The Gang's Not Here

Toni Massaro

Aggressive enforcement of municipal ordinances prohibiting jaywalking, prostitution, and public drunkenness, along with greater police visibility and discretion to enforce curfews and anti-loitering statutes, have become politically popular measures in many major cities. The theory being advanced in support of these measures is the "broken windows" theory of crime first asserted by James Q. Wilson and George Kelling[1] – which assumes that visible disorder breeds crime, and that measures that reassert visual order, such as fixing broken windows and sweeping street corners of persons who appear to be gang members, will reduce crime.

One such "order-maintenance policing" ordinance was passed by the City of Chicago in 1992, and provides that

> (a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more such persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.
>
> (b) It shall be an affirmative defense to an alleged violation … that no person who was observed loitering was in fact a member of a criminal street gang. …
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> (c)(1) "Loiter" means to remain in any one place with no apparent purpose.
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> (2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
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> (5) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.[2]

Each violation of the ordinance is punishable

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1 James Q. Wilson & George L. Kelling, *Broken Windows*, The Atlantic Monthly, March 1982.

2 Chicago Municipal Code § 8-4-015.

by a fine of up to $500, imprisonment for not more than six months, and 120 hours of community service.

The amount of discretion that this ordinance affords Chicago police to "disperse or arrest" suspected gang members is impressive, to say the least.[3] It thus came as little surprise when litigants challenged the ordinance on constitutional grounds, or when the Illinois Supreme Court, in *City of Chicago v. Morales*,[4] concluded that the ordinance was unconstitutionally vague under both the Illinois and the United States Constitutions. According to the Illinois Supreme Court, ordinary persons would be required to guess at the law's meaning,[5] and the absence of minimal guidelines to govern law enforcement would encourage arbitrary and discriminatory enforcement.[6]

Far more surprising was the United States Supreme Court's decision granting certiorari in *Morales*.[7] One possible reading of the grant of certiorari is that the Court wishes to clarify its murky (indeed, opaque) vagueness doctrine, in ways that may not affect much beyond this particularly open-ended ordinance. Alternatively, however, the grant of certiorari might signal the Court's desire to review more generally the increasingly prevalent grants of broad discretionary authority to urban police, and the "broken windows" refrain that is being intoned in support of these measures. The justices may consider the argument, advanced in recent scholarship and in legal briefs in *Morales*, that urban decay is fostered when police fail to assert order, and that aggressive policing of misdemeanor offenses, such as loitering, will enhance the liberty of the affected communities – many members of which strongly endorse these policies. That is, the Court may be poised to consider whether anti-loitering ordinances like the City of Chicago's, along with other comparably vigorous crime control measures, are worth the constitutional candles they may extinguish.

The "broken windows" theory of crime and the order-maintenance policing measures premised on the theory are being forcefully endorsed by several criminal law scholars – most notably and influentially, by University of Chicago's Dan Kahan. His argument now has reached the Court directly, as Kahan and his colleague Tracey Meares have filed an amicus brief on behalf of the Chicago Neighborhood Association defending the Chicago ordinance on the same grounds that Kahan asserts in his scholarship regarding alternative approaches to crime. The argument – in very compressed form – is that "most people refrain from engaging in crime not because they fear formal penalties but because they fear damage to their reputation and loss of status. But individuals fear stigma less when they perceive that criminality is rampant."[8] Visible signs of criminal activity – like broken windows, prostitution, and open congregations of criminal gang members – make engaging in crime less stigmatizing; it may even elevate the status of those who engage in crime. It also creates social pressure on law-abiders not to cooperate with each other or the police, lest they risk intimidation (or worse) by gang members. Consequently, one way to change the status quo – quite literally – and to make criminal gang membership detrimental to, or at least

3 But it isn't unprecedented. *See Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (striking down broadly worded vagrancy law on vagueness grounds); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (same); *Kolender v. Lawson*, 461 U.S. 352 (1983) (same).

4 177 Ill.2d 440, 687 N.E.2d 53 (1997).

5 177 Ill.2d at 449-50, 687 N.E.2d at 60.

6 177 Ill.2d at 456, 687 N.E.2d at 63.

7 118 S. Ct. 1510 (1998).

