the remaining defendants. On May 28, 1993, six additional named defendants moved to set aside the orders. [FN2]

FN2. The six defendants submitted declarations in support of the motion to vacate, including explanations of why certain defendants failed to attend the hearing on the order to show cause. Some of the defendants described their family and other ties to the Rocksprings neighborhood; a few also stated that they had never been--or were no longer--Sureno gang members.

The superior court conducted a hearing on June 28, 1993. It issued an order granting a preliminary injunction against 11 defendants, enjoined from

***1135** performing, "directly or indirectly," certain specified acts within the Rocksprings neighborhood. [FN3]

FN3. The superior court did not prepare a written statement of decision. The order granting the preliminary injunction enjoins defendants Carlos Acuna, Jose Bravo, Eberardo Cervantes, Martin Davila, Blanca Gonzalez, Jorge Gonzales, Juan Pineda Hernandez, Miguel Lopez, Miguel Moreno, Flavio Quinonez, and Rafael Ruiz from the following acts: "(a) Standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant herein, or with any other known 'VST' (Varrio Sureno Town or Varrio Sureno Locos) member; "(b) Drinking alcoholic beverages in public excepting consumption on properly licensed premises or using drugs; "(c) Possessing any weapons including but not limited to knives, dirks, daggers, clubs, nunchukas [sic; nunchakus], BB guns, concealed or loaded firearms, and any other illegal weapons as defined in the California Penal Code, and any object capable of inflicting serious bodily injury including but not limited to the following: metal pipes or rods, glass bottles, rocks, bricks, chains, tire irons, screwdrivers, hammers, crowbars, bumper jacks, spikes, razor blades; razors, sling shots, marbles, ball bearings; "(d) Engaging in fighting in the public streets, alleys, and/or public and private property; "(e) Using or possessing marker pens, spray paint cans, nails, razor blades, screwdrivers, or other sharp objects capable of defacing private or public property; "(f) Spray painting or otherwise applying graffiti on any public or private property, including but not limited to the street, alley, residences, block walls, vehicles and/or any other real or personal property; "(g) Trespassing on or encouraging others to trespass on any private property; "(h) Blocking free ingress and egress to the public sidewalks or street, or any driveways leading or appurtenant thereto in 'Rocksprings'; "(i) Approaching vehicles, engaging in conversation, or otherwise communicating with the occupants of any vehicle or doing anything to obstruct or delay the free flow of vehicular or pedestrian traffic; "(j) Discharging any firearms; "(k) In any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities, including

any persons who have provided information in support of this Complaint and requests for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction; "(l) Causing, encouraging, or participating in the use, possession and/or sale of narcotics; "(m) Owning, possessing or driving a vehicle found to have any contraband, narcotics, or illegal or deadly weapons; "(n) Using or possessing pagers or beepers in any public space; "(o) Possessing channel lock pliers, picks, wire cutters, dent pullers, sling shots, marbles, steel shot, spark plugs, rocks, screwdrivers, 'slim jims' and other devices capable of being used to break into locked vehicles; "(p) Demanding entry into another person's residence at any time of the day or night; "(q) Sheltering, concealing or permitting another person to enter into a residence not their own when said person appears to be running, hiding, or otherwise evading a law enforcement officer; "(r) Signaling to or acting as a lookout for other persons to warn of the approach of police officers and soliciting, encouraging, employing or offering payment to others to do the same; "(s) Climbing any tree, wall, or fence, or passing through any wall or fence by using tunnels or other holes in such structures; "(t) Littering in any public place or place open to public view; "(u) Urinating or defecating in any public place or place open to public view; "(v) Using words, phrases, physical gestures, or symbols commonly known as hand signs or engaging in other forms of communication which describe or refer to the gang known as 'VST' or 'VSL' as described in this Complaint or any of the accompanying pleadings or declarations; "(w) Wearing clothing which bears the name or letters of the gang known as 'VST' or 'VSL'; "(x) Making, causing, or encouraging others to make loud noise of any kind, including but not limited to yelling and loud music at any time of the day or night."

*****306 **625 *1136** Defendants appealed from that order. The Court of Appeal concluded that "insofar as the injunction reaches no further than the Constitution allows, it can properly be used to abate gang-related criminal activity as a public nuisance." Determining that many of the provisions were unconstitutionally vague or overbroad, or prohibited too much ordinary and innocuous conduct, it struck paragraphs (a), (e), (i), (m), (n), (o), (q), (r), (s), (v), (w), and (x) in whole and paragraphs (c), (k), and (l) in part. As modified, it affirmed the order granting the preliminary injunction.

The City sought review of the Court of Appeal's decision only as to two provisions: paragraphs (a) and (k). We granted review. [FN4]

FN4. Thus, as it indicated in written and oral argument, the City did not challenge the Court of Appeal's determination that the following conduct, *inter alia*, was improperly enjoined: possession or use in Rocksprings of such everyday items as beepers, pens, spray paint cans, nails, screwdrivers, or any "sharp objects capable of defacing private or public property"; "encouraging" or "participating" in the use or possession of narcotics; "engaging in conversation, or otherwise communicating with the occupants of any vehicle"; using communicative hand signs or signals describing or referring to the gangs; wearing clothing bearing the name or letters associated with the gangs; climbing trees or walls or "passing through" fences. The City impliedly concedes that the Court of Appeal correctly struck these provisions of the injunction as enjoining more conduct than was necessary to abate the nuisance and on constitutional grounds.

*****307 **626 II.**

We review an order granting a preliminary injunction for abuse of discretion. (*Hunter v. City of Whittier* (1989) 209 Cal.App.3d 588, 595, 257 Cal.Rptr. 559.) "Ordinarily an appeal from the granting of a preliminary injunction involves a very limited review of the [superior court's] exercise of discretion concerning two factors: (1) the likelihood that plaintiffs will ultimately prevail and (2) the interim harm plaintiffs will sustain if the preliminary injunction is denied compared to the interim harm defendant will suffer if the injunction is granted pending a final determination of the merits." (*Ibid.*) Thus, an appellate decision usually does not constitute a final adjudication of the ultimate rights in controversy; it merely determines whether the superior court abused its discretion based on the record before it at the time of the ruling.

Of course, questions underlying the preliminary injunction are reviewed under the appropriate standard of review. Thus, for example, issues of fact *1137 are subject to review under the substantial evidence standard; issues of pure law are subject to independent review. (*Bullock v. City and County of San Francisco* (1990) 221 Cal.App.3d 1072, 1094, 271 Cal.Rptr. 44 [" 'the standard of

review [for issues of pure law] is not abuse of discretion but whether statutory or constitutional law was correctly interpreted and applied by the trial court.' "].) [FN5] This case presents several issues of pure law, principally: (1) whether injunctive relief under public nuisance provisions for gang-related activity was preempted by the California Street Terrorism Enforcement and Prevention Act (hereafter the STEP Act), codified at Penal Code section 188.20 et seq.; (2) whether, as a matter of law, certain conduct could be abated as a public nuisance; and (3) whether certain provisions of the preliminary injunction were impermissibly vague or restrictive of protected First Amendment rights. [FN6]

FN5. "[T]he issue can arise, for example, when it is contended that an ordinance or statute is unconstitutional on its face and that no factual controversy remains to be tried. If such a question of pure law is presented, it can sometimes be determinative over the other factor, for example, when the defendant shows that the plaintiff's interpretation is wrong as a matter of law and thus the plaintiff has no possibility of success on the merits. [Citations.] Even where the question of law is not entirely determinative, it may be appropriate for the appellate court to express its opinion in order to clarify or narrow the issues for trial." (*Hunter v. City of Whittier*, *supra*, 209 Cal.App.3d at p. 595-596, 257 Cal.Rptr. 559; see, e.g., *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 287-290, 219 Cal.Rptr. 467, 707 P.2d 840.)

FN6. Defendants contend that *de novo* review of the entire record is required because the superior court's order affects their First Amendment rights. (See *Hurley v. Irish-American Gay Group of Boston* (1995) ---U.S. ---, ---, 115 S.Ct. 2338, 2344, 132 L.Ed.2d 487.) As *Hurley* explains, however, "[t]he 'requirement of independent appellate review ... is a rule of federal constitutional law,' ... which generally requires us to 'review the finding of facts by a State court ... where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts, ...' " (*Ibid.*, *italics added.*) That is not the case here; as will appear, our inquiry is limited to the facial validity of certain provisions of the injunction under the United States Constitution.

(Cite as: 14 Cal.4th 1090, *1137, 929 P.2d 596, **626, 60 Cal.Rptr.2d 277, ***307)

As to the remaining issues--including the likelihood that the City will succeed in establishing that specific conduct of the VSL/VST gangs constitutes a public nuisance and that individual defendants were properly enjoined--we review for abuse of discretion.

III.

As a threshold matter, defendants contend that the STEP Act is the exclusive means of enjoining criminal street gangs, preempting general public nuisance statutes. They are wrong. The act, by its express provisions, is not the exclusive remedy for abating gang activity constituting a public nuisance.

Under the STEP Act, a building or place used by members of a criminal street gang for specified illegal activities constitutes a nuisance per se: ***1138** "Every building or place used by members of a criminal street gang for the purpose of the commission of [specified] offenses ... and every building or place wherein or upon which that criminal conduct by gang members takes place, is a nuisance which shall be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance." *****308 **627** (Pen.Code, § 186.22a, subd. (a), italics added.) The Legislature has provided, however, that "[n]othing in this chapter shall preclude any aggrieved person from seeking any other remedy provided by law." (Id., § 186.22a, subd. (d).) The act thus plainly contemplates additional remedies to abate criminal gang activities, including those under our general public nuisance statutes.

The City expressly sought relief not under the STEP Act, but, instead, under the general public nuisance statutes. [FN7] Accordingly, we need not determine whether some or all of the conduct enjoined would also fall within the scope of the act or whether any of the defendants could be enjoined under its provisions.

FN7. Defendants concede that the City did not purport to seek injunctive relief under the STEP Act, but invoked the general public nuisance provisions; they argue, however, that the superior court erroneously purported to rely on the provision. We will uphold a judgment if it is correct for any reason " 'regardless of the

correctness of [its] grounds....' 'It is judicial action and not judicial reasoning which is the subject of review....' " (United Pacific Ins. Co. v. Hanover Ins. Co. (1990) 217 Cal.App.3d 925, 933, 266 Cal.Rptr. 231, fn. omitted.)

IV.

The City contends that all of the conduct described in paragraphs (a) and (k) of the preliminary injunction order was properly abated by the superior court as a public nuisance. Defendants claim that none of the conduct could be so enjoined. Neither is correct. As the Court of Appeal correctly concluded, some, but not all, of the conduct could not unreasonably be abated under our general public nuisance statutes.

Civil Code section 3479 defines a public nuisance as: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." Civil Code section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." A public nuisance is subject to a civil action for abatement, and may, as here, be "brought by the city attorney of any town or city in which such nuisance exists." (Code Civ.Proc., § 731.)

***1139** The act or condition to be abated may consist of criminal or noncriminal conduct, but the equitable remedy exists only "where the objectionable activity can be brought within the terms of the statutory definition of public nuisance." (People v. Lim (1941) 18 Cal.2d 872, 879, 118 P.2d 472.) "[E]quity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted." (Id. p. 880, 118 P.2d 472; accord, Nathan H. Schur, Inc.

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v. City of Santa Monica (1956) 47 Cal.2d 11, 19, 300 P.2d 831.) [FN8]

FN8. That both criminal and noncriminal conduct can be enjoined as a public nuisance is clear under our statutory and case law. (See, e.g., Civ.Code, § 3369 ["Neither specific nor preventive relief can be granted ... to enforce a penal law, except in a case of nuisance or as otherwise provided by law."]; Pen.Code, § 186.20 et seq. [STEP Act]; id., § 11525 et seq. [Red Light Abatement Law]; People ex rel. Busch v. Projection Room Theater (1976) 17 Cal.3d 42, 49, 53, 130 Cal.Rptr. 328, 550 P.2d 600 [exhibition of obscene books]; Nathan H. Schur, Inc. v. City of Santa Monica, supra, 47 Cal.2d at pp. 18-19, 300 P.2d 831 ["Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature.... [That] will not prevent the intervention of equity where a clear case justifying equitable relief is present...."]; People v. Lim, supra, 18 Cal.2d 872, 118 P.2d 472 [gambling house]; Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal.App.4th 334, 341, 23 Cal.Rptr.2d 377 [pollution of water]; Hayman v. Block (1986) 176 Cal.App.3d 629, 644, 222 Cal.Rptr. 293 [blocking right of way]; People v. Mason (1981) 124 Cal.App.3d 348, 353, 177 Cal.Rptr. 284 [noise emanating from bar and restaurant]; Vedder v. County of Imperial (1974) 36 Cal.App.3d 654, 661, 111 Cal.Rptr. 728 [fire hazard].) The City contends that the Court of Appeal's decision "relied substantially upon the premise that courts can enjoin only criminal, as opposed to noncriminal, conduct as a public nuisance." Not so. The Court of Appeal did not apply any such general rule; it merely concluded that the specific noncriminal conduct included within the superior court's order could not be appropriately enjoined under general public nuisance statutes. It did err, however, to the extent it held that all criminal conduct constitutes a public nuisance. Even if it were correct that, as it states, "a public nuisance is always a criminal offense," the inverse is not true. (See Pen.Code, § 370; Rest.2d Torts, § 821B, com. d, p. 89.)

*****309 **628** Nor may an injunction "go ... further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction." (People v. Mason, supra, 124 Cal.App.3d at p. 354, 177 Cal.Rptr. 284.) Rather, it is "important for the trial court to limit the scope of the injunction, taking

only those measures which would afford the People the relief to which they are entitled." (Ibid.; see also Anderson v. Souza (1952) 38 Cal.2d 825, 840-841, 243 P.2d 497 ["Injunctive process ought never to go beyond the necessities of the case."].)

