March 2016

Public Safety or Social Exclusion? Constitutional Challenges to the Enforcement of Loitering Ordinances

Eileen Divringi

Follow this and additional works at: https://via.library.depaul.edu/jsj

Recommended Citation
Available at: https://via.library.depaul.edu/jsj/vol8/iss1/2

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal for Social Justice by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
PUBLIC SAFETY OR SOCIAL EXCLUSION?
CONSTITUTIONAL CHALLENGES
TO THE ENFORCEMENT OF
LOITERING ORDINANCES

EILEEN DIVRINGI

INTRODUCTION

Modern loitering ordinances that regulate the uses of public space came into widespread application in the late 1980s and 1990s as local governments incorporated them into broader public safety and crime reduction efforts.¹ Broadly speaking, these loitering ordinances encompass a range of regulations designed to limit the presence or behavior of certain individuals in certain public spaces. Typically, these ordinances empower police officers to order dispersal of the groups engaging in activities prohibited by the ordinance and provide cause to arrest those who fail to comply.²

This paper explores constitutional challenges to loitering ordinances and related regulations at the federal level with respect to how the laws have evolved over time and across different societal circumstances. Though loitering ordinances are largely enacted at the municipal level, many successful legal challenges to them have come through the federal court system. This provides an interesting insight into the tension between locally based ef-

forts to promote public safety and the protection of civil liberties.

**CRITICISMS OF LOITERING ORDINANCES**

Critics of loitering laws consider them to be new iterations of historically classist vagrancy laws that, instead of targeting disfavored groups explicitly, focused on behaviors commonly associated with those groups as a proxy. Historically, their impact has disproportionately fallen on individuals experiencing homelessness, communities of color and other disfavored individuals such as sex workers, drug addicts and political dissidents.  

As noted above, the variety of loitering ordinances that have become increasingly common since the 1980s typically pertain to activities that occur in public spaces such as sidewalks and street corners. Many identify specific zones of enforcement within a municipality, effectively excluding members of targeted groups from these areas. This becomes particularly problematic when these areas are home to a high concentration of vital services, such as food assistance, drug treatment centers and public agencies.

Loitering laws rarely require their targets to be engaged in any sort of independent criminal act. Critics argue that this opens them up to broad discretion by the enforcing officer and enables selective enforcement. For example, many early loitering laws targeted individuals who “lacked visible means of support” or were enforced against students engaging in sit-in

---

3 Id.
5 Id.
protests. Though modern loitering ordinances are more likely to target activities associated with well-defined crimes (such as drug trafficking), connecting the act of loitering to criminal intent remains a legal challenge.8

**Constitutional Challenges**

While loitering ordinances have been challenged under a variety of different provisions of state constitutions, three doctrines have been the most common bases for challenges in federal courts. All three primarily focus on the amount of discretion an enforcing officer is given under the ordinance, and the potential for this discretion to be used towards discriminatory ends.

**Void-For-Vagueness Doctrine**

The void-for-vagueness doctrine is derived from the due process clauses of the Fifth and Fourteenth Amendments. The core prongs of the doctrine are notice and prohibition of arbitrary enforcement.9 Under the first prong, ordinances must provide sufficient notice so that an ordinary person may be able to infer which activities are and are not permissible.10 Some argue that this is the weaker of the two prongs, as many criminal laws are enforced without offering any notice or specificity of prohibited behaviors.11 The second prong of the void-for-vagueness doctrine requires the legislation to be sufficiently clear that it would not lead to arbitrary to discriminatory enforcement.12

Normally, facial challenges to criminal laws must demonstrate that the statute was unconstitutional as applied to the individual

---

8 See Wheeler, supra note 6.
9 *Id.* at 473.
10 *Id.*
11 Poulos, supra note 7, at 390.
12 Wheeler, supra note 6, at 474.
before the court. However, under the void-for-vagueness doctrine, challengers have historically only been required to demonstrate that the law as written could implicate other individuals engaging in constitutionally protected activities.\textsuperscript{13} Nevertheless, in cases where the court finds the individual’s actions to be clearly within scope of prohibited activities, such challenges are usually unsuccessful.\textsuperscript{14}