8 Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. Rev. 349, 357 (1997).

neutral vis-à-vis urban youths' social acceptance, is "to attack the public signs and cues that inform juveniles' (mis)perception that their peers value gang criminality. That's what gang-loitering laws attempt to do."[9]

In short, anti-loitering laws, like juvenile curfew laws,[10] help take the reputational sting out of *not* participating in nighttime street activity and criminal gang activity. Prohibiting loitering and banning youths from being out at night sap gangs of their visibility, of some of their membership, and of their primary means of achieving control over neighborhoods that they otherwise can tyrannize.

Another attraction of the new order-maintenance measures, defenders argue, is that they can substitute for the more severe punishment method of prison – a method that they say sends a message of contempt to the poor minority communities that are disproportionately affected by it.[11] The amicus brief stresses that the mostly minority communities that are disproportionately affected by aggressive policing of misdemeanor offenses welcome these tactics, as both more effective and less community- and family-destructive than prison. Thus, any civil libertarian who views the Chicago ordinance with outrage is being "short-sighted," because overturning gang-loitering laws may lead to greater reliance on more severe, and less effective punishment alternatives, which may mean less liberty in the long run for the affected communities.

As the amicus brief expresses the issue, and would answer in the affirmative, the question raised by an anti-loitering measure like Chicago's is:

> 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.[12]

In response to arguments that the ordinance flunks the vagueness standard set in past Supreme Court cases construing similarly broad anti-loitering laws, the brief maintains that the primary concern in these earlier cases was discriminatory enforcement of the law. This problem does not infect the Chicago ordinance because it was approved by the affected communities, and because the Chicago police force is now racially integrated.[13]

Thus goes the three-pronged justification

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9 *Id.* at 375-76.

10 *See, e.g., Hutchins v. District of Columbia*, 144 F.3d 798 (D.C. Cir. 1998) (holding that the Juvenile Curfew Act of 1995 enacted by the District of Columbia violated minor appellees' equal protection and due process rights, though disagreeing about proper standard of review); *Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997) (striking down city curfew ordinance on vagueness, equal protection, first amendment, and substantive due process grounds).

11 Kahan, *supra* note 8, at 393 (noting that "[m]embers of high-crime communities are much more likely … to support gang-loitering ordinances, curfews, and other order-maintenance policies, which they perceive to be appropriately moderate yet effective devices for reducing crime"). *See also* Tracy L. Meares, *It's A Question of Connections*, 31 Val. U. L. Rev. 579, 587-89 (1997) (discussing the social organization breakdown costs of incarceration as the primary method of punishment for drug offenses in poor minority communities).

12 *See* Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner (Dan M. Kahan, Tracey L. Meares, Michele L. Odorizzi, Jeffrey W. Sarles & Steffen N. Johnson, Counsel for Amici Curiae) at i.

13 *See* Amicus Brief at 4, 7-13.

for the "new path of deterrence" of crime:[14] first, that anything beats the harshness of the primary alternative to order maintenance policing, which is prison; second, that the aims of criminal law enforcement should include reducing the social status value of criminal activity; and third, that police need broad discretion, fewer constraints, and alternative, get-tough policing methods to alter existing status dynamics. Instead of the flaccid "just say 'no'" importuning of the 80s, we have the forceful "we just said 'go'!" command of the 90s, as police are being given very broad discretion to issue commands to disperse loiterers, to arrest turnstile jumpers, and to otherwise sweep the streets of visible signs of criminal order trumping civic order.[15]

Who could oppose such an agenda, based as it is on opposition to imprisonment as unduly harsh and expensive in many cases, and on an unassailable preference for civic, versus criminal, rule of crime-vulnerable neighborhoods? Who wouldn't prefer no broken windows, litter, prostitution, drive-by shootings, or open drug dealing in his or her neighborhood? Who wouldn't favor measures that make criminal activity, including criminal street gang activity, status degrading versus status enhancing?

One obvious, but increasingly unpopular, response to these questions is that someone might oppose these crime control measures on the ground that existing constructions of constitutional rights would be sacrificed if such crime control measures became commonplace. That is, one might agree completely with the underlying norm preferring order over urban disorder, and even accept the broken window premise that visible disorder breeds crime, yet still object to at least some of the order-maintenance policing measures as giving police too much discretion in ways that violate the Fourth and Fifth Amendments. Just as one might vehemently oppose violent crimes, yet reject mandatory DNA testing for all citizens as a means of improving law enforcement's ability to identify and deter such offenders, one might regard open-ended anti-loitering laws as the wrong way to proceed, given other constitutional values.