In addition, of course, our general public nuisance statutes "must be enforced in such a way as to operate in a constitutional fashion." (People ex rel. Busch v. Projection Room Theater, supra, 17 Cal.3d at p. 55, 130 Cal.Rptr. 328, 550 P.2d 600.) In ***1140** particular, "restrictions upon the exercise of First Amendment rights [citation] must be drawn with a narrow specificity calculated to prevent repression of expressive activities as to which restriction is constitutionally forbidden." (In re Berry (1968) 68 Cal.2d 137, 155, 65 Cal.Rptr. 273, 436 P.2d 273; see Burton v. Municipal Court (1968) 68 Cal.2d 684, 696, 68 Cal.Rptr. 721, 441 P.2d 281 [invalidating restrictions on operation of motion pictures]; City of Indio v. Arroyo (1983) 143 Cal.App.3d 151, 158-159, 191 Cal.Rptr. 565 [sign ordinance unconstitutionally overbroad as applied to noncommercial wall mural].)

"The First Amendment generally prevents government from proscribing speech [citation], or even expressive conduct [citation], because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." (R.A.V. v. City of St. Paul, Minnesota (1992) 505 U.S. 377, 382, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305.) The presumption of invalidity applies with particular force to injunctions. "Injunctions ... carry greater risks of censorship and discriminatory application than do general ordinances" and therefore require "a somewhat more stringent application of general First Amendment principles." (Madsen v. Women's Health Center (1994) 512 U.S. 753, ----, 114 S.Ct. 2516, 2524, 129 L.Ed.2d 593.) Accordingly, an injunction restricting speech or other expressive conduct must be content neutral and "burden no more speech than necessary to serve a significant government interest." (Id. at p. ----, 114 S.Ct. at p. 2525; Planned Parenthood Shasta-Diablo, Inc. v. Williams (1995) 10 Cal.4th 1009, 1019-1024, 43 Cal.Rptr.2d 88, 898 P.2d 402.)

An injunction restricting constitutionally protected activity must also be sufficiently clear to withstand a challenge on the ground of vagueness under the due process clauses of the United States and California

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Constitutions. (U.S. Const., Amends. V, XIV; Cal. Const., art I, § 7). Vague injunctions, like vague laws, " ' "offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." ' " (Williams v. Garcetti (1993) 5 Cal.4th 561, 567-568, 20 Cal.Rptr.2d 341, 853 P.2d 507.) The provisions of an injunction " ' "should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its *1141 provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language." ' " (Id. at p. 568, 20 Cal.Rptr.2d 341, 853 P.2d 507.)

***310 **629 Finally, an injunction restricting constitutionally protected activity must be narrowly tailored to withstand challenge on the ground of overbreadth. "[A]n overbreadth challenge implicates the constitutional interest in due process of law. (U.S. Const., Amends. V, XIV; Cal. Const., art. I, §§ 7 subd. (a), 24.) The overbreadth doctrine provides that 'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' [Citation.] [¶] ... [¶] Nevertheless, a facial overbreadth challenge is difficult to sustain.... '[A]pplication of the overbreadth doctrine ... is, manifestly, strong medicine. It has been employed ... sparingly and only as a last resort.' [Citation.] Consequently, to justify a conclusion of facial overbreadth, 'the overbreadth of a [restriction] must not only be real, but substantial as well....' " (Williams v. Garcetti, supra, 5 Cal.4th at p. 577, 20 Cal.Rptr.2d 341, 853 P.2d 507.)

V.

I turn now to the individual provisions of the

preliminary injunction that are at issue here.

a.

I agree with the Court of Appeal that following provisions of the preliminary injunction should be sustained, because they restrict gang-related conduct that the superior court not unreasonably found was likely to be proved on the merits to constitute a public nuisance in the Rocksprings neighborhood: paragraphs (b) (public consumption of alcoholic beverages or drugs); (d) (fighting in the public streets); (f) (spray painting or otherwise applying graffiti to public or private property); (g) (trespassing on or encouraging others to trespass on any private property); (h) (blocking free ingress and egress to the public sidewalks or street or to any driveways leading or appurtenant thereto in Rocksprings); (j) (discharging firearms); (p) (demanding entry into another person's residence); (t) (littering in any public place or place open to public view); and (u) (urinating or defecating in any public place or place open to public view). The record includes allegations and supporting declarations concerning the prevalence of these activities by VSL-VST gang members in Rocksprings. The activities also readily fall within the statutory definition of a "nuisance" as "[a]nything which is injurious to health, ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable *1142 enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any ... public park, square, street, or highway" (Civ.Code, § 3479.) and as a "public nuisance" as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons" (id., § 3480.) That some or all of these activities may also constitute criminal violations does not limit the superior court's power to grant a preliminary injunction in this case.

b.

As to the remaining provisions of the preliminary injunction, as stated above, the City only contests the decision of the Court of Appeal regarding paragraphs (a) and (k). Unlike the majority, I agree with the Court of Appeal that the sweeping prohibitions of the former do not withstand scrutiny, and that the latter provision must be stricken in part.

(Cite as: 14 Cal.4th 1090, *1142, 929 P.2d 596, **629, 60 Cal.Rptr.2d 277, ***310)

Paragraph (a) enjoins "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public with any other defendant herein, or with any other known 'VST' ... or 'VSL' ... member." It applies without any requirement or condition that a defendant or his associate be engaged in any illegal activity or misconduct related to the alleged public nuisance.

The provision is impermissibly vague. Who is a "known" VST or VSL member? And by whom is such membership "known"? (See *Lanzetta v. New Jersey* (1939) 306 U.S. 451, 458, 59 S.Ct. 618, 621, 83 L.Ed. 888 [expression "known to be a member [of any gang]" unconstitutionally vague]; *Farber v. Rochford* (N.D.Ill.1975) 407 F.Supp. 529, 532 [phrase "known to be [narcotic addict or prostitute]" impermissibly requires court to **630 ***311 "indulge in conjecture as to how reputation might be ascertained"].) In the absence of any specific definition of gang membership, neither police officers nor courts are provided with a consistent standard for determining when a violation of the injunction occurred.

Thus, even if we were to accept the City's argument that the only reasonable construction of the prohibition is that it requires a defendant to know that the person he or she is standing, sitting, driving, walking, driving, gathering, or appearing with is a gang member, it remains susceptible to arbitrary enforcement. Without a definition of gang membership, how would a defendant know when he or she was violating the injunction? It is also unclear how a police officer would know whether or not a defendant knows that he or she is engaging in these activities with a gang member. Under the City's construction, a defendant could be arrested and prosecuted for walking down the street or simply appearing in public with another person, based *1143 on a police officer's mere supposition that such defendant "knew" he or she was in the company of a "known" gang member. As the Court of Appeal recognized: "it is apparent a defendant could be engaged in one of the activities prohibited in paragraph (a) with a person not known to him or to her but known to police as a gang member, and suffer penalties for refusing to obey the injunction as a result. This is a classic case of vagueness."

Apart from these fundamental vagueness problems, the prohibitions under paragraph (a) go

"further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction" (*People v. Mason*, supra, 124 Cal.App.3d at p. 354, 177 Cal.Rptr. 284) by penalizing much ordinary and lawful activity that does not fall within the statutory definition of a public nuisance. The prohibitions are not only sweeping, but absolute: they apply without regard to the defendant's intent or to the circumstances. In my view, a defendant may not be subject to a contempt sanction for merely walking in, driving through, or "appearing" in the Rocksprings neighborhood in the company of any "known" gang member without causing any disruption. Such everyday conduct is not "injurious to health, ... or ... indecent or offensive to the senses, or an obstruction to the free use of property" (Civ.Code, § 3479); nor does it affect "at the same time an entire community or neighborhood" (id., § 3480.) [FN9]

FN9. As one court has observed: "The right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all--and to do so whenever one pleases--is an integral component of life in a free and ordered society. [Citations.] This right is rooted in the First Amendment's protection of freedom of expression and association, as well as ... the Fifth Amendment's protection of fundamental liberty interests under the doctrine of substantive due process." (*Waters v. Barry* (D.D.C.1989) 711 F.Supp. 1125, 1134; see also *Kolender v. Lawson* (1983) 461 U.S. 352, 358, 103 S.Ct. 1855, 1859, 75 L.Ed.2d 903 [law prohibiting wandering the streets at night without identification implicated "consideration of the constitutional right to freedom of movement"].)

The City asserts, and the majority apparently agree, that the associational rights of the members of the loosely formed VSL and VST gangs are not "worthy" of constitutional protection; they argue that only "intimate" and "expressive" associations are entitled to such protection. Although I, too, deplore gang violence, I am unwilling, despite the apparent nature of the Sureno gangs, to conclude that their members do not also engage in innocent intimate or expressive conduct. Moreover, the cases on which the majority rely, principally *Roberts v. United States Jaycees* (1984) 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462, and *Dallas v. Stanglin* (1989) 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d

18, are not in point. The preliminary injunction directly impairs the kinds of everyday intimate and expressive association with friends and relatives that have traditionally been subject to constitutional protection.

1144** Paragraph (k) enjoins "[i]n any manner confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to 'Rocksprings', or any other persons who are known to have complained about gang activities, including any persons who have provided information in support of this Complaint and requests for ***312 *631** Temporary Restraining Order, Preliminary Injunction and Permanent Injunction." Conduct or speech that is physically threatening, harassing, intimidating, or assaultive may constitute a public nuisance and is not constitutionally protected. The superior court did not abuse its discretion, therefore, in imposing restrictions against "intimidating, harassing, threatening ... assaulting and/or battering residents or patrons, or visitors to 'Rocksprings.'" "

Although the terms "harassing" and "intimidating" are not specifically defined in the preliminary injunction, I disagree with the Court of Appeal's conclusion that they are too vague. Their meaning is sufficiently definite in the context of paragraph (k) as modified. I understand them to refer to behavior that would cause a reasonable person to suffer substantial emotional distress. I note that courts have frequently affirmed provisions of injunctions enjoining "intimidating" or "harassing" others. (See, e.g., *Planned Parenthood Shasta-Diablo, Inc. v. Williams*, supra, 10 Cal.4th at p. 1013, 43 Cal.Rptr.2d 88, 898 P.2d 402 [anti-abortion protesters enjoined from harassing persons entering a clinic]; *In re Coleman* (1974) 12 Cal.3d 568, 571, 116 Cal.Rptr. 381, 526 P.2d 533 [union members enjoined from committing "acts of harassment or intimidation"]; *M Restaurants, Inc. v. San Francisco Local Joint Exec. Bd. Culinary etc. Union* (1981) 124 Cal.App.3d 666, 672, 177 Cal.Rptr. 690 [defendant unions enjoined from "threatening and/or committing acts of intimidation and physical violence"].)

The remainder of the provision, however, is too vague to withstand due process challenge. Activity in Rocksprings that consists of "in any manner confronting, annoying, ... challenging, [or]

provoking" others may include so much ordinary social behavior--and so much that depends on the individual sensibilities of those who might feel annoyed, challenged, or provoked--that it impermissibly invites arbitrary enforcement. As the United States Supreme Court observed in *Coates v. City of Cincinnati* (1971) 402 U.S. 611, 614-616, 91 S.Ct. 1686, 1688-89, 29 L.Ed.2d 214: "The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct.... [¶] ... 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 ***1145** political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens." (Fns. omitted; see also *H-CHH Associates v. Citizens for Representative Government* (1987) 193 Cal.App.3d 1193, 1221, 238 Cal.Rptr. 841 [prohibition against "approaching" mall patrons overbroad because it "encompass[es] lawful, as well as unlawful, activity"].)

I also conclude that the phrase "persons known to have complained about gang activity" is too imprecise and must be stricken from paragraph (k). The City concedes as much. It is, in any event, superfluous: defendants are prohibited from threatening or assaulting any other person in Rocksprings, i.e., all "residents, patrons, or visitors." [FN10]

FN10. In paraphrasing paragraph (k), the majority repeatedly mischaracterize it as only forbidding defendants from intimidating or otherwise challenging Rocksprings residents or other persons whom gang members know have complained about their conduct within the neighborhood. It is not so limited. Rather, it expressly prohibits threatening, intimidating, harassing, or assaulting any Rocksprings resident for any reason.

VI.

The preliminary injunction names specific individuals; it is not directed against the VSL/VST gangs generally. Defendants contend that the superior court erred by enjoining six persons who have not been shown to be directly and substantially responsible for the public nuisance. The City counters that all six defendants were properly enjoined. ***313 **632 Analogizing this matter to cases involving injunctions directed against unions and political organizations, it argues that "had [it] obtained a preliminary injunction against the VSL/VST street gangs to abate the public nuisance the gang created in Rocksprings, there is no question that injunction could have been made to bind the members of the gang as a class."

Neither is persuasive. I reject defendants' argument that an individual could properly be subject to the preliminary injunction only if he or she engaged in all of the enjoined conduct or was otherwise responsible for the public nuisance. I also reject the City's argument that each one of these defendants was properly enjoined because the superior court could have enjoined the VSL/VST gangs as a whole. They beg the question whether the gang members could properly have been enjoined as a class. Unlike the unions in *Watsonville Canning & Frozen Food Co. v. Superior Court* (1986) 178 Cal.App.3d 1242, 224 Cal.Rptr. 303, or the anti-abortion organizations *1146 in *Madsen v. Women's Health Center, Inc.*, supra, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593, the VSL/VST gang is a loose affiliation of hundreds of individuals, many of whom may never have participated in any of the activities constituting the public nuisance. Indeed, it is likely that many of them either live in Rocksprings themselves or have friends and relatives who do.