\textit{Overbreadth Doctrine}

Though similar to the vagueness doctrine in its emphasis on legislative scope, the overbreadth doctrine focuses on the impact that overly vague laws have on constitutionally permissible activities, particularly those protected under the First Amendment. Lack of specificity in this area is thought to have a "chilling effect" on the practice of constitutionally protected activities, again lending itself to discriminatory enforcement.\textsuperscript{15} Courts have historically been more inclined to overturn laws that impinge on activities protected under the First Amendment because these are considered vital to the functioning of American society.\textsuperscript{16}

Loitering laws have been particularly susceptible to overbreadth challenges because of their inherent regulation of the freedoms of association and assembly.\textsuperscript{17} Like the vagueness doctrine, the overbreadth doctrine allows for a facial challenge based on the potential for the law applied as written to violate the First Amendment rights of other individuals. In fact, as a result of the similarity between the two doctrines, courts are often not rigorous about distinguishing between the two in their opinions.\textsuperscript{18} This has convoluted the legal analysis of many court challenges.

\textsuperscript{13} Poulos, \textit{supra} note 7, at 393.
\textsuperscript{14} Id.
\textsuperscript{15} Id. at 391; see also Wheeler, \textit{supra} note 6, at 476.
\textsuperscript{16} Poulos, \textit{supra} note 7, at 403.
\textsuperscript{17} Wheeler, \textit{supra} note 6, at 477.
\textsuperscript{18} Poulos, \textit{supra} note 7, at 392.
decisions, leading some scholars to question whether the two doctrines can ultimately be considered separately.\textsuperscript{19}

\textbf{Equal Protection Challenges}

Equal protection challenges are also largely corollary with the void-for-vagueness doctrine. These challenges are applied to loitering laws that enable arbitrary arrests based on vague descriptions of offending activities. Such regulations are alleged to facilitate discriminatory enforcement against certain classes of people, violating the equal protection clause of the Fourteenth Amendment.\textsuperscript{20}

While there is much evidence that loitering laws have a disparate impact on the homeless and communities of color, challenges based on equal protection grounds have largely been unsuccessful.\textsuperscript{21} In fact, the equal protection doctrine is notably weak in criminal law, with relatively few cases litigated on its basis involving prosecutors rather than law enforcement officers.\textsuperscript{22} The primary reason these challenges have been largely unsuccessful is the incredibly high burden of proof required of plaintiffs. In the 1976 case \textit{Washington v. Davis}, the court held that equal protection challenges must present evidence of discriminatory intent, not merely discriminatory effect.\textsuperscript{23} This standard was reaffirmed by the \textit{McClesky v. Kemp} (1987) decision, in which the Court determined that evidence of racially disparate application of the death penalty in the state of Georgia was insufficient to sustain an equal protection challenge.\textsuperscript{24} Rarely, if ever, are activates with discriminatory intent so brazen as to meet this standard.

\begin{itemize}
\item \textsuperscript{19} Strosnider, \textit{supra} note 1, at 117.
\item \textsuperscript{20} Wheeler, \textit{supra} note 6, at 481.
\item \textsuperscript{21} Hansel, \textit{supra} note 2, at 453.
\item \textsuperscript{22} Strosnider, \textit{supra} note 1, at 113.
\item \textsuperscript{23} \textit{Washington v. Davis}, 426 U.S. 229, 244-45 (1976).
\item \textsuperscript{24} \textit{McCleskey v. Kemp}, 481 U.S. 279 (1987).
\end{itemize}
The Court’s reluctance to accept equal protection challenges based on disparate impact reflects the concern that such a finding could unleash a Pandora’s box of litigation. Due to factors that many consider exogenous to the legal process, most criminal laws are disproportionately enforced against communities of color. Allowing an equal protection challenge based on disparate impact alone, the Court feared, could open up virtually all of these laws to constitutional challenge.

**HISTORIC ROOTS: VAGRANCY LAWS & EARLY LOITERING ORDINANCES**

Loitering laws in the United States are often considered to be derived from old English vagrancy laws. Originated during the collapse of feudalism, these laws were based on the assumption that newly unemployed serfs would need to support themselves through crime, and therefore sought to make the state of idleness and unemployment illegal. As a result, in addition to crime prevention, vagrancy laws served an economic rationale that sought to punish individuals of lower socioeconomic-classes who refused to participate in the feudal economy. In a similar vein, during the antebellum period, southern states enacted a series of vagrancy-type laws to restrict the movement of slaves and prevent opportunities for organized rebellion. In the aftermath of the Emancipation Proclamation, these statutes were refashioned as the “Black Codes,” using similar means to prevent the newly freed from escaping exploitive plantation work.