But there are other, less obvious reasons to be skeptical of the new measures. The main one is that the norm-expressive, order-restoration justification being advanced in support of these reforms sweeps so wide that it is no justification. *Any* form of punishment that expresses contempt for offenders, that enables police to assert greater social control, and that does not shock a majority of the relevant community's politically active peoples' sensibilities, can claim to be consistent with this justification. Only very culturally exotic measures – like caning, public whippings, or

14 *See* Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477 (1997).

15 A complement to these "broken windows" steps, which is also being touted as an effective means of undermining the status of criminal activity, is shaming offenders. For example, johns who solicit prostitutes in red light districts, or thieves who lift goods from stores, may be compelled to wear signs that publicize their arrests. Again, the intuitively attractive theory is that punishment must be expressive of the proper social norms, and must undermine social meanings that otherwise condone criminal activity and offenders. The disorder of crime is thereby visibly condemned, and civic order is visibly restored, without excessive reliance on the expensive and harsh option of prison, or resort to the normatively anemic option of parole. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996) (discussing and defending shaming penalties). For a response to Kahan's defense of shame penalties, *see* Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCH., PUB. POL'Y & L. 645, 689-704 (1997).

physical brandings – would clearly fail the "politically tenable" requirement; and in nearly every imaginable high crime context, police could make a comparably powerful, but similarly general, claim that greater police discretion and authority are essential to efficient and aggressive implementation of an order-maintenance policy, and could assert that anything beats prison as the primary means of achieving order in these neighborhoods. The new rhetoric about policing obscures both this nearly limitless reach and the potential downside of asserting social order needs as a per se trump for constitutional concerns. It essentially treats the ever-present risks of police brutality and harassment as untroubling, inevitable costs of civic order.

Order-maintenance advocates also underplay the significant doctrinal impact that might result if the Court were to heed their urgings. For example, "false arrest," under their account, would become a difficult-to-prove affirmative defense against the excesses of law enforcement, instead of a baseline concern. The amicus brief filed on behalf of the Chicago Neighborhood Organizations proposes that the Court substitute a weak, "shocks the conscience" or "outrage" limit on government tactics for specific, stricter constitutional limits on these tactics. The sole significant constitutional restraint on law enforcement would become that the burden imposed by a criminal law must be meaningfully shared by all members of the community; and the sole constitutional issue thus would become whether a representation defect infects a law enforcement measure, not whether the challenged practice, even if properly adopted by a majority of the relevant community, invades traditional notions of liberty or justice. In other words, "Who voted for this law?" would become the constitutional inquiry, rather than "Who voted for this law *and* what does this law do?"

Imminent Supreme Court approval of such far-reaching doctrinal reform is very unlikely, given the significant caselaw it would displace. But the Court nevertheless might be moved to approve at least some order-maintenance measures based on the broken windows theory, if not to adopt a wholesale revision of constitutional criminal procedure. If it does uphold the ordinance in *Morales*, on an order trumps criminal disorder basis, this could advance the broader doctrinal reform aims expressed in the amicus brief, however incrementally.

Before the Court signs on to the broken windows theory, though, it should consider several potentially disruptive consequences of order-maintenance policing that its proponents tend to overlook. These consequences are – ironically – especially obvious if one considers the "expressive" function of criminal law that the order-maintenance theorists emphasize and wish to exploit.[16] The problem with their proposals thus is not that they believe that order-maintenance measures like anti-loitering ordinances and curfews have an expressive dimension; it is that they tend to focus solely on the positive meanings that the measures may express. For example, the amicus brief reads the social meaning of the Chicago ordinance as singular and benign: it is an unambiguous expression of social order and disapproval of criminal activity. Yet this construction of the ordinance overlooks many other possible, less positive messages that this ordinance, as well as other order-maintaining policing measures, may convey.

One alternative meaning that may be imbedded in this delegation of broad, virtually unchecked (and potentially *uncheckable* in some cases, insofar as it depends on an arrestee's capacity to launch an affirmative

16 *See* Kahan, *supra* note 15.

defense) police power, is a preference for police discretion over conventional norms of probable cause,[17] presumptions of innocence, and due process. If the social norm-expressive account of criminal law holds true, the ordinance could precipitate a shift away from these constitutional norms.