As the City concedes, an individual may be "validated" as a VSL/VST gang member simply because he or she wears gang colors (including "neutral" colors like khaki, black, white, and blue) and is seen in the company of other "validated" gang members. I would agree with the Court of Appeal that, absent any showing that an individual "validated" as a gang member is likely to commit acts constituting a public nuisance in Rocksprings, he or she may not properly be subjected to the injunction, at least to the extent that it enjoins

ordinary and innocent conduct within the Rocksprings neighborhood. (See *People v. Green* (1991) 227 Cal.App.3d 692, 699, 278 Cal.Rptr. 140 [mere membership in a street gang is not a crime]; see also *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 920, 102 S.Ct. 3409, 3429, 73 L.Ed.2d 1215 [individuals could not be enjoined merely because they belonged to a group, some members of which committed acts of violence; to impose liability by reason of association alone, it must be shown that the group itself possessed unlawful goals and the named individual held a specific intent to further those goals].) [FN11]

FN11. Use of the word "gang" has a tendency to strike fear in the hearts of countless persons. The trial court and now a majority of this court have succumbed to that somewhat irrational fear. The Court of Appeal is to be commended for looking at the issue dispassionately and objectively. Some of these defendants have not been convicted of, or even charged with, any crime. Yet they are, under the injunction, deprived of a number of personal rights generally reserved to all free citizens--including the right to walk or drive through the Rocksprings neighborhood with a "known" gang member even for an innocent purpose.

Under our general nuisance statutes, "[a] judgment prohibiting a defendant from doing that which neither past acts nor present intent indicates he is likely to do unless prevented by a court of equity, is an erroneous exercise of equitable jurisdiction." (*People v. Robin* (1943) 56 Cal.App.2d 885, 887, 133 P.2d 436.) The mere facts that a defendant "admitted" gang membership to a police officer or others or was seen associating with gang members or wearing gang colors or insignia, do not indicate that he or she has, or will in the future, engage in conduct amounting to a public nuisance. In my view, individual defendants may be subject to the preliminary injunction only if the City establishes a likelihood that it will succeed on the merits of its claim that he or she actively participated in the activities constituting a public nuisance, or had a specific intention to do so.

The City presented evidence of conduct by each of the named defendants in and around the Rocksprings area.

*1147 As to one of the named defendants, Blanca

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Gonzalez, the evidence consisted solely of a police officer's statement to the effect that she was the driver of a car that was circling up and down the street in a purportedly Norteno-dominated neighborhood--apparently not Rocksprings. On that occasion, she ***314 **633 was dressed in a black top and black jeans, consistent with members of Sureno gangs; she told the police officer that she belonged to the VST and VCT (also known as "Varrio Colonio Treces") gangs. On another occasion, a police officer on patrol in Rocksprings entered into a conversation with Gonzalez and another young Hispanic woman, after they drove up to an address in the Rocksprings neighborhood. Gonzales told him that she did not live in Rocksprings and that she was a member of the VSL gang.

None of this alleged conduct establishes a likelihood that the City will succeed on the merits of its claim that Gonzalez has participated in conduct amounting to a public nuisance in the Rocksprings neighborhood or elsewhere, or that she has any specific intention of doing so.

The record also fails to support enjoining Miguel Moreno or Rafael Ruiz. Although both at one time "admitted" gang membership, neither was adequately shown to have engaged in conduct amounting to a public nuisance in or around Rocksprings. Moreno was merely "identified" by an unknown party as having been involved in a drug offense in Rocksprings. Ruiz was identified by a police officer responding to a citizen call concerning a drug transaction as loosely matching a description of one of the participants.

Defendants also argue that the superior court erred in naming three other gang members, Jorge Gonzalez, Eberardo Cervantes, and Miguel Lopez. I disagree. As the Court of Appeal not unreasonably concluded, an adequate showing was made for the purposes of ordering preliminary injunctive relief against them. All three not only freely admitted that they were active gang members, but they participated in conduct in and around Rocksprings amounting to a public nuisance. [FN12] I would therefore sustain the Court of Appeal's determination that these defendants were not unreasonably restrained.

FN12. Thus, Jorge Gonzalez was stopped in

connection with a gang-related disturbance in Rocksprings and admitted to police officers that he was a gang member; he was also found in possession of cocaine and marijuana after his car was stopped by a police officer near Rocksprings; Eberardo Cervantes was observed selling illegal drugs in Rocksprings and prosecuted for possession for sale and sale of marijuana and cocaine; Miguel Lopez was observed selling narcotics in Rocksprings and was found to be in possession of marijuana. The question whether the superior court erred in naming five other defendants, Carlos Acuna, Jose Bravo, Hassan Martin Davila, Juan Pineda Hernandez, Flavio Quinonez, is not before us; it was neither ruled on by the Court of Appeal nor raised in the petitions for review.

In sum, I would affirm the judgment of the Court of Appeal to the extent that it sustained paragraphs (b), (c), (d), (f), (g), (h), (j), (p), (t), and (u) and *1148 struck paragraph (a). I would reverse the judgment of the Court of Appeal to the extent that it struck the terms "harassing" and "intimidating" from paragraph (k).

CONCLUSION

The majority would permit our cities to close off entire neighborhoods to Latino youths who have done nothing more than dress in blue or black clothing or associate with others who do so; they would authorize criminal penalties for ordinary, nondisruptive acts of walking or driving through a residential neighborhood with a relative or friend. In my view, such a blunderbuss approach amounts to both bad law and bad policy. Chief Justice Warren warned in *Jay v. Boyd* (1956) 351 U.S. 345, 367, 76 S.Ct. 919, 932, 100 L.Ed. 1242: "Unfortunately, there are some who think that the way to save freedom in this country is to adopt the techniques of tyranny." The majority here appear to embrace that misguided belief. Accordingly, I dissent.

END OF DOCUMENT

The PEOPLE, Plaintiff and Respondent,
v.
Jessie GONZALEZ, Defendant and Appellant.

No. S045546.

Supreme Court of California.

Feb. 29, 1996.

Defendant was convicted in Municipal Court, No. 93P04943, Los Angeles County, Lloyd M. Nash, J., of four counts of contempt for violating gang activity injunction. Defendant appealed. The Superior Court, Appellate Department, Los Angeles County, No. BR33744, affirmed. Defendant appealed. The Supreme Court granted review, superseding the opinion of the Court of Appeal, and held, per Lucas C.J., that municipal court and Appellate Department of Superior Court had authority to entertain defendant's challenge to validity of injunctive order that was basis of contempt charges.

Judgment of Court of Appeal reversed.

Opinion, 38 Cal.Rptr.2d 235, vacated.

[1] COURTS ⇌ 481

106k481

State Constitution does not vest jurisdiction in municipal court to overturn judgment of Superior Court. West's Ann.Cal. Const. Art. 6, §§ 4, 11.

[2] INJUNCTION ⇌ 219

212k219

Defendant did not seek to overturn Superior Court's order when he asserted that order was unconstitutional as defense in contempt action; rather, defendant was merely challenging use of order in separate cause.

[3] COURTS ⇌ 481

106k481

One Superior Court generally lacks jurisdiction to overturn, enjoin or declare void the order of another superior court, since State Constitution limits power to overturn Superior Court's order to appellate courts. West's Ann.Cal. Const. Art. 6, § 11.

[4] CONTEMPT ⇌ 40

93k40

Contempt action is considered quasi-criminal, due to potential for punishment, and contemnor possesses some rights of criminal defendant. West's Ann.Cal.C.C.P. §§ 1209(a), par. 5, 1218.

[5] CONTEMPT ⇌ 66(1)

93k66(1)

Contemnor possesses no right of appeal, and review of contempt judgment is by extraordinary writ. West's Ann.Cal.C.C.P. § 1222.

[6] CONTEMPT ⇌ 21

93k21

Disobedience of order of court may be punished as contempt only if underlying order is valid; void order cannot be basis for valid contempt judgment. West's Ann.Cal.Penal Code § 166(a)(4).

[7] INJUNCTION ⇌ 219

212k219

Contemnor may challenge validity of injunction forming basis of contempt prosecution, even if no such claim was made when injunction issued and contempt proceedings are not brought in court authoring injunction. West's Ann.Cal.Penal Code § 166.

[8] INJUNCTION ⇌ 219

212k219

Person affected by injunctive order may challenge order's validity on ground that it was issued without or in excess of jurisdiction by either complying with order while seeking judicial declaration as to jurisdictional validity, or by disobeying order and raising jurisdictional contentions when he is sought to be punished for such disobedience. West's Ann.Cal.Penal Code § 166.

[9] CONTEMPT ⇌ 21

93k21

If Superior Court issues order without or in excess of jurisdiction, violation of order does not constitute punishable wrong. West's Ann.Cal.Penal Code § 166.

[10] CONTEMPT ⇌ 21

93k21

Contemnor may, for first time, collaterally challenge validity of order he is charged with violating. West's Ann.Cal.Penal Code § 166.

[11] CONTEMPT ⇌ 44

93k44

Municipal court has jurisdiction to try charge of misdemeanor contempt for willful disobedience of Superior Court's order. West's Ann.Cal. Const. Art. 6, § 10; West's Ann.Cal.Penal Code § 1462.

[12] COURTS ⇌ 26

106k26

Court with jurisdiction over cause has jurisdiction to resolve all issues before it. West's Ann.Cal.C.C.P. § 187.

[13] INJUNCTION ⇌ 230(1)

212k230(1)

Municipal court is proper forum in which to raise issue of validity of injunction underlying contempt charge, since there can be no contempt of void injunctive order and collateral attacks may be brought on void orders. West's Ann.Cal.Penal Code § 166.

[14] CONTEMPT ⇌ 66(1)

93k66(1)

On appeal from municipal court contempt adjudication, Appellate Department of Superior Court would ordinarily have jurisdiction to decide such issues as validity of order that was basis for contempt adjudication. West's Ann.Cal.Penal Code § 166.

[15] CONTEMPT ⇌ 66(1)

93k66(1)

Although direct attack seeking to overturn order on which contempt charge was based would not be permitted in Appellate Department of Superior Court, defendant could bring collateral challenge seeking to avoid effect of that order in another cause. West's Ann.Cal.Penal Code § 166.

[16] CRIMINAL LAW ⇌ 1018

110k1018

Appellate Department of Superior Court has appellate jurisdiction over municipal court judgments, and defendant may appeal final judgment of conviction to Appellate Department. West's Ann.Cal. Const. Art. 6, § 11; West's Ann.Cal.Penal Code § 1466.

[17] INJUNCTION ⇌ 231

212k231

Just as constitutionality of statute or ordinance under

which defendant is convicted is proper subject for appeal, constitutional validity of injunction which is basis for criminal contempt judgment must be appealable as well. West's Ann.Cal.Penal Code § 166.

[18] CONTEMPT ⇌ 21

93k21

Erroneous order is not necessarily order in excess of issuing court's jurisdiction; however, order that is unconstitutional on its face is in excess of jurisdiction, and cannot sustain contempt judgment. West's Ann.Cal.Penal Code § 166.

[18] MOTIONS ⇌ 7

267k7

Erroneous order is not necessarily order in excess of issuing court's jurisdiction; however, order that is unconstitutional on its face is in excess of jurisdiction, and cannot sustain contempt judgment. West's Ann.Cal.Penal Code § 166.

[19] CONTEMPT ⇌ 2

93k2

Purpose of contempt charge is to enable courts to vindicate their authority and maintain dignity and respect. West's Ann.Cal.Penal Code § 166.

[20] INJUNCTION ⇌ 219

212k219

Permitting collateral attack of injunction in Court of Appeal, but not in trial court, does not serve purpose of vindicating power of court issuing injunction.

[21] INJUNCTION ⇌ 219

212k219

Persons or interests that are to be protected by injunctive order have no protectible interest in imposing unconstitutional restraints on defendant's conduct.

[22] INJUNCTION ⇌ 219

212k219

Trial court could consider validity of injunction issued by another court that formed basis for contempt prosecution, even though trial court did not have facts giving rise to injunctive order, since defendant primarily attacked injunction on its face, requiring no factual determination. West's Ann.Cal.Penal Code § 166.

[23] INJUNCTION ⇐ 219

212k219

Even though allowing trial court to entertain collateral attacks on injunctive orders may result in piecemeal derogation of Superior Court orders resulting in judgments without precedential value, need to protect individual's interests in being free from coercive effects of unconstitutional orders outweighs that concern.

[24] INJUNCTION ⇐ 219

212k219

Court of Appeal was not only proper court to review collateral attack on order which formed basis of contempt prosecution, since appellate jurisdiction over misdemeanor judgment rests with Appellate Department of Superior Court with further review only by discretionary transfer. West's Ann.Cal.Penal Code § 166; Cal.Rules of Court, Rule 62(a).

*****76 **1367** On Appeal from the Municipal Court of Los Angeles County, Lloyd M. Nash, Judge.

***807 **1368** Michael P. Judge, Public Defender, Albert J. Menaster, Cynthia Solomon, John Hamilton Scott and Alex Ricciardulli, Deputy Public Defenders, for Defendant and Appellant.

James K. Hahn, City Attorney, Debbie Lew and Candice I. Horikawa, Deputy City Attorneys, for Plaintiff and Respondent.

Arlo Smith, District Attorney, San Francisco and Celia E. Rowland, Assistant District Attorney, as Amici Curiae on behalf of Plaintiff and Respondent.

***808 LUCAS**, Chief Justice.

In this case we determine the authority of the municipal court and the appellate department of the superior court to consider a *****77** challenge to the validity of a preliminary injunction issued by a superior court.

