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# Gangsta's Paradise? How Chicago's Antigang Loitering Ordinance Punishes Status Instead of Behavior

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## GANGSTA'S PARADISE? HOW CHICAGO'S ANTIGANG LOITERING ORDINANCE PUNISHES STATUS INSTEAD OF BEHAVIOR

### INTRODUCTION

*As I walk through the valley of the shadow of death  
I take a look at my life and realize there's nothin' left  
Cause I've been blasting and laughing so long, that  
Even my mama thinks that my mind is gone.*<sup>1</sup>

*[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.*<sup>2</sup>

Chicago is no stranger to gangs, gang violence, and gang-related crimes.<sup>3</sup> Arguably, it is famous for them.<sup>4</sup> Rap star Kanye West, a Chicago native, released a 2011 song entitled “Murder to Excellence.”<sup>5</sup> In the song, West raps that he is from the “murder capital,” ending the second verse: “I feel the pain in my city wherever I go/314 soldiers died in Iraq, 509 died in Chicago.”<sup>6</sup> Gangs have had a presence in the city for decades,<sup>7</sup> and Chicago policy makers and law enforcement officials have struggled to develop effective means of addressing them.<sup>8</sup> One such effort was through the implementation of

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1. COOLIO, *Gangsta's Paradise*, on GANGSTA'S PARADISE (Tommy Boy Records 1995).

2. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

3. Jane Penley, Comment, *Urban Terrorists: Addressing Chicago's Losing Battle with Gang Violence*, 61 DEPAUL L. REV. 1185, 1185 (2012) (“Chicago has long been an epicenter for gang violence; since the days of Al Capone, up to the modern-day Latin Kings, the streets of Chicago have been plagued with violence.”).

4. See James C. Howell & John P. Moore, *History of Street Gangs in the United States*, NAT'L GANG CENTER BULL., May 2010, at 1, 3, available at <http://www.nationalgangcenter.gov/content/documents/history-of-street-gangs.pdf>. For example, Al Capone, also known as “Scarface,” put Chicago on the map as he became “the most violent and prolific gangster in Chicago, if not . . . the United States, that law enforcement has ever experienced.” *Id.* (alteration in original).

5. See Anthony Osei, *Production Credits: Kanye West & Jay-Z “Watch the Throne,”* COMPLEX (July 18, 2011), <http://www.complex.com/music/2011/07/production-credits-kanye-west-jay-z-watch-the-throne>.

6. KANYE WEST & JAY-Z, *Murder in Excellence*, on WATCH THE THRONE (Diamond Media 360 2011).

7. See Howell & Moore, *supra* note 4, at 5.

8. See Penley, *supra* note 3, at 1185 (“As Professor John Hagedorn of the University of Illinois at Chicago noted, ‘We’ve been at war for 40 years with gangs[,] and maybe it’s time to think about a different strategy; it’s not working all that well.’” (quoting Steve Edwards & Richard

a controversial antigang loitering ordinance in 1992, the Chicago Gang Congregation Ordinance (Original Ordinance).<sup>9</sup> The U.S. Supreme Court eventually struck down the Original Ordinance for vagueness in the seminal case *City of Chicago v. Morales*.<sup>10</sup> *Morales* generated its own controversy as the Court, in six opinions, struggled to offer guidance on drafting a constitutionally sound antigang loitering ordinance.<sup>11</sup>

Since *Morales*, Chicago has tried again to implement a Revised Antigang Loitering Ordinance (Revised Ordinance).<sup>12</sup> The Revised Ordinance allows the city to impose criminal sanctions on people who police officers perceive as gang members and find to be loitering in certain areas if the individuals do not comply with a police order to disperse.<sup>13</sup> The Revised Ordinance has been criticized not only for ineffectiveness,<sup>14</sup> but more significantly for the host of constitutional rights it implicates.<sup>15</sup> A central and especially controversial feature of the Revised Ordinance is the authority it confers on the Superintendent of Police to target specific “hot spots” where the Ordinance applies exclusively. Critics argue that both the power conferral and the

Steele, *Cops and Neighbors: Exploring the Divide Between Police and the Community*, WBEZ (June 12, 2011, 12:00 AM), <http://www.wbez.org/episode-segments/2011-05-30/cops-and-neighbors-explaining-divide-between-police-and-community-87166>).