The social consequences of such a shift are difficult to predict, and may be harder still to contain. The shift certainly could effect some positive social consequences, such as equalizing the costs of expansive rights for criminal suspects and offenders. As a colleague once said, much constitutional criminal procedure might be abandoned if the crime that afflicts lower class neighborhoods were prevalent in middle or upper class neighborhoods. His point was, in part, that anyone vulnerable to crime realizes that criminal procedure affects liberty in multiple respects, and that preserving the liberty of offenders imposes costs that are not borne equally by all citizens. Residents of gated middle and upper class communities suffer few of the costs of strict constitutional limits on police power, whereas inner city residents pay a steep price. But the costs of *not* preserving the liberty of *suspected* offenders, which costs are at stake in *Morales*, might prompt that same middle class neighborhood to resurrect certain constitutional rights very quickly, despite any reduction in police capacity to maintain order, if police brutality, false arrests, and other police misconduct that affects citizens on the streets, and not just post-arrest practices, became prevalent.

Still another outcome, however, might be that the community could rapidly become inured to strict police surveillance, routine arrests, and other comparably invasive police tactics, so that constitutional norms against such practices would collapse. Moreover, resurrecting the constitutional norms might prove to be far more difficult than dismantling them, no matter how abusive and pervasive the police practices became. That is, abandoning constitutional rights for the pursuit of civic order in a crime-ridden community, could have negative, difficult-to-reverse, consequences, if one worries about constitutional norm collapse.

That constitutional norms – especially those that secure the autonomy of suspected criminal offenders despite the liberty costs to others – may be vulnerable to collapse obviously raises intractable questions. How should we distinguish a welcome change in the constitutional balance here from a disastrous one? What is a change in interpretation that preserves autonomy, versus one that denies it? My point is that whether or not the Court believes that a welcome change would be to approve an open-ended loitering ordinance like Chicago's, it should consider the possibility that approving this ordinance could erode due process norms in ways that may be hard to reverse.

What is also clear, regardless of one's view of the proper liberty balance and its implications for criminal procedure, is that the argument advanced in the amicus brief in *Morales* that a criminal law that affects us "all," and that "we" have adopted, cannot unduly invade "our" liberty, because we have imposed it on "ourselves" and bear its burdens, is a very controversial account of constitutional liberty. At a minimum, this view invites a closer examinationof who *in fact* "voted" for the Chicago law and what *that* means.[18] Moreover, it hardly closes the discussion about whether its politi-

17 The Chicago ordinance was supplemented by police department guidelines for its enforcement, which specify criteria for establishing probable cause that an individual is a member of a street gang. These criteria are not part of the ordinance itself, however. *Morales*, 177 Ill.2d at 446-47, 687 N.E.2d at 59.

18 For example, simply because we are told that "the political acceptability of shaming penalties … is close to an established fact," *see* Kahan, *supra* note 14, at 2484, may not make it so, particularly if the sole basis for the assertion is a single news item. Kahan's sole support for this claim is a *New York*

cal acceptability, even if proven, should be the sole or even primary measure of the ordinance's social meaning or its social value. To claim that it does is to ignore the many ways in which one community's response to its crime control problems might have quite significant, difficult-to-cabin, effects on other communities, or on the same existing communities in future scenarios, once "order" there has been restored. If, for example, the Court in *Morales* agrees to set constitutional standards in ways that "slide up and down a scale according to the gravity of the crime problem we wish to combat,"[19] this could result in constitutional baselines that are determined by the worst-case scenarios in terms of crime – again, with no easy means of ratcheting the constitutional baseline back up in other communities or in the crime-ridden communities after their crime problems are alleviated. Consequently, that some Chicago citizens in 1992 voted away certain of their liberties does not, especially under current conceptions of constitutional law that presuppose one federal constitutional order, necessarily mean that all people *affected* by that decision had meaningful political input into it. To claim otherwise betrays an assumption of this community's insularity that is difficult to accept – factually, politically, or normatively.

The argument also exaggerates the need for context-specific constitutional rules in *Morales*, even if it does make sense in other contexts. An anti-gang ordinance that is unduly vague in Kalamazoo or Boise does not suddenly become clearer in Chicago, even *if* the criminal gang control problems in Chicago are worse than in Kalamazoo or Boise. The proper constitutional response in all these cases would be to clarify the ordinance in a way that citizens and police in any city could understand, not to widen the scope of police authority with no meaningful, intelligible limitations. Indeed, if the Chicago police department was able to issue regulations that narrowed the ordinance and made it less vague, as the city argued it had, then there is little reason why the ordinance itself could not have been similarly narrowed and thus rescued from the vagueness peril.