Defendant violated a preliminary injunction issued by the Los Angeles County Superior Court restricting the activities of gang members in a certain geographical area of Los Angeles. The People sought a misdemeanor conviction against defendant in the municipal court for criminal

contempt.

In municipal court, defendant demurred to the complaint, seeking, among other things, to assert, on constitutional grounds, the facial invalidity of the injunction he was accused of violating. The municipal court refused to entertain the challenge and overruled the demurrer, stating it had no jurisdiction to review the constitutional validity of an order of a higher court. Defendant was convicted of four counts of contempt. The appellate department of the superior court affirmed, a majority of the court refusing to consider the validity of the injunction on the ground of lack of jurisdiction.

The Court of Appeal determined the municipal court lacked authority to adjudicate an attack on an injunction issued by a court of superior jurisdiction. In addition, it held the appellate department of the superior court, unless it happened to be the department that issued the injunction, lacked authority to review the constitutionality of the injunction on appeal from a contempt judgment entered in the municipal court.

We conclude the judgment of the Court of Appeal should be reversed. Settled California law establishes that there can be no contempt of a void injunctive order, and that assertedly unconstitutional injunctive orders are subject to challenge when contempt is charged, and on review of any contempt judgment. The Court of Appeal failed to recognize that although defendant was not entitled to bring a direct attack seeking to dissolve the injunction in the municipal court, he was entitled to defend against the contempt charges on the ground the injunction he was accused of violating was unconstitutional. That is, he was entitled to challenge the injunction on constitutional grounds when he was charged with contempt and to seek appellate review of the contempt judgment on the same grounds.

I. FACTS

The City of Los Angeles brought a civil public nuisance action in the superior court, and, on April 27, 1993, secured a preliminary injunction limiting the activities of members of the Blythe Street Gang within a certain ***809** geographical area of Los Angeles. Among other things, the injunction prohibited gang members from using or possessing

deadly weapons, including such items as glass bottles, large metal belt buckles and ball bearings. It prohibited gang members from using or possessing numerous other items, including pagers and cellular phones, whistles and car parts. No gang member was to "annoy, harass, or intimidate any person," or contact any person who "will complain about the defendants' activities," or be present on private property in the absence of the owner without the written consent of the owner. In addition, gang members were enjoined from climbing any tree, wall or fence, and from being on the roof of any building except in an emergency, from obstructing traffic, or if underage, from violating a specified curfew. Adults, too, were enjoined from being present in a specified area between 8 p.m. and 6 a.m., without proper identification and proof of legal residence in the area.

Defendant was not a party to this action, although, as a member of the gang, he was served with a copy of the injunctive order on May 11, 1993.

****1369** On May 28, 1993, defendant was arrested after he fled from officers conducting a narcotics investigation in the area designated by the preliminary injunction. In the course of his flight, defendant threw beer bottles at the officers' car and hid in an apartment he had entered without the consent of the owners. On June 22, 1993, an amended criminal complaint was filed in the municipal court, charging defendant with, inter alia, five counts of misdemeanor contempt in violation of Penal Code section 166 (all statutory references are to this code unless otherwise indicated), that is, "willfully and unlawfully commit[ing] contempt of court by willful disobedience of a process and order lawfully issued by a court, *****78** to wit: LOS ANGELES SUPERIOR COURT, CASE No. LC 20525 [i.e., the preliminary injunction]...." As to each count, the complaint specified which section of the superior court's preliminary injunction defendant allegedly had violated. Thus, in the first count, the complaint alleged defendant violated the order, section "a) 5, in that the above-named defendant did use and possess a deadly weapon, to wit: glass bottles, in a designated public place." The other contempt counts alleged defendant violated the injunction because he possessed a pager, was present on private property without prior written consent of the owner, entered private property by threat and

force, and obstructed pedestrian and vehicular traffic. In addition to the contempt charges, the complaint charged defendant threw a substance at a vehicle and its occupant on the highway, in violation of Vehicle Code section 23110, and entered private property without permission, in violation of the Los Angeles Municipal Code.

Defendant demurred to the five contempt counts of the amended complaint on two grounds. First, he claimed the complaint alleged a violation of ***810** an order of the superior court, but did not allege that he was subject to the order. Second, defendant argued the injunction was unlawful on its face because "it improperly seeks to enjoin criminal acts, and it is unconstitutionally vague and overbroad." The demurrer challenged the constitutionality of the sections of the injunction defendant was accused of violating, as well as the constitutionality of the injunction as a whole.

The municipal court overruled the demurrer. It refused to rule on the claim that the injunction was invalid, stating that any constitutional challenge to the injunction would have to be heard in a different court. The municipal court also rejected defendant's motion to dismiss under section 991, again declining to rule on the constitutionality of the preliminary injunction.

Defendant filed a petition for writ of habeas corpus in the superior court, requesting that court to direct the municipal court to vacate the above orders overruling the demurrer and denying the motion to dismiss. The superior court summarily denied relief, its order reciting that defendant had an adequate remedy by way of appeal.

The parties waived jury trial and stipulated to the facts underlying the charges. Defendant refused to stipulate to the constitutionality of the preliminary injunction, and renewed the claims stated in his demurrer. The municipal court again declined to consider the question of the constitutionality of the injunction, declaring that defendant should have appealed the original superior court order granting the injunction. The court found defendant guilty of four counts of misdemeanor contempt for violating the injunction, namely, counts one (possession of glass bottles), two (possession of pager), three (entering private property without permission) and five (obstructing traffic). The remaining three

(Cite as: 12 Cal.4th 804, *810, 910 P.2d 1366, **1369, 50 Cal.Rptr.2d 74, ***78)

counts were dismissed in the interest of justice. (§ 1385.) Defendant was sentenced to three years' probation on various terms and conditions, including that he serve ninety days in the county jail.

Defendant appealed to the appellate department of the superior court, arguing, *inter alia*, that the convictions should be reversed because of the unconstitutionality of the injunction.

In a divided opinion, the appellate department affirmed the judgment of conviction. One judge determined the appellate department had the authority to review the constitutionality of those portions of the injunction defendant was accused of violating **1370 and, finding them constitutional, rejected defendant's contention the convictions should be overturned. The remaining two judges concurred in the result but expressed the opinion the appellate department had no jurisdiction to review the validity of the injunction. One of these judges believed defendant's sole remedy was to seek appellate review of the injunction when it issued, while the other concurring judge *811 declared defendant's only avenue for review of the validity of the injunction was "by way of a petition for extraordinary relief filed with the Court of Appeal."

On October 1, 1994, the Court of Appeal transferred the case to itself pursuant to rule ***79 62(a) of the California Rules of Court, for the limited purpose of deciding the jurisdictional issue, [FN1] and reversed.

FN1. In their petitions for review, the parties did not challenge the order of the Court of Appeal limiting the issues, and we therefore do not consider its propriety. (See, e.g. *People v. Dupuis* (1992) 7 Cal.App.4th 696, 700, 8 Cal.Rptr.2d 923 [concluding Court of Appeal has power to limit issues when it transfers cause to itself under rule 62(a) of the California Rules of Court].)

The Court of Appeal, pointing to state constitutional provisions limiting appellate jurisdiction, concluded neither the municipal court nor the appellate department of the superior court had authority to review the validity of an injunction issued by the superior court. The court determined that defendant's statutory right to appeal (see § 1466) would be meaningless unless the appellate

department could review the validity of the order the defendant was charged with violating. In order to avoid what it saw as an equal protection violation for those charged with misdemeanor contempt, as compared with those charged with any other misdemeanor, who retain the statutory right of appeal, the Court of Appeal reached the following conclusion. When a misdemeanor contempt of a superior court injunctive order is charged, the superior court shall have exclusive original jurisdiction to try the charge. If the trial department of the superior court is not the one that issued the order defendant is charged with violating, that court, too, must treat the injunctive order as valid. On appeal to the Court of Appeal, however, the defendant may contest the constitutionality of the order the violation of which resulted in the contempt conviction.

Both parties petitioned for review. Both ask us to reject the holding of the Court of Appeal that the superior court has original, exclusive jurisdiction over misdemeanor contempt charges involving violation of superior court orders. Defendant asks that we hold that both the municipal court and the appellate department of the superior court have authority to entertain a challenge to the validity of a superior court injunctive order in a contempt proceeding. He argues a contrary holding would require us to strike down the misdemeanor contempt statute as unconstitutional or, in any event, to order courts to hold preliminary hearings on misdemeanor contempt complaints filed in the superior court. The People agree that the Court of Appeal erred in purporting to vest the superior court with subject matter jurisdiction over misdemeanor contempt charges. They ask, however, that we limit any challenge to the validity of a superior court injunction in the context of a *812 misdemeanor contempt prosecution to a writ proceeding in the Court of Appeal or this court. Although they did not raise the matter in their petition for review, in their brief on the merits the People also ask that we determine the constitutionality of the underlying injunction.

II. DISCUSSION

A. The Court of Appeal Opinion.

The Court of Appeal determined that the state Constitution limits the jurisdiction of the municipal

court and the appellate department of the superior court to adjudicate the validity of the superior court's injunctive order. With respect to the jurisdiction of the municipal court, it asserted that under article VI, section 11 of the Constitution, appellate jurisdiction over superior court judgments is vested exclusively in the Court of Appeal and the Supreme Court. The section provides in pertinent part: "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction **1371 and in other causes prescribed by statute." (Ibid.) Notably, and not surprisingly, the Constitution does not provide that the municipal court may exercise appellate jurisdiction to review an order of a superior court. Accordingly, the Court of Appeal concluded the municipal court had no authority to review the validity of an injunction issued by the superior court.

The Court of Appeal also concluded the appellate department of the superior court lacked authority to pass on the constitutionality of the injunction in the context of defendant's appeal from the judgment convicting him of contempt. The court pointed out that under article VI, section 11 of the state Constitution, ***80 a superior court has no appellate jurisdiction over orders of another superior court. That section limits the superior court's appellate jurisdiction to review of judgments entered in an inferior court, stating: "Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal courts in their counties." (Cal. Const., art. VI, § 11.) [FN2]

FN2. The constitutional provision is given effect by section 1466, which provides, in pertinent part, that "[a]n appeal may be taken from a judgment or order of an inferior court, in an infraction or misdemeanor case, to the superior court of the county in which the inferior court is located...." (§ 1466, subd. (a).)

In addition, the Court of Appeal pointed out that under article VI, section 4 of the state Constitution, a superior court is a single entity. That provision states: "In each county there is a superior court of one or more judges." (Ibid.) The Court of Appeal cited cases interpreting this provision to mean that one department of a superior court normally has no authority to interfere with another department's

adjudication of a cause. (See, e.g., *Williams v. *813 Superior Court* (1939) 14 Cal.2d 656, 662, 96 P.2d 334.) From cases concluding that one department of a superior court cannot overrule the order of another department of the same superior court, the Court of Appeal inferred that one department of the superior court cannot entertain an attack on the validity of an injunction issued by another department of a superior court in the context of an appeal from a contempt conviction.

In support, the Court of Appeal relied on our decision in *Williams v. Superior Court*, supra, 14 Cal.2d 656, 96 P.2d 334. In *Williams*, a cause was assigned to a department of the superior court for record preparation, and, during the proceedings, the court ordered the court reporter to file a transcript by a specific date. The court reporter failed to comply, and the superior court heard and denied an application to have the order vacated, then issued an order to show cause why the reporter should not be held in contempt. Before the contempt matter could be heard, a second department of the same superior court purported to declare void the first court's order setting a transcript filing date.

We annulled the second court's order, stating "[t]he state Constitution ... provides for but one superior court in each county.... [J]urisdiction is vested by the Constitution in the court and not in any particular judge or department thereof.... It follows, therefore, that where a proceeding has been duly assigned for hearing and determination to one department of the superior court ... and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation.] In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts." (*Williams v. Superior Court*, supra, 14 Cal.2d at p. 662, 96 P.2d 334.) We explained that if the law were otherwise, conflicting adjudications of the same subject matter would issue from the superior court, causing great confusion. (Ibid.)

The Court of Appeal also relied heavily on *Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 233

[23] INJUNCTION ⇐ 219
212k219

Even though allowing trial court to entertain collateral attacks on injunctive orders may result in piecemeal derogation of Superior Court orders resulting in judgments without precedential value, need to protect individual's interests in being free from coercive effects of unconstitutional orders outweighs that concern.

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Court of Appeal was not only proper court to review collateral attack on order which formed basis of contempt prosecution, since appellate jurisdiction over misdemeanor judgment rests with Appellate Department of Superior Court with further review only by discretionary transfer. West's Ann.Cal.Penal Code § 166; Cal.Rules of Court, Rule 62(a).

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contempt.

In municipal court, defendant demurred to the complaint, seeking, among other things, to assert, on constitutional grounds, the facial invalidity of the injunction he was accused of violating. The municipal court refused to entertain the challenge and overruled the demurrer, stating it had no jurisdiction to review the constitutional validity of an order of a higher court. Defendant was convicted of four counts of contempt. The appellate department of the superior court affirmed, a majority of the court refusing to consider the validity of the injunction on the ground of lack of jurisdiction.

The Court of Appeal determined the municipal court lacked authority to adjudicate an attack on an injunction issued by a court of superior jurisdiction. In addition, it held the appellate department of the superior court, unless it happened to be the department that issued the injunction, lacked authority to review the constitutionality of the injunction on appeal from a contempt judgment entered in the municipal court.