26 Id. at 125-26.
28 Wheeler, *supra* note 6, at 469.
30 Roberts, *supra* note 27.
PUBLICATION: PUBLIC SAFETY OR SOCIAL EXCLUSION?

While many early loitering laws were blatantly incompatible with the constitutional rights guaranteed to all Americans, the indigent communities against whom they were enforced were largely incapable of mustering the legal resources to fight them in court.\footnote{Poulos, supra note 7, at 387.} However, legal challenges to these laws became more common in the mid-1960s after the Supreme Court decided in \textit{Gideon v. Wainwright} that indigent persons charged with felonies were entitled to legal representation.\footnote{Wheeler, supra note 6, at 470.} The following section provides an overview of key vagrancy cases tried in federal courts that set important precedents for the later consideration of loitering laws.

\textit{Goldman v. Knecht (1969)}

Illustrating the extent to which early loitering laws were arbitrarily enforced, \textit{Goldman v. Knecht} arose from the arrest of individuals who were neither loitering nor moving about in public. The plaintiffs were residing in what District Judge Doyle described as a "hippie hangout" when officers entered in a search for narcotics.\footnote{Goldman v. Knecht, 295 F.Supp. 897, 899 (D.Colo. 1969).} Though no narcotics were found, plaintiffs were charged under the state of Colorado's vagrancy statute, which defined a vagrant as "a person able to work in an honest and respectable calling, who is found loitering or strolling about, frequenting public places where liquor is sold, begging, or leading an idle, immoral, or profligate course of life, or not having any visible means of support."\footnote{Colo. Rev. Stat. § 40-8-19 (1963).} Plaintiffs were arrested again a few months later under similar circumstances.

Certainly, it would not require a constitutional scholar or experienced law enforcement professional to see that interpretation of this statute invites broad discretion. How would an officer be able to deem a person "able to work in an honest and
respectable calling,” or as having no “visible means of support?” Accordingly, the District Court for the District of Colorado found that the law was both overbroad and unconstitutionally vague. Words such as “loitering” and “strolling” were seen as open to subjective determination and arbitrary enforcement. Further, the court noted that the statute “subjects to arrest, imprisonment and fine essentially every able-bodied citizen of Colorado who happens, at one time or another, to be doing one of the inherently innocuous acts or things mentioned.” Furthermore, the Court raised substantive due process concerns around criminalizing an individual’s status (i.e. as a vagrant) as opposed to a specific behavior.

_Papachristou v. City of Jacksonville (1972)_

In their first modern decision on vagrancy laws, the U.S. Supreme Court overturned a vagrancy ordinance enacted in the city of Jacksonville, Florida on the basis of unconstitutional vagueness. At the time the decision was delivered, vagrancy laws were still common in many states. _Papachristou_ was the

---

37 Id. at 904.
38 Jacksonville Ordinance Code § 26-57 provided at the time of these arrests and convictions as follows: “Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.”
39 Hansel, supra note 2, at 449.
first case to outline the prongs of the vagueness doctrine as it applies to loitering statues.40

The five consolidated cases included the Papachristou decision illustrate the vast breadth and arbitrariness of these early laws. In the first case, a car full of individuals of different racial backgrounds were ostensibly arrested for “prowling by auto” after stopping near a used-car lot that had previously been broken into, despite there being no evidence of a break-in on the night of their arrest. In another, two young African American men were arrested for “loitering” while waiting for a friend to lend them a car so they could apply for a job. In perhaps the most egregious abuse of the ordinance’s scope, one young man was arrested for “loitering” in a driveway after being stopped by an officer and asked to step out of his vehicle.41

Accordingly, the court found that the ordinance was overly vague, effectively giving police officers the ability to arbitrarily punish members of socially disfavored groups. Indeed, instead of condemning loitering as a suspicious or unsavory practice, Justice Douglas in his majority opinion extolled the value of activities that the Jacksonville ordinance prohibited, stating:

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

40 Id. at 448-49.
Whitman's writings, especially in his "Song of the Open Road." They are reflected, too, in the spirit of Vachel Lindsay's "I Want to Go Wandering," and by Henry D. Thoreau." Justice Douglas' emphasis on the virtues of aimless wandering has subsequently led some to suggest the basis for a due process "right to loiter." 