9. CHI., ILL., MUN. CODE § 8-4-015 (June 17, 1992), *invalidated by City of Chicago v. Morales*, 527 U.S. 41 (1999) (plurality opinion).

10. 527 U.S. 41, 64 (1999) (plurality opinion); *see also* Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 101 (2002).

11. Strosnider, *supra* note 10, at 101–02.

In the end, the *Morales* majority left little clear other than that the Chicago ordinance gave police too much discretion over whom to arrest. Its opinion harkened back to the Court’s legendary effort to deal with obscenity: as with obscenity laws, the Court in effect indicated it could not define what constituted an unconstitutional anti-gang ordinance, but it knew one when it saw one . . . .

*Id.* at 102.

12. CHI., ILL., MUN. CODE § 8-4-015 (2015).

13. *See id.*

14. Penley, *supra* note 3, at 1187 (“However, the Revised Ordinance has not accomplished its desired effect of lowering gang violence. The Revised Ordinance is rarely used in Chicago’s current efforts to reduce gang crime and is a clear example of Chicago’s misguided and symbolic, rather than practical, suppression strategies.”).

15. *See, e.g.*, Strosnider, *supra* note 10, at 101, 115 (“The Court’s vagueness jurisprudence, which frequently lies at the heart of challenges to anti-gang ordinances, has become entangled with other doctrines, including substantive due process, overbreadth, and . . . equal protection.”); *id.* at 138 (“[Chicago’s] targeted [Revised Antigang Loitering Ordinance] implicates both due process and equal protection . . . [L]aws that are too specific—isolating enforcement only in particular hot spots and against particular groups—run afoul of a fundamental tenet of due process: that the law is to be general in application.”); Penley, *supra* note 3, at 1187–88 (“In many respects, the Revised Ordinance is still as vague and arbitrary as its predecessor, and it still allows for discriminatory application.”).

exclusive application make the statute overinclusive and underinclusive.<sup>16</sup>

This Comment examines Chicago's Revised Antigang Loitering Ordinance in light of the new gang recruitment patterns in the city. While the constitutionality of the Revised Ordinance has been criticized since its inception, recent gang patterns create novel constitutional concerns. A particularly influential development in modern gang culture is the breakdown of large, centralized, unified gangs into small, factioned, independent gangs.<sup>17</sup> This has, in turn, formed a culture of gang assignment.<sup>18</sup> Teens, preteens, and even young children are assigned into gangs based on where they live,<sup>19</sup> and gang membership is no longer a choice because of the ever-present violence and threats of violence in their communities.<sup>20</sup> This trend, coupled with an ordinance that is already constitutionally questionable, revives a constitutional objection to antigang laws that has been rejected: the law punishes status instead of behavior.

While critics of antigang ordinances have previously asserted the status argument, many have historically rejected it, relying on the notion that gang membership is volitional.<sup>21</sup> Geographic gang assignment gives new life to the status argument because the validity of the premise on which it is rejected—that gang membership is a choice—is threatened.<sup>22</sup>

Chicago should abandon the Revised Ordinance because it is ineffective and unconstitutionally punishes status instead of behavior. The legislature should supplant the Revised Ordinance with a modified restorative justice approach that focuses on prevention—through various educational and community program reforms—as well as re-

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16. Strosnider, *supra* note 10, at 103 (“Applying only to particular ‘hot spots’ and not to the entire city, this new breed of anti-gang ordinance threatens to blur an already fading line between the generalized criminal law and more particularized and targeted injunctions.” (footnotes omitted)).