We conclude the judgment of the Court of Appeal should be reversed. Settled California law establishes that there can be no contempt of a void injunctive order, and that assertedly unconstitutional injunctive orders are subject to challenge when contempt is charged, and on review of any contempt judgment. The Court of Appeal failed to recognize that although defendant was not entitled to bring a direct attack seeking to dissolve the injunction in the municipal court, he was entitled to defend against the contempt charges on the ground the injunction he was accused of violating was unconstitutional. That is, he was entitled to challenge the injunction on constitutional grounds when he was charged with contempt and to seek appellate review of the contempt judgment on the same grounds.

I. FACTS

The City of Los Angeles brought a civil public nuisance action in the superior court, and, on April 27, 1993, secured a preliminary injunction limiting the activities of members of the Blythe Street Gang within a certain ***809** geographical area of Los Angeles. Among other things, the injunction prohibited gang members from using or possessing

deadly weapons, including such items as glass bottles, large metal belt buckles and ball bearings. It prohibited gang members from using or possessing numerous other items, including pagers and cellular phones, whistles and car parts. No gang member was to "annoy, harass, or intimidate any person," or contact any person who "will complain about the defendants' activities," or be present on private property in the absence of the owner without the written consent of the owner. In addition, gang members were enjoined from climbing any tree, wall or fence, and from being on the roof of any building except in an emergency, from obstructing traffic, or if underage, from violating a specified curfew. Adults, too, were enjoined from being present in a specified area between 8 p.m. and 6 a.m., without proper identification and proof of legal residence in the area.

Defendant was not a party to this action, although, as a member of the gang, he was served with a copy of the injunctive order on May 11, 1993.

****1369** On May 28, 1993, defendant was arrested after he fled from officers conducting a narcotics investigation in the area designated by the preliminary injunction. In the course of his flight, defendant threw beer bottles at the officers' car and hid in an apartment he had entered without the consent of the owners. On June 22, 1993, an amended criminal complaint was filed in the municipal court, charging defendant with, inter alia, five counts of misdemeanor contempt in violation of Penal Code section 166 (all statutory references are to this code unless otherwise indicated), that is, "willfully and unlawfully commit[ing] contempt of court by willful disobedience of a process and order lawfully issued by a court, *****78** to wit: LOS ANGELES SUPERIOR COURT, CASE No. LC 20525 [i.e., the preliminary injunction]...." As to each count, the complaint specified which section of the superior court's preliminary injunction defendant allegedly had violated. Thus, in the first count, the complaint alleged defendant violated the order, section "a) 5, in that the above-named defendant did use and possess a deadly weapon, to wit: glass bottles, in a designated public place." The other contempt counts alleged defendant violated the injunction because he possessed a pager, was present on private property without prior written consent of the owner, entered private property by threat and

force, and obstructed pedestrian and vehicular traffic. In addition to the contempt charges, the complaint charged defendant threw a substance at a vehicle and its occupant on the highway, in violation of Vehicle Code section 23110, and entered private property without permission, in violation of the Los Angeles Municipal Code.

Defendant demurred to the five contempt counts of the amended complaint on two grounds. First, he claimed the complaint alleged a violation of ***810** an order of the superior court, but did not allege that he was subject to the order. Second, defendant argued the injunction was unlawful on its face because "it improperly seeks to enjoin criminal acts, and it is unconstitutionally vague and overbroad." The demurrer challenged the constitutionality of the sections of the injunction defendant was accused of violating, as well as the constitutionality of the injunction as a whole.

The municipal court overruled the demurrer. It refused to rule on the claim that the injunction was invalid, stating that any constitutional challenge to the injunction would have to be heard in a different court. The municipal court also rejected defendant's motion to dismiss under section 991, again declining to rule on the constitutionality of the preliminary injunction.

Defendant filed a petition for writ of habeas corpus in the superior court, requesting that court to direct the municipal court to vacate the above orders overruling the demurrer and denying the motion to dismiss. The superior court summarily denied relief, its order reciting that defendant had an adequate remedy by way of appeal.

The parties waived jury trial and stipulated to the facts underlying the charges. Defendant refused to stipulate to the constitutionality of the preliminary injunction, and renewed the claims stated in his demurrer. The municipal court again declined to consider the question of the constitutionality of the injunction, declaring that defendant should have appealed the original superior court order granting the injunction. The court found defendant guilty of four counts of misdemeanor contempt for violating the injunction, namely, counts one (possession of glass bottles), two (possession of pager), three (entering private property without permission) and five (obstructing traffic). The remaining three

counts were dismissed in the interest of justice. (§ 1385.) Defendant was sentenced to three years' probation on various terms and conditions, including that he serve ninety days in the county jail.

Defendant appealed to the appellate department of the superior court, arguing, *inter alia*, that the convictions should be reversed because of the unconstitutionality of the injunction.

In a divided opinion, the appellate department affirmed the judgment of conviction. One judge determined the appellate department had the authority to review the constitutionality of those portions of the injunction defendant was accused of violating **1370 and, finding them constitutional, rejected defendant's contention the convictions should be overturned. The remaining two judges concurred in the result but expressed the opinion the appellate department had no jurisdiction to review the validity of the injunction. One of these judges believed defendant's sole remedy was to seek appellate review of the injunction when it issued, while the other concurring judge *811 declared defendant's only avenue for review of the validity of the injunction was "by way of a petition for extraordinary relief filed with the Court of Appeal."

On October 1, 1994, the Court of Appeal transferred the case to itself pursuant to rule ***79 62(a) of the California Rules of Court, for the limited purpose of deciding the jurisdictional issue, [FN1] and reversed.

FN1. In their petitions for review, the parties did not challenge the order of the Court of Appeal limiting the issues, and we therefore do not consider its propriety. (See, e.g. *People v. Dupuis* (1992) 7 Cal.App.4th 696, 700, 8 Cal.Rptr.2d 923 [concluding Court of Appeal has power to limit issues when it transfers cause to itself under rule 62(a) of the California Rules of Court].)

The Court of Appeal, pointing to state constitutional provisions limiting appellate jurisdiction, concluded neither the municipal court nor the appellate department of the superior court had authority to review the validity of an injunction issued by the superior court. The court determined that defendant's statutory right to appeal (see § 1466) would be meaningless unless the appellate

department could review the validity of the order the defendant was charged with violating. In order to avoid what it saw as an equal protection violation for those charged with misdemeanor contempt, as compared with those charged with any other misdemeanor, who retain the statutory right of appeal, the Court of Appeal reached the following conclusion. When a misdemeanor contempt of a superior court injunctive order is charged, the superior court shall have exclusive original jurisdiction to try the charge. If the trial department of the superior court is not the one that issued the order defendant is charged with violating, that court, too, must treat the injunctive order as valid. On appeal to the Court of Appeal, however, the defendant may contest the constitutionality of the order the violation of which resulted in the contempt conviction.

Both parties petitioned for review. Both ask us to reject the holding of the Court of Appeal that the superior court has original, exclusive jurisdiction over misdemeanor contempt charges involving violation of superior court orders. Defendant asks that we hold that both the municipal court and the appellate department of the superior court have authority to entertain a challenge to the validity of a superior court injunctive order in a contempt proceeding. He argues a contrary holding would require us to strike down the misdemeanor contempt statute as unconstitutional or, in any event, to order courts to hold preliminary hearings on misdemeanor contempt complaints filed in the superior court. The People agree that the Court of Appeal erred in purporting to vest the superior court with subject matter jurisdiction over misdemeanor contempt charges. They ask, however, that we limit any challenge to the validity of a superior court injunction in the context of a *812 misdemeanor contempt prosecution to a writ proceeding in the Court of Appeal or this court. Although they did not raise the matter in their petition for review, in their brief on the merits the People also ask that we determine the constitutionality of the underlying injunction.

II. DISCUSSION

A. The Court of Appeal Opinion.

The Court of Appeal determined that the state Constitution limits the jurisdiction of the municipal

court and the appellate department of the superior court to adjudicate the validity of the superior court's injunctive order. With respect to the jurisdiction of the municipal court, it asserted that under article VI, section 11 of the Constitution, appellate jurisdiction over superior court judgments is vested exclusively in the Court of Appeal and the Supreme Court. The section provides in pertinent part: "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction **1371 and in other causes prescribed by statute." (Ibid.) Notably, and not surprisingly, the Constitution does not provide that the municipal court may exercise appellate jurisdiction to review an order of a superior court. Accordingly, the Court of Appeal concluded the municipal court had no authority to review the validity of an injunction issued by the superior court.

The Court of Appeal also concluded the appellate department of the superior court lacked authority to pass on the constitutionality of the injunction in the context of defendant's appeal from the judgment convicting him of contempt. The court pointed out that under article VI, section 11 of the state Constitution, ***80 a superior court has no appellate jurisdiction over orders of another superior court. That section limits the superior court's appellate jurisdiction to review of judgments entered in an inferior court, stating: "Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal courts in their counties." (Cal. Const., art. VI, § 11.) [FN2]

FN2. The constitutional provision is given effect by section 1466, which provides, in pertinent part, that "[a]n appeal may be taken from a judgment or order of an inferior court, in an infraction or misdemeanor case, to the superior court of the county in which the inferior court is located...." (§ 1466, subd. (a).)

In addition, the Court of Appeal pointed out that under article VI, section 4 of the state Constitution, a superior court is a single entity. That provision states: "In each county there is a superior court of one or more judges." (Ibid.) The Court of Appeal cited cases interpreting this provision to mean that one department of a superior court normally has no authority to interfere with another department's

adjudication of a cause. (See, e.g., *Williams v. *813 Superior Court* (1939) 14 Cal.2d 656, 662, 96 P.2d 334.) From cases concluding that one department of a superior court cannot overrule the order of another department of the same superior court, the Court of Appeal inferred that one department of the superior court cannot entertain an attack on the validity of an injunction issued by another department of a superior court in the context of an appeal from a contempt conviction.

In support, the Court of Appeal relied on our decision in *Williams v. Superior Court*, supra, 14 Cal.2d 656, 96 P.2d 334. In *Williams*, a cause was assigned to a department of the superior court for record preparation, and, during the proceedings, the court ordered the court reporter to file a transcript by a specific date. The court reporter failed to comply, and the superior court heard and denied an application to have the order vacated, then issued an order to show cause why the reporter should not be held in contempt. Before the contempt matter could be heard, a second department of the same superior court purported to declare void the first court's order setting a transcript filing date.

We annulled the second court's order, stating "[t]he state Constitution ... provides for but one superior court in each county.... [J]urisdiction is vested by the Constitution in the court and not in any particular judge or department thereof.... It follows, therefore, that where a proceeding has been duly assigned for hearing and determination to one department of the superior court ... and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation.] In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts." (*Williams v. Superior Court*, supra, 14 Cal.2d at p. 662, 96 P.2d 334.) We explained that if the law were otherwise, conflicting adjudications of the same subject matter would issue from the superior court, causing great confusion. (Ibid.)

The Court of Appeal also relied heavily on *Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 233

Cal.Rptr. 607. There the superior court entered judgment in a cause, consisting in part of an order regarding the disposition of documents made part of the **1372 record at trial. The court declared that some documents could not be returned to the litigants in the action, and ordered that some of these remain sealed, while others were available for public inspection and comment. Plaintiffs, who were not parties to the original action but who alleged they were persons named in these documents, sought *814 an injunction in another department of the superior court to restrain execution of that part of the judgment relating to the disposition of the documents. The reviewing court affirmed the order of the second superior court dismissing plaintiffs' action, citing *Williams v. Superior Court*, supra, 14 Cal.2d 656, 96 P.2d 334 and the state constitutional provisions ***81 discussed therein. The court reasoned that because the superior court is but one court, one department of a superior court cannot review and restrain the judgment entered by another department. Accordingly, it concluded that "judgment rendered in one department of the superior court is binding on that matter upon all other departments until such time as the judgment is overturned." (*Ford v. Superior Court*, supra, 188 Cal.App.3d at p. 742, 233 Cal.Rptr. 607; see also *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 5 Cal.Rptr.2d 742 [when one department of superior court has entered judgment and order denying motion to vacate judgment is on appeal, another department cannot permit intervention of third party and order judgment set aside as to that party]; *Slone v. Inyo County Juvenile Court* (1991) 230 Cal.App.3d 263, 268, 282 Cal.Rptr. 126 [superior court cannot invalidate order of juvenile court in pending dependency matter because "California law prohibits one department of a superior court from invalidating a ruling made by another department of the same court"].) Plaintiffs' remedy, the Ford court stated, was to intervene in the original action and appeal any adverse judgment. (*Ford v. Superior Court*, supra, 188 Cal.App.3d at p. 742, 233 Cal.Rptr. 607.)

Concluding from its analysis of these authorities that neither the municipal court nor the appellate department of the superior court had authority to entertain defendant's attack on the constitutionality of the injunction he was accused of violating, the Court of Appeal turned to a perceived violation of

defendant's right to equal protection. It pointed out that all misdemeanants have a statutory right of appeal under section 1466, but that defendant's right to appeal the contempt judgment would be made nugatory if his appeal could not raise the primary issue in contention, that is, the constitutionality of the injunction. In order to avoid violating defendant's right to equal protection with respect to his statutory right of appeal, the Court of Appeal purported to vest the superior court with original jurisdiction over misdemeanor contempt charges stemming from the violation of a superior court injunctive order. The court directed that, at trial of such charges, the superior court must accept the validity of the injunction unless it was the department issuing the injunction. The Court of Appeal concluded, however, that on appeal to the Court of Appeal, the defendant may, for the first time, raise the claim that the injunction was invalid.

Both parties assail the holding purporting to vest the superior court with exclusive original jurisdiction over misdemeanor charges. They urge that the *815 power to establish the jurisdiction of the courts rests solely with the Legislature. We need not address this claim, however, because we disagree with the Court of Appeal's holding that neither the municipal court nor the appellate department of the superior court had authority to entertain defendant's constitutional challenge to the validity of the order he was accused of violating.