Kolender v. Lawson (1983)

Kolender v. Lawson represents the first Supreme Court ruling on what are considered modern loitering laws. This case centered on a California criminal statute that required persons loitering or wandering on public streets to provide "credible and reliable" identification when stopped by a police officer who has reasonable suspicion of criminal activity. Lawson, who had been detained and arrested on these grounds on multiple occasions, sought to enjoin the enforcement of the statute.

In writing the majority opinion, Justice O'Connor concluded that the statute "as it has been construed is unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide 'credible and reliable' identification." Essentially, the vagueness of the identification requirement leaves the determination of whether or not a piece of identification is acceptable to the discretion of the enforcing officer. In his concurring opinion, Justice Brennan took this argument a step further, stating that the failure to produce any form of identification alone should not be grounds for criminal prosecution.

42 Id. at 162.
43 Strosnider, supra note 1, at 119.
46 Id. at 362.
The most prominent ruling on modern loitering laws occurred in 1999, when the Supreme Court heard the Morales v. City of Chicago case. This case pertained to the enforcement of the newly passed Gang Congregation Ordinance, which was ostensibly enacted in response to community concerns around rising drug-related gang violence. The ordinance allowed police to order groups of two or more people to disperse if they were loitering in a public place with “no apparent purpose” or if the police believed that at least one individual was a member of a gang. Failure to disperse could result in arrest. In support of the law's passage, the City Council found that gang activities often involved the establishment of control over specific areas for the purpose of monopolizing local drug trafficking. To the extent that such behavior leads to inter-gang conflict and the intimidation of passersby, an ordinance targeting suspicious loitering was argued to be an appropriate response.

However, not everyone was convinced of the ordinance's merits. Critics of the law alleged from the beginning that the ordinance was designed by business owners to target youth from communities of color who socially utilize street corners and public spaces. They argued that because enforcement is based on the officer's assessment of an individual's criminal proclivities, the ordinance lent itself to arbitrary and discriminatory enforcement. While racialized policing does little to improve a community's safety, they argued, it does guarantee that traditional targets of discriminatory practices will continue to be subject to extensive police monitoring. Like many loitering laws, the

49 Poulos, supra note 7, at 384.
50 Strosnider, supra note 1, at 121.
Gang Congregation Ordinance was quickly met with criticisms that the fuzzy definition of “loiter” failed to adequately specify prohibited behaviors.\textsuperscript{52}

In evaluating the ordinance against due process claims, the Supreme Court used the two-pronged vagueness test to assess if: 1) a person of reasonable intelligence would be able to determine which activities were and were not lawful, and 2) the offending behaviors would be defined at a level of specificity that would not facilitate arbitrary or discriminatory enforcement.\textsuperscript{53}

The majority failed to agree on whether or not the ordinance provided sufficient notice to satisfy the first prong, basing the core of its decision on the potential for arbitrary or discriminatory enforcement. It appears that the ordinance’s critical flaw was in its definition of loitering—“to remain in any one place with no apparent purpose,”\textsuperscript{54}—which lacked a \textit{mens rea} requirement to distinguish between innocent loiterers and individuals intending to engage in gang-related activities. Further, the ordinance made no mention of how to treat individuals whose loitering had a clear criminal intent. In the majority opinion, Justice Stevens found this to be both over and under inclusive:

Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council’s findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang’s dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs. As the Illinois Supreme

\textsuperscript{52} \textit{Id.} at 164.

\textsuperscript{53} \textit{Morales}, supra note 47, at 90.

\textsuperscript{54} \textit{CHICAGO, ILL. MUNICIPAL CODE} §8-4-015(c)(5) (1992).
PUBLIC SAFETY OR SOCIAL EXCLUSION?

Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent.55

The Court’s emphasis on the arbitrary enforcement prong in the Morales decision was a departure from previous jurisprudence that had primarily focused on the provision of adequate “notice”. Though Kolender v. Lawson (1983) had also largely centered on the arbitrary enforcement prong, the lack of discussion of the notice requirement was broadly interpreted as suggesting the two criteria were conjoined.56 Some have suggested that this decision reflects the Court’s desire to entertain a facial challenge to the ordinance, as it is more difficult to establish standing under the notice prong in cases where the defendant may have actually engaged in the prohibited conduct.57

Other interpretations of the decision assert that by focusing on the arbitrary enforcement prong, the Court effectively established an equal protection argument that enables a judicial check on the legislative ability to pass ordinances that have a disparate impact on people of color.58 Doing so through the vagueness doctrine, as opposed to the Fourteenth Amendment, allowed the court to avoid political scrutiny for expanding the rights covered by substantive due process.59

In the aftermath of the Morales decision, the City of Chicago scrambled to reinstate an ordinance that complied with the standards outlined in the Justices’ opinions. Drawing most directly from Justice O’Connor’s opinion, the new ordinance narrowed the geographic scope of the ordinance to “known drug corners” or “hotspots” and eliminated the provision allowing the arrest of

55 Morales, supra note 47, at 63.
56 Stronsinder, supra, note 1 at 115.
57 Id. at 118; Packebusch, supra note 51, at 166.
58 Id.
59 Stronsinder, supra note 1, at 116-27.
non-gang members.\textsuperscript{60} The new ordinance further clarified loitering to cover behavior that "would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang" to control a given area.\textsuperscript{61} Notably, a \textit{mens rea} requirement still appears to be absent from the new ordinance.

**POST-MORALES VARIATIONS ON LOITERING ORDINANCES**

Following Chicago's lead, a number of large municipalities across the country began incorporating anti-loitering components into their public safety initiatives.\textsuperscript{62} Where federal courts have found laws targeting vagrancy and mere loitering unconstitutional, municipalities have responded by further tailoring their ordinances towards specific disfavored behaviors. This heightened level of specificity has allowed a number of this new generation of loitering ordinances to survive court scrutiny.\textsuperscript{63} This section provides an overview of the major federal court cases that have addressed loitering ordinances since the \textit{Morales} decision.

\textit{Justin v. City of Los Angeles (2000)}

Los Angeles was among the major cities that began utilizing anti-loitering provisions in its crime-fighting efforts in the late 1990s. Specifically, a section of the Los Angeles Municipal Code prohibited individuals from standing in or upon any public way "in such a manner as to annoy or molest any pedestrian thereon or so as to obstruct or unreasonably interfere with the free passage of pedestrians."\textsuperscript{64}

\begin{itemize}
  \item Packebusch, \textit{supra} note 51, at 167.
  \item \textit{CHICAGO, ILL. MUNICIPAL CODE} § 8-4-015(d)(1) (2000).
  \item See Packebusch, \textit{supra} note 51.
  \item Hansel, \textit{supra} note 2, at 449.
  \item \textit{LOS ANGELES, CAL. MUNICIPAL CODE} § 41.18(a) (1995).
\end{itemize}

\textsuperscript{60} Packebusch, \textit{supra} note 51, at 167.
\textsuperscript{61} \textit{CHICAGO, ILL. MUNICIPAL CODE} § 8-4-015(d)(1) (2000).
\textsuperscript{62} See Packebusch, \textit{supra} note 51.
\textsuperscript{63} Hansel, \textit{supra} note 2, at 449.
\textsuperscript{64} \textit{LOS ANGELES, CAL. MUNICIPAL CODE} § 41.18(a) (1995).
In December of 2000, a group of homeless individuals sought a Temporary Restraining Order to enjoin the enforcement of this provision, claiming it had resulted in a "widespread campaign of harassment and intimidation directed at" the homeless population. This harassment was purported to consist of unreasonably stopping homeless individuals and demanding that they produce identification, ordering homeless individuals to move from sidewalks, searching and seizing the property of homeless individuals without probable cause and threatening homeless individuals with arrest. Plaintiffs went on to claim that the alleged harassment limits their ability to access critical services such as food, counseling and emergency shelter, which are concentrated in the downtown core where the ordinance is most intensively enforced. Furthermore, they expected enforcement of the ordinance to intensify during the fast-approaching holiday season.