17. Ben Austen, *Public Enemies: Social Media Is Fueling Gang Wars in Chicago*, WIRED (Sept. 17, 2013, 6:30 AM), <http://www.wired.com/underwire/2013/09/gangs-of-social-media/all/> (“The prevalence of gun crimes in Chicago is due in large part to a fragmentation of the gangs on its streets: There are now an estimated 70,000 members in the city, spread out among a mind-boggling 850 cliques, with many of these groupings formed around a couple of street corners or a specific school or park.”).

18. *This American Life: Harper High School, Part One*, WBEZ (Feb. 15, 2013) [hereinafter *This American Life*], available at <http://www.thisamericanlife.org/radio-archives/episode/487/transcript>.

19. *Id.* (“Today, whether or not you want to be in a gang, you’re in one.”).

20. See *infra* notes 55–90 and accompanying text.

21. Jocelyn L. Santo, Note, *Down on the Corner: An Analysis of Gang-Related Antiloitering Laws*, 22 CARDOZO L. REV. 269, 289 (2000).

22. See *infra* notes 55–90 and accompanying text.

habilitation and restoration, instead of criminal sanctions and isolation. Such an approach is more appropriate because it eliminates the Revised Ordinance's constitutional violations, and it more effectively addresses the underlying causes of gangs and works to abate them.

Part II of this Comment discusses the structure of the former gang culture in Chicago.<sup>23</sup> Part II also discusses the ways that gangs have changed in Chicago, using Harper High School in Englewood as a living illustration of these trends and their impact on gang participation.<sup>24</sup> Additionally, Part II analyzes *City of Chicago v. Morales*,<sup>25</sup> explains the pertinent provisions of the Revised Ordinance and its implementation,<sup>26</sup> and traces case law that influences how courts assess status versus behavior claims.<sup>27</sup> Lastly, Part II explains the philosophy of restorative justice.<sup>28</sup> Part III argues that because of recent gang trends, the Chicago Revised Antigang Loitering Ordinance punishes status instead of behavior and is therefore unconstitutional.<sup>29</sup> Part III also calls for a different method of dealing with gangs, one that is socially restorative, holistic in nature, and incorporates strategies with successful track records: a modified restorative justice approach.<sup>30</sup> Finally, Part IV provides a practical example of this alternative method and the positive impact this new approach could have on gangs, their communities, and the city as a whole.<sup>31</sup>

## II. BACKGROUND

In order to understand how the Revised Ordinance punishes status instead of behavior, it is important to first become acquainted with the various elements that contribute to the argument. Therefore, this background discusses Chicago's former gang culture,<sup>32</sup> its current gang culture,<sup>33</sup> the Original Ordinance and the Supreme Court's rejection of it in *City of Chicago v. Morales*,<sup>34</sup> the Revised Ordinance,<sup>35</sup>

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23. See *infra* notes 38–54 and accompanying text.

24. See *infra* notes 55–90 and accompanying text.

25. See *infra* notes 91–108 and accompanying text.

26. See *infra* notes 109–134 and accompanying text.

27. See *infra* notes 135–158 and accompanying text.

28. See *infra* notes 159–185 and accompanying text.

29. See *infra* notes 185–219 and accompanying text.

30. See *infra* notes 220–256 and accompanying text.

31. See *infra* notes 257–298 and accompanying text.

32. See *infra* notes 38–54 and accompanying text.

33. See *infra* notes 55–90 and accompanying text.

34. See *infra* notes 91–108 and accompanying text.

35. See *infra* notes 109–134 and accompanying text.

status versus behavior jurisprudence,<sup>36</sup> and the restorative justice philosophy.<sup>37</sup>