[1][2] With respect to the authority of the municipal court, it is true that the state Constitution does not vest jurisdiction in the municipal court to overturn a judgment of the superior court. Defendant, however, does not claim the municipal court had appellate jurisdiction over the injunctive order of the superior court. He does not argue the municipal court had authority to overturn or dissolve the injunction. Rather, in the municipal court, defendant sought to assert the alleged invalidity of the injunction collaterally, as a defense in a different cause. The claim that such an order is unconstitutional is a recognized defense in a contempt action. Such a claim does not seek to overturn the **1373 order, but merely to challenge its use in a separate cause.

[3] As for the authority of the appellate department of the superior court to entertain defendant's claim on appeal from his contempt

deadly weapons, including such items as glass bottles, large metal belt buckles and ball bearings. It prohibited gang members from using or possessing numerous other items, including pagers and cellular phones, whistles and car parts. No gang member was to "annoy, harass, or intimidate any person," or contact any person who "will complain about the defendants' activities," or be present on private property in the absence of the owner without the written consent of the owner. In addition, gang members were enjoined from climbing any tree, wall or fence, and from being on the roof of any building except in an emergency, from obstructing traffic, or if underage, from violating a specified curfew. Adults, too, were enjoined from being present in a specified area between 8 p.m. and 6 a.m., without proper identification and proof of legal residence in the area.

Defendant was not a party to this action, although, as a member of the gang, he was served with a copy of the injunctive order on May 11, 1993.

****1369** On May 28, 1993, defendant was arrested after he fled from officers conducting a narcotics investigation in the area designated by the preliminary injunction. In the course of his flight, defendant threw beer bottles at the officers' car and hid in an apartment he had entered without the consent of the owners. On June 22, 1993, an amended criminal complaint was filed in the municipal court, charging defendant with, inter alia, five counts of misdemeanor contempt in violation of Penal Code section 166 (all statutory references are to this code unless otherwise indicated), that is, "willfully and unlawfully commit[ing] contempt of court by willful disobedience of a process and order lawfully issued by a court, *****78** to wit: LOS ANGELES SUPERIOR COURT, CASE No. LC 20525 [i.e., the preliminary injunction]...." As to each count, the complaint specified which section of the superior court's preliminary injunction defendant allegedly had violated. Thus, in the first count, the complaint alleged defendant violated the order, section "a) 5, in that the above-named defendant did use and possess a deadly weapon, to wit: glass bottles, in a designated public place." The other contempt counts alleged defendant violated the injunction because he possessed a pager, was present on private property without prior written consent of the owner, entered private property by threat and

force, and obstructed pedestrian and vehicular traffic. In addition to the contempt charges, the complaint charged defendant threw a substance at a vehicle and its occupant on the highway, in violation of Vehicle Code section 23110, and entered private property without permission, in violation of the Los Angeles Municipal Code.

Defendant demurred to the five contempt counts of the amended complaint on two grounds. First, he claimed the complaint alleged a violation of ***810** an order of the superior court, but did not allege that he was subject to the order. Second, defendant argued the injunction was unlawful on its face because "it improperly seeks to enjoin criminal acts, and it is unconstitutionally vague and overbroad." The demurrer challenged the constitutionality of the sections of the injunction defendant was accused of violating, as well as the constitutionality of the injunction as a whole.

The municipal court overruled the demurrer. It refused to rule on the claim that the injunction was invalid, stating that any constitutional challenge to the injunction would have to be heard in a different court. The municipal court also rejected defendant's motion to dismiss under section 991, again declining to rule on the constitutionality of the preliminary injunction.

Defendant filed a petition for writ of habeas corpus in the superior court, requesting that court to direct the municipal court to vacate the above orders overruling the demurrer and denying the motion to dismiss. The superior court summarily denied relief, its order reciting that defendant had an adequate remedy by way of appeal.

The parties waived jury trial and stipulated to the facts underlying the charges. Defendant refused to stipulate to the constitutionality of the preliminary injunction, and renewed the claims stated in his demurrer. The municipal court again declined to consider the question of the constitutionality of the injunction, declaring that defendant should have appealed the original superior court order granting the injunction. The court found defendant guilty of four counts of misdemeanor contempt for violating the injunction, namely, counts one (possession of glass bottles), two (possession of pager), three (entering private property without permission) and five (obstructing traffic). The remaining three

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counts were dismissed in the interest of justice. (§ 1385.) Defendant was sentenced to three years' probation on various terms and conditions, including that he serve ninety days in the county jail.

Defendant appealed to the appellate department of the superior court, arguing, *inter alia*, that the convictions should be reversed because of the unconstitutionality of the injunction.

In a divided opinion, the appellate department affirmed the judgment of conviction. One judge determined the appellate department had the authority to review the constitutionality of those portions of the injunction defendant was accused of violating **1370 and, finding them constitutional, rejected defendant's contention the convictions should be overturned. The remaining two judges concurred in the result but expressed the opinion the appellate department had no jurisdiction to review the validity of the injunction. One of these judges believed defendant's sole remedy was to seek appellate review of the injunction when it issued, while the other concurring judge *811 declared defendant's only avenue for review of the validity of the injunction was "by way of a petition for extraordinary relief filed with the Court of Appeal."

On October 1, 1994, the Court of Appeal transferred the case to itself pursuant to rule ***79 62(a) of the California Rules of Court, for the limited purpose of deciding the jurisdictional issue, [FN1] and reversed.

FN1. In their petitions for review, the parties did not challenge the order of the Court of Appeal limiting the issues, and we therefore do not consider its propriety. (See, e.g. *People v. Dupuis* (1992) 7 Cal.App.4th 696, 700, 8 Cal.Rptr.2d 923 [concluding Court of Appeal has power to limit issues when it transfers cause to itself under rule 62(a) of the California Rules of Court].)

The Court of Appeal, pointing to state constitutional provisions limiting appellate jurisdiction, concluded neither the municipal court nor the appellate department of the superior court had authority to review the validity of an injunction issued by the superior court. The court determined that defendant's statutory right to appeal (see § 1466) would be meaningless unless the appellate

department could review the validity of the order the defendant was charged with violating. In order to avoid what it saw as an equal protection violation for those charged with misdemeanor contempt, as compared with those charged with any other misdemeanor, who retain the statutory right of appeal, the Court of Appeal reached the following conclusion. When a misdemeanor contempt of a superior court injunctive order is charged, the superior court shall have exclusive original jurisdiction to try the charge. If the trial department of the superior court is not the one that issued the order defendant is charged with violating, that court, too, must treat the injunctive order as valid. On appeal to the Court of Appeal, however, the defendant may contest the constitutionality of the order the violation of which resulted in the contempt conviction.

Both parties petitioned for review. Both ask us to reject the holding of the Court of Appeal that the superior court has original, exclusive jurisdiction over misdemeanor contempt charges involving violation of superior court orders. Defendant asks that we hold that both the municipal court and the appellate department of the superior court have authority to entertain a challenge to the validity of a superior court injunctive order in a contempt proceeding. He argues a contrary holding would require us to strike down the misdemeanor contempt statute as unconstitutional or, in any event, to order courts to hold preliminary hearings on misdemeanor contempt complaints filed in the superior court. The People agree that the Court of Appeal erred in purporting to vest the superior court with subject matter jurisdiction over misdemeanor contempt charges. They ask, however, that we limit any challenge to the validity of a superior court injunction in the context of a *812 misdemeanor contempt prosecution to a writ proceeding in the Court of Appeal or this court. Although they did not raise the matter in their petition for review, in their brief on the merits the People also ask that we determine the constitutionality of the underlying injunction.

II. DISCUSSION

A. The Court of Appeal Opinion.

The Court of Appeal determined that the state Constitution limits the jurisdiction of the municipal

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court and the appellate department of the superior court to adjudicate the validity of the superior court's injunctive order. With respect to the jurisdiction of the municipal court, it asserted that under article VI, section 11 of the Constitution, appellate jurisdiction over superior court judgments is vested exclusively in the Court of Appeal and the Supreme Court. The section provides in pertinent part: "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction **1371 and in other causes prescribed by statute." (Ibid.) Notably, and not surprisingly, the Constitution does not provide that the municipal court may exercise appellate jurisdiction to review an order of a superior court. Accordingly, the Court of Appeal concluded the municipal court had no authority to review the validity of an injunction issued by the superior court.

The Court of Appeal also concluded the appellate department of the superior court lacked authority to pass on the constitutionality of the injunction in the context of defendant's appeal from the judgment convicting him of contempt. The court pointed out that under article VI, section 11 of the state Constitution, ***80 a superior court has no appellate jurisdiction over orders of another superior court. That section limits the superior court's appellate jurisdiction to review of judgments entered in an inferior court, stating: "Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal courts in their counties." (Cal. Const., art. VI, § 11.) [FN2]

FN2. The constitutional provision is given effect by section 1466, which provides, in pertinent part, that "[a]n appeal may be taken from a judgment or order of an inferior court, in an infraction or misdemeanor case, to the superior court of the county in which the inferior court is located...." (§ 1466, subd. (a).)

In addition, the Court of Appeal pointed out that under article VI, section 4 of the state Constitution, a superior court is a single entity. That provision states: "In each county there is a superior court of one or more judges." (Ibid.) The Court of Appeal cited cases interpreting this provision to mean that one department of a superior court normally has no authority to interfere with another department's

adjudication of a cause. (See, e.g., *Williams v. *813 Superior Court* (1939) 14 Cal.2d 656, 662, 96 P.2d 334.) From cases concluding that one department of a superior court cannot overrule the order of another department of the same superior court, the Court of Appeal inferred that one department of the superior court cannot entertain an attack on the validity of an injunction issued by another department of a superior court in the context of an appeal from a contempt conviction.

In support, the Court of Appeal relied on our decision in *Williams v. Superior Court*, supra, 14 Cal.2d 656, 96 P.2d 334. In *Williams*, a cause was assigned to a department of the superior court for record preparation, and, during the proceedings, the court ordered the court reporter to file a transcript by a specific date. The court reporter failed to comply, and the superior court heard and denied an application to have the order vacated, then issued an order to show cause why the reporter should not be held in contempt. Before the contempt matter could be heard, a second department of the same superior court purported to declare void the first court's order setting a transcript filing date.

We annulled the second court's order, stating "[t]he state Constitution ... provides for but one superior court in each county.... [J]urisdiction is vested by the Constitution in the court and not in any particular judge or department thereof.... It follows, therefore, that where a proceeding has been duly assigned for hearing and determination to one department of the superior court ... and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation.] In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts." (*Williams v. Superior Court*, supra, 14 Cal.2d at p. 662, 96 P.2d 334.) We explained that if the law were otherwise, conflicting adjudications of the same subject matter would issue from the superior court, causing great confusion. (Ibid.)

The Court of Appeal also relied heavily on *Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 233

Cal.Rptr. 607. There the superior court entered judgment in a cause, consisting in part of an order regarding the disposition of documents made part of the **1372 record at trial. The court declared that some documents could not be returned to the litigants in the action, and ordered that some of these remain sealed, while others were available for public inspection and comment. Plaintiffs, who were not parties to the original action but who alleged they were persons named in these documents, sought *814 an injunction in another department of the superior court to restrain execution of that part of the judgment relating to the disposition of the documents. The reviewing court affirmed the order of the second superior court dismissing plaintiffs' action, citing *Williams v. Superior Court*, supra, 14 Cal.2d 656, 96 P.2d 334 and the state constitutional provisions ***81 discussed therein. The court reasoned that because the superior court is but one court, one department of a superior court cannot review and restrain the judgment entered by another department. Accordingly, it concluded that "judgment rendered in one department of the superior court is binding on that matter upon all other departments until such time as the judgment is overturned." (*Ford v. Superior Court*, supra, 188 Cal.App.3d at p. 742, 233 Cal.Rptr. 607; see also *Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 5 Cal.Rptr.2d 742 [when one department of superior court has entered judgment and order denying motion to vacate judgment is on appeal, another department cannot permit intervention of third party and order judgment set aside as to that party]; *Slone v. Inyo County Juvenile Court* (1991) 230 Cal.App.3d 263, 268, 282 Cal.Rptr. 126 [superior court cannot invalidate order of juvenile court in pending dependency matter because "California law prohibits one department of a superior court from invalidating a ruling made by another department of the same court"].) Plaintiffs' remedy, the Ford court stated, was to intervene in the original action and appeal any adverse judgment. (*Ford v. Superior Court*, supra, 188 Cal.App.3d at p. 742, 233 Cal.Rptr. 607.)

Concluding from its analysis of these authorities that neither the municipal court nor the appellate department of the superior court had authority to entertain defendant's attack on the constitutionality of the injunction he was accused of violating, the Court of Appeal turned to a perceived violation of

defendant's right to equal protection. It pointed out that all misdemeanants have a statutory right of appeal under section 1466, but that defendant's right to appeal the contempt judgment would be made nugatory if his appeal could not raise the primary issue in contention, that is, the constitutionality of the injunction. In order to avoid violating defendant's right to equal protection with respect to his statutory right of appeal, the Court of Appeal purported to vest the superior court with original jurisdiction over misdemeanor contempt charges stemming from the violation of a superior court injunctive order. The court directed that, at trial of such charges, the superior court must accept the validity of the injunction unless it was the department issuing the injunction. The Court of Appeal concluded, however, that on appeal to the Court of Appeal, the defendant may, for the first time, raise the claim that the injunction was invalid.

Both parties assail the holding purporting to vest the superior court with exclusive original jurisdiction over misdemeanor charges. They urge that the *815 power to establish the jurisdiction of the courts rests solely with the Legislature. We need not address this claim, however, because we disagree with the Court of Appeal's holding that neither the municipal court nor the appellate department of the superior court had authority to entertain defendant's constitutional challenge to the validity of the order he was accused of violating.