Another troubling aspect of order-maintenance policing rhetoric is that it recharacterizes constitutional checks on assertions of police power as restraints on "liberty," because they hamper official power to restore civic order and public safety. "Liberty," according to this account, is freedom from private tyranny, secured by aggressive government force, virtually unchecked by traditional constitutional restraints. The implicit public/private reversal within this account of liberty may be warranted: just as maintaining privacy of the home is now understood to be liberty-depriving in certain circumstances, maintaining freedom from intrusive police practices on the street may also be liberty-depriving in some circumstances. But neither "liberty" nor "order" is unambiguously aligned on the one side or the other, under either the old modes or the new modes of policing; liberty losses and disorder remain problems under *both*. These complexities of "liberty" and "order" too are underplayed by the order-maintenance policing advocates, in ways that may compromise the autonomy balance that constitutional law seeks to effect.

Times article that focuses primarily on one case involving a shaming penalty, where the Illinois Supreme Court struck down the penalty, and where members of the relevant community expressed very different views of the penalty, including the view that it was too harsh. *Id.* at n.40 (citing Jan Hoffman, *Crime and Punishment: Shame Gains Popularity,* N.Y. Times, Jan. 16, 1997, at 1).

19 *City of Chicago v. Youkhana*, 277 Ill. App. 3d 101, 114, 660 N.E.2d 34, 42-43, 213 Ill. Dec. 777, 785-86 (1995).

Another potentially negative message conveyed by the Chicago ordinance is that criminal gangs in Chicago have, in effect, won, and that the citizens there have grudgingly abdicated procedural norms in favor of other norms. In other words, they are willing to pay whatever price – in terms of wrongful arrests and curtailment of liberty – that the new, get-tough regime may entail, but they would prefer, in a better world, that the constitutional process norms, including their most expansive formulations, were preserved. The social meaning and social norm consequences of signaling such an abdication are very difficult to predict, but could include a coarsening of public feelings toward criminal offenders and undue pessimism about the efficacy of less strict measures.

A far less subtle meaning of the Chicago ordinance is that certain people are "broken windows."[20] Specifically, the "broken windows" are people who *look like* criminal gang members, or who associate with someone who does. If police "fix" these broken windows – by arresting them, dispersing them (or, in the case of New York City, placing them on a barge off of Rikers' Island)[21] – then social order will be restored. Criminal offenders, or people who resemble them, are a blight that should be treated as such, through physical expungement. Again, this treatment could harden public sympathy for the many inner city youths who wear clothing or otherwise effect a personal style, behavior, or physical appearance that is associated with criminal gang culture. This may be one objective of the ordinance – to make such attire socially and legally costly, and thus not worn. But again, it is a strategy with many other potential costs that must be weighed against the crime deterrence advantages it may possess.

The ordinance may also say something negative to and about the predominantly poor, minority communities to which it is being applied, even if (as proponents stress) many politically active members of these communities would, and did, endorse the policy. Arrest, arraignment, and a night in jail become potential costs of living for youths in these aggressively policed neighborhoods – costs that have meanings of their own, and that must be weighed both against and among the steep costs already incurred by these citizens, in terms of their vulnerability to violence, poverty, and educational disadvantages. Few parents, in other communities or in the affected ones, likely would be unfazed if their fourteen-year-old son or daughter were subject to arrest, fingerprinting, and criminal prosecution for loitering with a person whom the police "reasonably believed" to be a gang member. Fewer still would regard a police record as an insignificant barrier to their teen's life prospects. While some of these parents might still welcome the aggressive policing measures as the lesser of two evils, even insofar as they affected their children, the measures currently apply only to *certain* communities. Thus another message conveyed by the ordinance in *Morales* is that constitutional rights are zoned. In areas like Marquette Park, youths have few such rights, and suffer great consequences for their misdemeanors, while in areas like Kenilworth, residents retain the full complement of rights and may incur few penalties for low level criminal activity, provided they stick close to home for it. This message may not be a new one, of course, but it certainly is a troublesome one.

The penalties being imposed on offenders

20 *See* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, Mich. L. Rev. (*forthcoming* November 1998).