The Plaintiffs' claims against the City consisted of three parts: 1) the City had violated their constitutionally protected right to loiter without police interference, 2) unwarranted requests to produce identification violated their Fourth Amendment rights and 3) searches, seizures and, in some cases, destruction of personal property belonging to homeless individuals had further violated their Fourth Amendment rights.

With respect to the plaintiff's first claim, the Court cited the Morales decision as providing precedence for a constitutionally protected right to loiter. While the Court found merit in their claim that enforcement activities had violated this right, they denied a facial challenge to the code itself. The facial challenge had been based on the argument that the ordinance – particularly the language "in a manner as to annoy or molest" was

66 Id. at 1.
67 Id.
68 Id. at 11-12.
unconstitutionally vague. However, the court found that the plaintiffs failed to produce evidence that they or anyone else had been specifically cited under this law, and were therefore unable to determine whether it had been arbitrarily applied. The court found merit in the plaintiff’s second two claims and granted the temporary restraining order, being careful to note the specific actions that were enjoined – among them, issuing citations to the homeless for loitering – though not the enforcement of the ordinance itself.70

**NAACP Anne Arundel County Branch v. City of Annapolis (2001)**

One variant of the loitering statute that has come to widespread use is the Drug-Free Zone.71 Though a variety of different structures have been implemented, ordinances enabling their use generally outline some sort of criteria for designating a certain area as a Drug-Free Zone and impose stricter regulations on activities within that area. The stated goal of these regulations is to curtail loitering for the purposes of buying or selling drugs.72

In 1999, the City Council of Annapolis, Maryland enacted an ordinance with provisions to establish a Drug-Free Zone. Inside this zone, a police officer has the ability to order the dispersal of any individual “behaving in a manner indicating that the person is remaining at or in a public place...for the purpose of engaging in drug-related activity,” as well as known drug offenders.73 Before the ordinance even went into effect, the NAACP Anne Arundel County Branch challenged its constitutionality in Federal Court, alleging that the new law was both vague and overbroad.

---

70 Justin, 2000 U.S. Dist. LEXIS 17881, at 38.
71 Bancroft, supra note 4, at 73.
72 Id. at 64.
The debate around whether or not the NAACP had standing to introduce the case constitutes some of the most direct discussion of the racialized nature of anti-loitering laws before a federal court. In arguing that the challenge was “germane to the organization’s purpose,” the NAACP noted that loitering laws have historically been disproportionately enforced against African Americans. They went on to cite that at the time of the lawsuit all four of the approved Drug-Free Zones were in predominantly African American neighborhoods, indicating the potential for continued discriminatory enforcement. The Court found these arguments sufficiently compelling to conclude that the ordinance may disproportionately impact Annapolis’ African American community and granted NAACP standing.

The United States District Court of Maryland’s subsequent discussion as to whether or not the ordinance included a mens rea requirement is demonstrative of the complexities of drafting an anti-loitering ordinance that withstands constitutional challenges. Generally, the court notes, loitering ordinances without mens rea requirements are found to be unconstitutionally vague. Though the City asserted that the ordinance must be read as having a mens rea requirement, the plain language of the ordinance only requires “behaving in a manner indicating” intent to engage in drug-related activity. Furthermore, the court cited evidence that the ordinance was deliberately drafted without this crucial mens rea requirement because, ironically, its authors believed that such a requirement was not measurable or objective, and therefore vulnerable to legal scrutiny.

With respect to the NAACP’s vagueness claim, the Court found that the Annapolis ordinance failed both the notice and

74 NAACP Anne Arundel County Branch v. City of Annapolis, 133 F.Supp.2d 795, 802 (D.Md. 2001).
75 Id at 807.
76 Id at 803.
77 Id at 807.
79 NAACP, 133 F.Supp.2d at 805.
arbitrary enforcement tests. Given that the ordinance as written lacked a mens rea requirement, the average person was left to discern whether or not their activities were prohibited under the ordinance. In the eyes of the court, this did not constitute sufficient notice. Furthermore, a number of prohibited activities named in the ordinance, including “hand signals associated with drug related activity” and “patterns of conduct normally associated. . . with the illegal distribution, purchase or possession of drugs,” lack definition, leaving the enforcing officer with substantial discretion. The court determined that this opened the door for discriminatory enforcement.