[1][2] With respect to the authority of the municipal court, it is true that the state Constitution does not vest jurisdiction in the municipal court to overturn a judgment of the superior court. Defendant, however, does not claim the municipal court had appellate jurisdiction over the injunctive order of the superior court. He does not argue the municipal court had authority to overturn or dissolve the injunction. Rather, in the municipal court, defendant sought to assert the alleged invalidity of the injunction collaterally, as a defense in a different cause. The claim that such an order is unconstitutional is a recognized defense in a contempt action. Such a claim does not seek to overturn the **1373 order, but merely to challenge its use in a separate cause.

[3] As for the authority of the appellate department of the superior court to entertain defendant's claim on appeal from his contempt

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conviction, it is true that one superior court generally lacks jurisdiction to overturn, enjoin or declare void the order of another superior court, as the authorities cited by the Court of Appeal show. The state Constitution limits the power to overturn a superior court's order to the appellate courts. (Cal. Const., art. VI, § 11.) Again, however, defendant does not claim that on appeal from the misdemeanor contempt judgment, the appellate department had authority to overturn ***82 or enjoin enforcement of the injunction issued by another department of the superior court. Rather, defendant sought to raise the issue of the constitutional validity of the injunction collaterally, as an issue on appeal from the contempt judgment.

The authorities relied on by the Court of Appeal are distinguishable. They involve parties who request a superior court to overturn or enjoin execution of a judgment of another department of that court. Thus in *Williams v. Superior Court*, supra, 14 Cal.2d 656, 96 P.2d 334, the litigant petitioned one department of the superior court to declare void the order of another department of the superior court to which the cause had been assigned. And although *Ford v. Superior Court*, supra, 188 Cal.App.3d 737, 233 Cal.Rptr. 607, did involve a collateral attack on a judgment, the collateral attack sought to enjoin enforcement of the order--a remedy essentially indistinguishable from an order overturning the judgment. The remedy defendant sought in this case, however, would leave the injunctive order entirely intact, simply limiting the effect of the order in a separate cause.

*816 In sum, although the authorities cited by the Court of Appeal certainly establish that neither the municipal court nor the appellate department of the superior court could dissolve or enjoin enforcement of the injunction, [FN3] they are silent regarding a court's authority to entertain an argument seeking to avoid the effect of the injunction at trial in a separate contempt action. The propriety of such a collateral challenge, as we shall demonstrate, is an accepted fact of California contempt jurisprudence.

FN3. Defendant concedes as much in this court.

B. The Law of Contempt.

[4][5] Contempt of a valid order of a court may be punished in two ways. First, an order to show

cause regarding an alleged act of contempt may issue in the court that made the order that was violated, commencing a separate action in the ordering court. Upon a finding of contempt, the contemner may be punished with up to five days in jail and a fine. (Code Civ.Proc., §§ 1209, subd. (a)(5), 1218; 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 17, pp. 48-50.) Because of the potential punishment, this type of proceeding is considered quasi-criminal, and the defendant possesses some of the rights of a criminal defendant. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913, 141 Cal.Rptr. 133, 569 P.2d 727; *Raiden v. Superior Court* (1949) 34 Cal.2d 83, 86, 206 P.2d 1081; *In re Witherspoon* (1984) 162 Cal.App.3d 1000, 209 Cal.Rptr. 67; see also *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1240-1244, 265 Cal.Rptr. 144, 783 P.2d 731 (plur. opn of Eagleson, J.); 3 Witkin, Cal. Procedure, supra, Actions, § 17, pp. 48-50.) The contemner possesses no right of appeal, however, and review of the contempt judgment is by extraordinary writ. (Code Civ.Proc. § 1222; *Bermudez v. Municipal Court* (1992) 1 Cal.4th 855, 861, fn. 5, 4 Cal.Rptr.2d 609, 823 P.2d 1210; *Brunton v. Superior Court* (1942) 20 Cal.2d 202, 204, 124 P.2d 831; 8 Witkin, Cal. Procedure, supra, Enforcement of Judgments, § 354, p. 306, and cases cited.)

[6] Disobedience of a valid order of a court may also be punished as contempt under section 166, making it a misdemeanor to engage in, among other things, "[w]illful disobedience of any process or order lawfully issued by any court." (§ 166, subd. (a)(4), italics added.) Defendant was charged under this statute.

According to section 166, it is only the violation of an order "lawfully issued" that is **1374 punishable as contempt. In the case of quasi-criminal contempt as well, "[a]n order of contempt cannot stand if the underlying order is invalid." (*In re Misener* (1985) 38 Cal.3d 543, 558, 213 Cal.Rptr. 569, 698 P.2d 637; see also *Crawford v. Workers' Comp. Appeals Bd.* (1989) 213 *817 Cal.App.3d 156, 169, 259 Cal.Rptr. 414; *Watsonville Canning & Frozen Food Co. v. Superior Court* (1986) 178 Cal.App.3d 1242, 1246, 224 Cal.Rptr. 303.)

The rule is well settled in California that a void order cannot be the basis for a valid contempt

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judgment. We established in *In re Berry* (1968) 68 Cal.2d 137, 147, 65 Cal.Rptr. 273, 436 P.2d 273 (Berry), a case involving a ***83 misdemeanor contempt prosecution, that "the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt [citations], and that the 'jurisdiction' in question extends beyond mere subject matter or personal jurisdiction...." Rather, "any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction." (Ibid.) Specifically, we held in *Berry* that a defendant should not be tried in the municipal court for misdemeanor contempt for violating a temporary restraining order issued by the superior court during a labor dispute, when the superior court's order was violative of defendant's First Amendment rights.

This court and the Courts of Appeal have frequently acknowledged that violation of a void order is not punishable as contempt. In *In re Misener*, supra, 38 Cal.3d 543, 213 Cal.Rptr. 569, 698 P.2d 637, for example, we held that a quasi-criminal contempt judgment against an attorney could not stand "if the underlying order [violated] is invalid." (Id. at p. 558, 213 Cal.Rptr. 569, 698 P.2d 637.) Similarly, in *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 5, 154 Cal.Rptr. 893, 593 P.2d 838, we held that a superior court's quasi-criminal contempt judgment should be annulled on a writ of review because the judgment was based on an injunction relating to a labor dispute that was beyond the court's authority to issue. And in an earlier case, *Fortenbury v. Superior Court* (1940) 16 Cal.2d 405, 408-409, 106 P.2d 411, we annulled a superior court's quasi-criminal contempt judgment on certiorari, finding the superior court's order enjoining peaceful picketing during a labor dispute void. (See also *Watsonville Canning and Frozen Food Co. v. Superior Court*, supra, 178 Cal.App.3d at p. 1246, 224 Cal.Rptr. 303 [valid injunctive order is prerequisite of contempt judgment based on violation of order]; *Mowrer v. Superior Court* (1969) 3 Cal.App.3d 223, 229-230, 83 Cal.Rptr. 125 [violation of invalid court order cannot produce valid contempt judgment]; 8 Witkin, Cal. Procedure, supra, Enforcement of Judgments, §

342, p. 294 ["contempt adjudication cannot be upheld if the order violated was itself fatally defective"]; 2 Witkin, Cal. Procedure, supra, Jurisdiction, § 277, p. 683 [void order never binding; violation cannot constitute contempt]; 6 Witkin, Cal. Procedure, supra, Provisional Remedies § 330, p. 278 ["contempt adjudication falls if it is determined that the injunction was void"].)

*818 [7] Some other jurisdictions require persons affected by injunctive orders to challenge the injunctive order directly, and in the meantime, to obey the order. Disobedience of the order is punished as contempt whether the order is valid or not. [FN4] This is known as **1375 the "collateral bar" rule. California law is otherwise. Section 166 has defined misdemeanor contempt as involving only the violation of "lawfully issued" orders ever since the statute was first enacted in 1872. Further, out of a concern to protect the constitutional rights of those affected by invalid injunctive orders, and to avoid forcing citizens to obey void injunctive orders on pain of punishment for contempt, this court has firmly established that a person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court. That is, the defendant in a contempt proceeding in this state may challenge ***84 the validity of an injunction, the violation of which is the basis for the contempt prosecution, even if no such claim was made when the injunction issued. (*Berry*, supra, 68 Cal.2d at pp. 148-149, 65 Cal.Rptr. 273, 436 P.2d 273; *Fortenbury v. Superior Court*, supra, 16 Cal.2d at pp. 408-409, 106 P.2d 411.) Although most cases on this topic involve quasi-criminal contempt proceedings in the court authoring the injunction, our language in *Berry* applies this rule in the context of criminal contempt prosecutions pursuant to section 166.

FN4. See, e.g., *Walker v. Birmingham* (1967) 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (following so-called collateral bar rule, with certain exceptions); *Ex parte Purvis* (Ala.1980) 382 So.2d 512, 514-515 (same); *Cologne v. Westfarms Assocs.* (1985) 197 Conn. 141, 496 A.2d 476, 481 (same); *Dade County Classroom Teachers' Ass'n. v. Rubin* (Fla.1970) 238 So.2d 284, 288 (same); *Dep't. of Rev. v. Universal Foods Corp.* (1993)

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318 Or. 78, 862 P.2d 1288, 1291-1292 (appeal from contempt adjudication may not collaterally attack underlying order, with certain exceptions); but see *Wood v. Goodson* (1972) 253 Ark. 196, 485 S.W.2d 213, 217 (recognizing collateral attack on void order); *Phoenix Newspapers, Inc. v. Superior Court* (1966) 101 Ariz. 257, 418 P.2d 594, 596 (unconstitutional order is void and may be collaterally attacked); *Ex parte Tucci* (Tex.1993) 859 S.W.2d 1, 2 (rejecting collateral bar rule); *State ex rel. Superior Court v. Sperry* (1971) 79 Wash.2d 69, 483 P.2d 608, 611 (noting criticism of collateral bar rule and rejecting it as to orders void on their face).

[8][9] As we said in *Berry*, supra, 68 Cal.2d 137, 65 Cal.Rptr. 273, 436 P.2d 273, unlike in jurisdictions that do not permit collateral challenges to injunctive orders, "[i]n this state a person affected by an injunctive order has available to him two alternative methods by which he may challenge the validity of such order on the ground that it was issued without or in excess of jurisdiction. He may consider it a more prudent course to comply with the order while seeking a judicial declaration as to its jurisdictional validity. [Citation.] On the other hand, he may conclude that the exigencies of the situation or the magnitude of the rights involved render immediate action worth the cost of peril. In the latter event, such a person, under California law, may disobey the order and raise his jurisdictional contentions when he is sought to be punished for such *819 disobedience. If he has correctly assessed his legal position, and it is therefore finally determined that the order was issued without or in excess of jurisdiction, his violation of such void order constitutes no punishable wrong." (*Id.* at pp. 148-149, 65 Cal.Rptr. 273, 436 P.2d 273, italics added.)

We observed that our rule is "considerably more consistent with the exercise of First Amendment freedoms" than that of other jurisdictions that have adopted the so-called collateral bar rule barring collateral attack on injunctive orders. (*Berry*, supra, 68 Cal.2d at p. 150, 65 Cal.Rptr. 273, 436 P.2d 273.) The high court of Washington has made a similar observation, stating that "[f]requently an injunction issues immediately before the planned activity is to occur and there is then no time available to the enjoined party to make a direct attack upon the injunction. The practical result then

is that the enjoined party has no adequate remedy at law and cannot engage in a lawful activity because of an unconstitutional order. To us '[i]t ... seems unlikely that allowing collateral attack would significantly reduce citizen compliance with lawful decrees; the citizen still faces a substantial risk of criminal penalties if proved wrong in collateral, rather than direct, attack on the decree's validity.' " (*State ex rel. Superior Court v. Sperry*, supra, 483 P.2d at p. 611; see also *Note, Defiance of Unlawful Authority* (1970) 83 Harv.L.Rev. 626, 635 [observing that especially in the case of preliminary injunctions, to require obedience to the order pending review or a full hearing is to effectively restrain freedom of speech: "[i]f collateral attack is barred when there is insufficient time [before the planned speech or strike] for direct attack on the order, the wrongly enjoined party has no adequate remedy [fns. omitted]"; *Labunski, The "Collateral Bar" Rule and the First Amendment: the Constitutionality of Enforcing Unconstitutional Orders* (1988) 37 Am.U.L.Rev. 323, 327 [criticizing collateral bar rule on ground it "places in the hands of the judiciary the power to threaten contempt to force temporary obedience to invalid orders that never should have been issued"].)

[10] California courts continue to reject the collateral bar rule adopted by other jurisdictions. Instead, they apply the rule that in the contempt proceeding, the contemner may, for the first time, collaterally challenge **1376 the validity of the order he or she is charged with violating. (See *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 327, 204 Cal.Rptr. 165, 682 P.2d 360; *United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 907, fn. 3, 122 Cal.Rptr. 877, 537 P.2d 1237; *Condor Enterprises, Ltd. v. Valley View State Bank* (1994) 25 Cal.App.4th 734, 741-742, 30 Cal.Rptr.2d 613; *Zal v. Steppe* (9th Cir.1992) 968 F.2d 924, 927; see also 7 Witkin, *Summary of Cal.Law* (9th ed. 1988) *Constitutional Law*, § 84, p. 134; 6 Witkin, *Cal. Procedure*, supra, *Provisional Remedies*, § 329, pp. 277-278; *Note, Defiance of Unlawful Authority*, supra, 83 Harv.L.Rev. at p. 633, fn. 48.)

***85 *820 The question remains, however, which court may adjudicate a collateral attack on a superior court injunctive order.

C. The Proper Forum for Adjudication of

Defendant's Challenge.