### A. Chicago's Former Gang Culture

While gangs have been present in Chicago since the early 1900s,<sup>38</sup> the most influential era of gang development occurred in the 1960s.<sup>39</sup> During that time, gangs exploded into what many scholars refer to as “super gangs,” expanding to more than a thousand members per gang.<sup>40</sup> The gangs were primarily comprised of black members, and their growth and racial composition have been attributed to the public housing system crafted by city planners in post-World War II Chicago.<sup>41</sup> As a result, that public housing system has been called “the worst mistake that city planners made.”<sup>42</sup> Two of the most commonly known Chicago super gangs during this time period were The Black Gangster Disciple Nation and The Black P-Stone Nation.<sup>43</sup> These gangs have been highly influential in forming public opinion of Chicago gangs.<sup>44</sup>

In the 1970s, The Black Gangster Disciple Nation and The Black P-Stone Nation evolved into People Nation and Folk Nation, respectively: their new prison gang names.<sup>45</sup> The People and Folks were bitter rivals.<sup>46</sup> Even though there were smaller sets or cliques within both gangs, each gang espoused an “all for one, one for all” philosophy, which augmented the unity of each gang as a whole.<sup>47</sup> As super gangs, each had thousands of members, and each's compositions were

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36. See *infra* notes 135–158 and accompanying text.

37. See *infra* notes 159–185 and accompanying text.

38. Howell & Moore, *supra* note 4, at 5.

39. *Id.* at 7; see also John M. Hagedorn, *Race Not Space: A Revisionist History of Gangs in Chicago*, 91 J. AFR. AM. HIST. 194, 201 (2006).

40. Howell & Moore, *supra* note 4, at 7.

41. *Id.*

42. *Id.*

43. See *id.* (“Three gangs in particular ruled from within the public housing projects and controlled drug distribution operations: the Conservative Vice Lords, the Gangster Disciples, and the Black P. Stones.”); see also *Street Gangs—Chicago Based or Influenced: People Nation and Folk Nation*, FLA. DEPARTMENT CORRECTIONS, <http://www.dc.state.fl.us/pub/gangs/chicago.html> (last visited Apr. 10, 2015) [hereinafter *Street Gangs*] (discussing the history and evolution of the Black P-Stone Nation and Black Gangster Disciple Nation).

44. See *Street Gangs*, *supra* note 43; see also Howell & Moore, *supra* note 4, at 7–8.

45. See Howell & Moore, *supra* note 4, at 8.

46. *Id.*

47. *Street Gangs*, *supra* note 43; see also Mara Shalhoup, *A History of Gang Violence: The Almighty Black P Stone Nation*, CHI. READER (Apr. 3, 2013), <http://www.chicagoreader.com/chicago/spring-books-interview-natalie-moore-lance-williams/Content?oid=9210530> (explaining that historically, there were organizations and coalitions among gangs that worked together).

highly structured.<sup>48</sup> Each gang claimed and ran large sectors of the city as its territory.<sup>49</sup> This was the structure of Chicago gangs when the Original Ordinance was enacted in 1992.<sup>50</sup>

In recent decades, Chicago law enforcement has effectively located and arrested many primary gang leaders.<sup>51</sup> As a result, the hierarchies have disintegrated.<sup>52</sup> And without the gang leaders on the streets to maintain the umbrella alliances, Chicago gangs have found themselves in uncharted territory—both literally and figuratively.<sup>53</sup> Gang culture has been gradually adjusting to this change.<sup>54</sup>

### B. *New Gang Patterns and the Example of Harper High School*

The formation of subcultures and the defining traits within them have long been a subject of sociological and psychological study.<sup>55</sup> While several theories of cultural development and analysis exist, most researchers agree that objective and subjective elements contribute to the creation of subcultures and their defining characteristics.<sup>56</sup> The objective elements can include external factors, such as housing.<sup>57</sup>

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48. Howell & Moore, *supra* note 4, at 7; *see also* Hagedorn, *supra* note 39, at 203 (quoting MIKE ROYKO, BOSS: RICHARD J. DALEY OF CHICAGO 206 (1971)).