Similarly, the court sided with the defendants on the issue of overbreadthness, finding that the risk of constitutionally protected activities falling under the scope of the ordinance outweighed the potential benefit to the public. One NAACP member testified that his voter registration activities could fall under the ordinance’s prohibition of distributing small items. By contrast, the city could not produce substantial evidence that the ordinance contributed to the goals of public safety. Rather, it was brought to the court’s attention that the ordinance had been passed by the City Council against the recommendation of Public Safety Committee, who felt the ordinance was unnecessary.

Betancourt v. Guliani (2001)

This case arose from the 1997 arrest of a homeless man, Augustine Betancourt, in New York City under the subsection of a loitering ordinance that prohibited “leaving boxes and erecting structures in public places.” The evening of the arrest, Betancourt had chosen to lie down on a park bench and fashion a tube from three cardboard boxes to cover his body, with the

81 NAACP, 133 F.Supp.2d at 807.
82 Id at 812.
apparent intent of sheltering himself as he slept. Early the next morning, police swept through the park, picking up Betancourt and other homeless individuals and ticketing them under the aforementioned ordinance.\(^84\)

Passed in 1994, this ordinance was a component of the city’s widely publicized “Quality of Life” initiative that cracked down on street offenses – what critics refer to as “social crimes”\(^85\) – such as prostitution, sleeping in public and drug dealing.\(^86\) Betancourt alleged that the ordinance, as applied to him, was overbroad and unconstitutionally vague, and that his arrest was without probable cause. He further urged that the ordinance had little to do with public safety and was rather a thinly veiled attempt to forcibly remove homeless individuals from the street.\(^87\)

To Betancourt’s contention of vagueness, the majority concluded that the ordinance was sufficiently clear, stating that “[a]n ordinary person would understand that an agglomeration of boxes large enough for a man to fit into would be ‘something that obstructs or impedes.’”\(^88\) Secondly, his overbreadth argument was dismissed on that basis that the doctrine only applied to activities protected by the First Amendment, and that no such activity was occurring at his time of arrest. Finally, his arrest without probable cause was dismissed because he was found in the box structure, which the Court already identified as clearly in violation of the ordinance.\(^89\)

While the majority rejected Betancourt’s vagueness claim, Circuit Court Judge Calabresi contributed a strongly worded dissent. Citing the standard established in Kolender v. Lawson (1983), whereby the statute must provide descriptions of prohib-
ited actions that an ordinary person would be able to comprehend, Judge Calabresi states:

I simply cannot see how one could divine, even after carefully studying the full text of Section 16-122(b), that sleeping on a park bench covered with cardboard is any more unlawful under the ordinance than doing so covered with blankets (which is plainly not illegal under the law at hand). Moreover, the specific words that the majority emphasizes — “to erect” and “obstruction” — do not... provide meaningful notice to the ordinary citizen of what is enjoined.90

Judge Calabresi goes on to note that the police department identifies the statute as an enforcement option for such disparate crimes as “prostitution, drug sales, and aggressive panhandling,” finding that fact alone was sufficient to suggest its intent to provide unconstitutionally broad discretion to police officers.91

**Virginia v. Hicks (2003)**

The most recent Supreme Court decision regarding municipal loitering ordinances took place in 2003, when a Virginia man was arrested for violating an ordinance that prohibited persons without “a legitimate business or social purpose”92 from entering the grounds of public housing facilities maintained by the Richmond Redevelopment and Housing Authority (RRHA). The defendant, who claimed he was entering the property to deliver diapers to the mother of his child,93 argued that the law was unconstitutionally overbroad in violation of the First Amend-

90 Id. at 330.
91 Virginia v. Hicks, 539 U.S. 113 (2003).
This argument was based in part on a tacit rule that required individuals seeking to leaflet or hold a demonstration to gain permission from facilities managers.95

The RRHA purports to have enacted the ordinance in an effort to curtail on-site drug-related activities. They argued that the majority of individuals arrested for these offenses were non-residents, making the ordinance an appropriate means of achieving their safety objectives.96 Furthermore, the ordinance contains a provision whereby trespassers are given written notice that they have been barred from the premises before a formal arrest is made.97 The defendant had been issued such a notice and subsequently trespassed again, at which point he was arrested.