Defendant argues the municipal court had authority to entertain his challenge to the validity of the injunction in the contempt proceeding, and that the appellate court could review the validity of the injunction on appeal from the contempt judgment.

The People, in opposition, concede that our decision in *Berry* entitles a defendant to challenge the validity of the injunction at some point during the contempt proceedings. They do not advocate--or even mention--the position of the Court of Appeal that article VI, sections 4 and 11 of the state Constitution limit the power of the trial court to consider a collateral attack on the constitutionality of a superior court's injunctive order. Nonetheless, they ask us to "clarify" *Berry* and hold that the issue of the validity of an injunction in the context of a contempt prosecution may be raised only in writ proceedings in the Court of Appeal or this court. Challenges in the trial court, they assert, should be barred.

1. Municipal Court Jurisdiction.

We find no cases supporting the People's position that the trial court lacked jurisdiction to entertain defendant's challenge. While the reported decisions naturally emanate from appellate courts, this fact says nothing of the power of a trial court to entertain such a claim. The People's suggestion that *Berry*, supra, 68 Cal.2d 137, 65 Cal.Rptr. 273, 436 P.2d 273, recognizes only collateral attacks by way of writ petition is unfounded; as we will show, *Berry* acknowledges the power of the municipal court to entertain a collateral attack on an injunction that is raised on demurrer. (Id. at p. 146, 65 Cal.Rptr. 273, 436 P.2d 273.)

[11][12][13] The municipal court had jurisdiction to try the charge of misdemeanor contempt for willful disobedience of a superior court's order. (Cal. Const., art VI, § 10; Pen.Code, § 1462; *People v. Lindemann* (1992) 8 Cal.App.4th Supp. 7, 11 Cal.Rptr.2d 886.) A court with jurisdiction over a cause has jurisdiction to resolve all issues before it. (Code Civ.Proc., § 187; *Kennedy v. Hamer* (1861) 19 Cal. 374, 387; *Holibaugh v. Stokes* (1961) 192 Cal.App.2d 564, 570, 13 Cal.Rptr. 528; *Guardianship of Peterson* (1944) 64 Cal.App.2d 473, 478, 149 P.2d 65.) The validity

of the order defendant is charged with violating is such an issue, for, as we have seen, California law defines misdemeanor contempt as, among other things, disobedience of an order "lawfully issued" by a court. (§ 166, subd. (a)(4).) As we have also *821 shown, California law has long established there can be no contempt of an invalid injunctive order. (*Berry*, supra, 68 Cal.2d at p. 147, 65 Cal.Rptr. 273, 436 P.2d 273 [void order cannot sustain contempt judgment; where order is void, "petitioner should not have been adjudged guilty of contempt"]; *Watsonville Canning and Frozen Food Co. v. Superior Court*, supra, 178 Cal.App.3d at p. 1246, 224 Cal.Rptr. 303; see also *In re Blaze* (1969) 271 Cal.App.2d 210, 212, 76 Cal.Rptr. 551.) Because under settled law there can be no contempt of a void injunctive order, and because we have long recognized the propriety of collateral attacks on void orders, it seems evident that the trial court is a proper forum in which to raise the issue of the validity of the injunction.

In fact, in *Berry* itself we stated in dictum that the municipal court, as trial court in a misdemeanor contempt charge, had authority to entertain an attack on the validity of an **1377 injunction issued by the superior court. There the petitioners, like the defendant here, were charged with criminal contempt in municipal court for violation of an injunctive order, namely, a temporary restraining order (TRO) issued by the superior court. They obtained a stay of the municipal court criminal proceedings and attacked the constitutionality of the TRO they were charged with violating by way of a petition for writ of habeas corpus in the superior court. We decided they were not obligated to raise the invalidity of the TRO in municipal court in the first instance. But we noted the defendants could have demurred to the misdemeanor complaint in the municipal court on the ground of the invalidity of the superior ***86 court's TRO, if the complaint in municipal court had set forth the TRO or referred to it other than "generically." We stated: "[I]n the circumstances of this case [habeas] relief is not barred by the failure of petitioners to challenge directly the jurisdiction of the municipal [sic] court and thus give that court the opportunity to examine its own jurisdiction in light of the constitutional contentions here made. The sole method available for launching such a challenge prior to trial is by a demurrer ... which reaches only defects appearing on the face of the accusatory pleading. [Citation.]

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Since the order whose constitutional validity [e.g., the TRO] is here challenged was neither set forth nor referred to, other than generically, in the original complaints, the matters presently at issue could not have been raised by demurrer. The remedy of habeas corpus is appropriate in these circumstances; we proceed to the merits of the controversy." (Berry, supra, 68 Cal.2d at p. 146, 65 Cal.Rptr. 273, 436 P.2d 273, fn. omitted.)

We conclude the municipal court had authority to entertain defendant's challenge to the validity of the injunction he was charged with violating.

2. Appellate Department Jurisdiction.

[14][15] Next, we consider the authority of the appellate department to entertain defendant's claim on appeal from the contempt judgment. The full *822 terms of the injunction defendant was charged with violating were made part of the record at trial. As the Court of Appeal recognized, ordinarily, on appeal from a municipal court contempt adjudication, the appellate department of the superior court would have jurisdiction to decide such issues as the validity of the order that was the basis for the contempt adjudication. The Court of Appeal concluded, however, that no such review was available in the appellate department because the challenged order was that of another department of the superior court. This analysis was based on the assumption that the state Constitution deprived the appellate department of authority to review the order of another department of the superior court. The Court of Appeal erred, as we have shown, in failing to recognize that although a direct attack seeking to overturn the order would not be permitted, a collateral challenge seeking to avoid the effect of the order in another cause is appropriate under established law.

[16][17] The appellate department of the superior court has appellate jurisdiction over municipal court judgments, and defendant may appeal a final judgment of conviction to the appellate department. (Cal. Const. art. VI, § 11; Pen.Code, § 1466.) Under section 1466, defendant was entitled to raise on appeal any errors of law occurring at trial, the sufficiency of the evidence to support the judgment, the validity of the judgment and any error in denying a motion for new trial. (§ 1466, subd. (a)(2); 6 Witkin, Cal.Criminal Law (2d ed. 1989)

Appeal, § 3163, p. 3919.) As we have seen, it is firmly established that a judgment of contempt is invalid and cannot stand if it is based on a violation of a void injunction (Berry, supra, 68 Cal.2d at p. 147, 65 Cal.Rptr. 273, 436 P.2d 273 [violation of unconstitutional order "cannot produce a valid judgment of contempt"]; see also *In re Misener*, supra, 38 Cal.3d at p. 558, 213 Cal.Rptr. 569, 698 P.2d 637; *San Diego Teachers Assn. v. Superior Court*, supra, 24 Cal.3d at p. 5, 154 Cal.Rptr. 893, 593 P.2d 838; 6 Witkin, Cal. Procedure, supra, Provisional Remedies, § 330, p. 278.) Just as the constitutionality of the statute or ordinance under which a defendant is convicted is a proper subject for appeal (7 Witkin, Summary of Cal. Law, supra, Constitutional Law, § 84, p. 134 ["a defendant in a criminal or **1378 civil proceeding brought under a statute may challenge its constitutionality in the trial court and appeal from an adverse decision...."]), the constitutional validity of an injunction which is the basis for a criminal contempt judgment must be appealable as well.

D. The People's Claims.

[18] The People cite *Signal Oil Etc. Co. v. Ashland Oil Co.* (1958) 49 Cal.2d 764, 322 P.2d 1 (*Signal Oil*), for the proposition that " '[a]n injunction duly issuing out of a court of general jurisdiction with equity powers' " must be obeyed, even if erroneous, so long as the issuing court had subject *823 matter and ***87 personal jurisdiction. (Id., at p. 776, fn. 6, 322 P.2d 1.) An erroneous order, however, is not necessarily an order in excess of the issuing court's jurisdiction, as an order that is unconstitutional on its face would be. We acknowledged in Berry that *Signal Oil* held that an injunctive order enforcing an invalid contract, the invalidity of which is not apparent on its face, is not an injunction issued "in excess of jurisdiction." (Berry, supra, 68 Cal.2d at p. 148, 65 Cal.Rptr. 273, 436 P.2d 273.) But we also explained in Berry the overriding principle that an order unconstitutional on its face is in excess of jurisdiction and cannot sustain a contempt judgment. (Ibid.)

Further, the People's reliance on the language quoted from *Signal Oil*, supra, 49 Cal.2d 764, 322 P.2d 1, seems inconsistent with their concession that an unconstitutional order may be challenged in a contempt proceeding, albeit, according to the

People, only in the Court of Appeal or this court. To the extent the People claim, despite their concession, that no such challenge is permitted as long as the issuing court had subject matter and personal jurisdiction, we reject the argument. As we have seen, this argument was explicitly rejected in *Berry*, as follows: "In this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt [citations], and that the 'jurisdiction' in question extends beyond mere subject matter or personal jurisdiction to ... 'any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis....' " (*Berry*, supra, 68 Cal.2d at p. 147, 65 Cal.Rptr. 273, 436 P.2d 273, first italics added; see also *Fortenbury v. Superior Court*, supra, 16 Cal.2d at pp. 407-408, 410, 106 P.2d 411.) No reason is given for reconsidering this conclusion here.

[19][20] The People also urge policy grounds in support of their claim that no collateral attack on a superior court's injunctive order should be permitted except by way of extraordinary writ in the Court of Appeal or this court. They point out that the purpose of the contempt charge is to " 'enable the courts to vindicate their authority and maintain the dignity and respect due to them.' " (In re *McKinney* (1968) 70 Cal.2d 8, 12, 73 Cal.Rptr. 580, 447 P.2d 972.) This argument has been accepted as an overriding consideration in jurisdictions that have adopted the collateral bar rule, [FN5] but, as explained above, California has rejected that rule. Nor do we see how it serves the stated purpose of vindicating the power of the court issuing the injunction to permit a collateral attack in the Court of Appeal, but not in the trial court. A total bar on collateral attacks would serve that purpose by requiring conformance with and punishing violation of even invalid orders. But as long as *824 this state acknowledges that an unconstitutional order cannot give rise to a valid contempt judgment--a premise the People apparently do not dispute--a person subject to such an injunctive order will be able to violate the order and raise the invalidity of the order as a defense, whether the claim is made in the trial court or by way of extraordinary writ.

FN5. See, e.g., *Walker v. City of Birmingham*, supra, 388 U.S. at p. 321, 87 S.Ct. at 1832; *Ex parte Purvis*, supra, 382 So.2d at p. 515.

[21] The People also argue that to permit a collateral attack in the trial court or appellate department adversely affects those persons or interests that were to be protected **1379 by the injunctive order--here, the interest of local residents in avoiding imminent harm to their peaceful enjoyment of their homes and neighborhood. Of course, these third parties have no protectable interest in imposing unconstitutional restraints on defendant's conduct. And again, unless collateral attacks are barred altogether, the interest asserted by the People cannot be served.

[22] Next, the People argue the trial court is ill suited to entertain a challenge to the validity of an injunction issued by another court, because it does not have the facts giving rise to the injunctive order before it, nor could it consider such facts in the context ***88 of a demurrer to the complaint. This claim is of little weight, because defendant primarily sought to attack the injunction on its face, a claim that requires, and indeed permits, no factual determination. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1091-1092, 40 Cal.Rptr.2d 402, 892 P.2d 1145.)

[23] The People argue the trial court should not entertain collateral attacks on injunctive orders, because of the danger of piecemeal derogation of superior court orders resulting in judgments without precedential value. Permitting a collateral attack only in the Court of Appeal, the argument continues, would at least produce an opinion binding on all parties involved in the litigation over the injunction.

This is, indeed, a substantial concern, yet it is one overbalanced by the need to protect the individual's interest in being free from the coercive effects of unconstitutional orders. In *Berry* itself, we acknowledged the authority of the municipal court, by sustaining a demurrer, to prevent trial on a charge of violation of an invalid order. (*Berry*, supra, 68 Cal.2d at p. 146, 65 Cal.Rptr. 273, 436 P.2d 273.) Such an order would have no precedential value. Nevertheless, as we established in *Berry*, and as the very wording of section 166 makes clear, in this state, the interest of the

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individual in avoiding the coercive effect of void injunctive orders is more substantial than the interest of society in vindicating a court's power by maintaining deference even to void orders through the contempt power.

[24] Finally, we observe that the Court of Appeal ordinarily is not involved in reviewing misdemeanor proceedings, because appellate jurisdiction over *825 misdemeanor judgments rests with the appellate department of the superior court, with further review only by a discretionary transfer under rule 62(a) of the California Rules of Court. We are not inclined to increase the role of the Courts of Appeal and this court in reviewing misdemeanor convictions in the manner suggested by the People, when the state Constitution and the Legislature have assigned that function primarily to the superior courts.

III. CONCLUSION

We conclude the judgment of the Court of Appeal should be reversed, as the municipal court and the appellate department of the Superior Court had authority to entertain defendant's challenge to the validity of the Superior Court injunctive order that was the basis of the charges of contempt.

Because of this conclusion, we need not address the Court of Appeal's concern with avoiding a violation of equal protection with respect to the right of appeal. No need arises, accordingly, to vest the superior court with original jurisdiction over misdemeanor cases, and we do not consider the parties' arguments relating to this point. Nor do we consider the People's argument that we should determine the validity of the injunction. Neither party petitioned for review on this ground. (California Rules of Court, rule 29.3.)

The judgment of the Court of Appeal is reversed, and the matter remanded to the Court of Appeal for further proceedings not inconsistent with this opinion.

MOSK, KENNARD, ARABIAN, BAXTER,
GEORGE and WERDEGAR, JJ., concur.

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