21 *See* David M. Halbfinger, *City Detaining More Youths Before Trial – Overcrowding Forces Use of Barge as Jail*, N.Y. Times, July 2, 1998, at a20, col. 6.

under the Chicago ordinance are easy to overlook, if one listens only to the broken windows justification for the measure. In an important forthcoming piece critiquing both the "broken windows" theory and order-maintenance policing as practiced in New York City, Bernard Harcourt emphasizes that although the new rhetoric invokes images of order being achieved by fixing broken windows, the new tactics in fact rely heavily on *arrests* as the means of restoring order. As Harcourt observes:

> New York City's quality-of-life initiative has probably contributed to the decline in crime. But the mechanism is not just a reduction in litter, fixing broken windows, or beautifying neighborhoods – though all of these may have some positive neighborhood effects on crime. The primary engine of community policing in New York may be the enhanced power of surveillance offered by a policy of aggressive misdemeanor arrests. The quality-of-life initiative enables a much greater collection of identifying information and an enhanced potential for checking records, fingerprints, DNA, and other identifying characteristics. It also facilitates information gathering from informants. These mechanisms have little to do with fixing broken windows and much more to do with arresting window breakers – or persons who look like they might break windows, or are simply disorderly, or are strangers or outsiders.[22]

"Order-maintenance" policing thus might more precisely be called "strict surveillance and arrest" policing, which would better illumine the real crime control mechanisms at work.

These measures impose an order onto targeted neighborhoods that resembles the order imposed within highly regulated settings – like the military, schools, or prisons. In effect, the ordinances treat all juveniles as though they were offenders out on probation, subject to arrest for hanging with the wrong crowd, for making a suspicious move, or for otherwise failing to observe quite significant restraints on behaviors that are not inherently criminal – such as being out at night, or standing on a street corner with a gang member. This order comes at a constitutional price, a price that may be much harder to accept if one notices the arrests that effect the order, and not just the fixed windows.

The new order-maintenance policing therefore has multiple social meanings – some of which have potentially harsh and difficult-to-predict, long-term social consequences. Just as the now-routine metal detector searches that assert order at airports, courthouses, and some public schools convey multiple, discursive messages about order, and just as national border searches based on "drug courier profiles" convey multiple, discursive messages about order, so do anti-loitering and juvenile curfew laws send multiple, discursive messages about order, even if the measures affect us all and thus may be said to be neutral laws of general applicability.

These alternative social meanings of order-maintenance policing are given remarkably little weight in expressive-theory-of-crime accounts of why these new police practices are sound public policy. This is, as I say, ironic, given that the accounts stress social meaning and order, and given that some of these messages may convey as much "contempt" or disregard for members of the affected communities as did the police practices that they replaced. Perhaps the risks of the negative social consequences of these negative messages are worth incurring; perhaps relinquishing restrictions on police discretion in urban centers is dictated by Maslow's hierarchy, because the physical safety of inner city

22 *See* Harcourt, *supra* note 20.

residents must be secured before rights less essential to survival are. But it is hardly an unambiguous restoration of positive social norms or of order, as proponents of the ordinance would have us believe. On the contrary, the order being established in Chicago is actually a form of martial law. It may well displace the order of criminal street gangs, as hoped; but it also could displace aspects of our constitutional order, in ways that ambiguate the "our," redefine "constitutional," and pluralize the "order" of this phrase.

Order is always an attractive social and political agenda. In public schools, public sector workplaces, military settings, prisons, and many other government-owned and government-run institutions, "order," "safety," "civility," and "decorum" are routinely invoked, and very often respected as proper grounds for restricting our speech, movement, attire, and many other forms of behavior. But in every such case there is a tension between order in one sense, and order in another, quite fragile sense, of permitting the disruptions that freedom from government regulations – *even* ones we vote for, or otherwise sign off on – may entail. The same tension pervades order-maintenance policing, and the specific ordinance at issue in *Morales*. These measures are not, as some would have us believe, univalent. Nor is the Court's ruling on the Chicago ordinance likely to be. The Court in *Morales* thus should not ignore, in debating this case, the profound ambiguities of order nestled within the practice of order-maintenance policing, the plural aspect of the social norms at stake, and the uncertain boundaries of the neighborhoods that will be affected by its determination of what Chicago's anti-gang ordinance means. GB