While both the Virginia Court of Appeals and Virginia Supreme Court found the ordinance unconstitutionally overbroad, the U.S. Supreme Court unanimously reversed the lower court’s decisions. In a decision penned by Justice Scalia, the court denied the validity of the overbreadth allegation, stating that “Hicks [had] not shown that the RRHA policy prohibits a substantial amount of protected speech in relation to its many legitimate applications.”98 Justice Scalia went on to note that overbreadth challenges are generally unsuccessful against regulations that do not specifically address speech or related conduct, arguing that the ordinance in question does not inherently regulate speech because it applies to persons entering the premises for any purpose. In instances where the ordinance does violate protected expression, the Court felt that as-applied challenges would provide sufficient legal remedy.99

94 Hicks, 539 U.S. at 113.
95 Id.
96 Mears, supra note 93.
97 RICHMOND, VA. CODE No. 97-181-197 §1.
98 Hicks, 539 U.S. at 123-24.
99 Id.
CONCLUSION

In recent federal cases, the ability of loitering ordinances to withstand judicial scrutiny hinged on the specificity with which they defined offending behaviors. Whereas courts continued to strike down ordinances that encompassed a broad range of ill-defined activities, the ones that prohibited particular actions were largely upheld. Given the judicial doctrines of overbreadth and void-for-vagueness, it is not surprising that local legislation has been steered in this direction.

What is less clear is the extent to which this trend represents progress on the civil rights concerns associated with loitering ordinances. On one hand, the statutes that most freely lent themselves to arbitrary enforcement against disfavored groups have been largely invalidated. However, the resulting emphasis on specific behaviors, such as sleeping in public, occupying a public sidewalk or visiting a significant other in public housing, could be seen as contributing to the overt criminalization of activities associated with individuals in a state of poverty. Those with the least material wealth are arguably the most dependent on the use of public spaces, yet increasing prohibition against subsistence activates – some of which are legitimately associated with dangerous criminal activities, but others merely socially undesirable – dramatically constrains their use of this resource.

It may be that the best option for countering the potential discriminatory impacts of loitering ordinances is to vigilantly pursue challenges based on the vagueness and overbreadth doctrines, narrowing to the greatest extent possible the opportunity for their discretionary application. The NAACP Anne Arundel County Branch v. City of Annapolis case cited above illustrates


Volume 8, Number 1 Winter 2014
how this approach can be effectively pursued. Of course, such challenges will be, at best, piecemeal, leading to victories at the margins without addressing central issues of disparate policing practices or the criminalization of activities associated with poverty. As in Chicago following the Morales decision, municipalities may simply revise successfully challenged ordinances to tailor them to court decisions, reforming the language of the law without meaningfully addressing the issues associated with their enforcement.

Those seeking more substantive opportunities for challenging systemically discriminatory laws may be heartened by the recent Floyd et al, v. City of New York (2013) decision, in which the U.S. District Court of the Southern District of New York found the City’s controversial “stop and frisk” policing tactics had been carried out in a racially biased manner that violated plaintiffs’ Fourth and Fourteenth Amendment rights. Statistical analyses that demonstrated that African American and Hispanic individuals were disproportionately likely to be targeted for stops and subject to officers’ use of force were among the central pieces of evidence cited in the decision.

However, key facets of the Floyd decision limit its broader applicability. First, the statistical evidence presented in the case was based on millions of documented stops. In less populous jurisdictions where sample sizes are necessarily smaller, it would be substantially more challenging to decisively isolate the impact of race over other confounding factors. Second, in addition to the statistical evidence, anecdotal evidence suggested that NYPD officers had been pressured to increase the number of stops regardless of their legal merit, with indifference to prior admonitions over the department’s racially biased track re-

103 Packebusch, supra note 51, at 167.
105 Id. at 558-559.
106 Id. at 558.
This lent credence to the argument that the department had proceeded in a deliberately discriminatory manner. In the absence of comparable evidence, equal protection challenges may not to meet the intentional discrimination standard.

Ultimately, there is a variety of potential, but limited, legal remedies that can be pursued against laws that disproportionately burden socially disfavored groups. The most effective challenges will be dictated by the particular circumstance of the statute in question. As local governments continue to refine anti-loitering provisions in an effort to maintain what they view as effective crime reduction policies, such challenges will continue to highlight the tension between public safety and social exclusion.

107 Id. at 560-561.