49. Howell & Moore, *supra* note 4, at 7–8.

50. The change in gang patterns, namely the disintegration of a few large gangs into several smaller ones, has been occurring over the past decade or so, long after the Original Ordinance was enacted. *See, e.g.*, Frank Main, *Gangs Using Social Media To Spread Violence*, CHI. SUN TIMES (Jan. 26, 2012, 7:10 PM), <http://www.suntimes.com/news/metro/10256178-418/cyber-tagging-now-the-gang-graffiti-of-the-internet.html> (“Over the past decade, the corporate structure of many large gangs like the Gangster Disciples began to disintegrate as housing projects were demolished and gang members were scattered throughout Chicago and the suburbs . . .”).

51. *See This American Life*, *supra* note 18.

When you ask kids or cops or school staff how it got like this, they’ll tell you that at one point, this whole area was controlled pretty much by a single gang: The Gangster Disciples. But, and this is how most people tell this part of the story, Chicago police have been so effective locking up the big gang leaders that the hierarchy of those gangs has crumbled.

*Id.*

52. *Id.*

53. *See id.* (declaring that the disintegration of the hierarchies has “left a lot of room for newcomers”).

54. *See infra* notes 55–90 and accompanying text.

55. *See, e.g.*, DAVID M. DOWNES, *THE DELINQUENT SOLUTION: A STUDY IN SUBCULTURAL THEORY* (Routledge Revivals 2013) (1966).

56. Miriam Sperring, *Current Issues in Cross-Cultural Psychology: Research Topics, Applications, and Perspectives* 5 (Dec. 2001) (unpublished manuscript), *available at* <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.321.3436&rep=rep1&type=pdf> (“Most authors in the field of cross-cultural psychology now follow the notion that culture can be very broadly defined as the human-made part of the environment consisting of both objective elements (e.g. tools, roads, housing), and subjective elements, or a ‘group’s characteristic way of perceiving its social environment.’” (citations omitted)).

57. *Id.*

The subjective elements have been characterized as “a multidimensional array of shared beliefs, norms, and values of a particular group that are instantiated in everyday social practices and institutions, and that have been historically cultivated, transmitted, and deemed functional across time.”<sup>58</sup> This has led researchers to conclude that culture is not only the result of the aforementioned factors coming together in the past and creating a foundation, but also that it is a driving power in shaping future characteristics and, thus, the future behavior of the subculture’s members.<sup>59</sup> Culture is therefore regarded as a powerful force affecting an individual’s worldview and behavior in the past, present, and future.

Because of the significant way culture influences its members, understanding the unique elements of Chicago gang subculture is essential in determining how to approach the “gang problem,” namely that gangs, and the violence and crimes affiliated with them, are so prevalent and deeply rooted in many areas of the city. More importantly, a thorough understanding of these special characteristics should affect how the constitutionality of the current legislative regime is assessed because they change what the law is punishing.

As previously discussed, Chicago gangs were historically few in number but large in membership, hierarchically configured, and criminally motivated by drug trafficking.<sup>60</sup> This is no longer the case in some areas in the city. Because law enforcement officers effectively identified and incarcerated leaders of the major gangs,<sup>61</sup> gangs have factioned into much smaller, independent gangs, or “cliques,” that claim ownership over territories considerably smaller than was typical in the past.<sup>62</sup> Accordingly, there are high numbers of rival cliques in close proximity, each claiming small pieces of adjacent territory.<sup>63</sup> For purposes of this Comment, this proximity concern will be referred to

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58. *Id.* (citation omitted).

59. *See id.*

60. *This American Life*, *supra* note 18 (“Maybe you think you have an idea of how street gangs operate. . . . A single gang leader controlling thousands of members. A strictly enforced hierarchy branching out underneath him, with gang colors and hats tilted to the right or left.”). Linda Lutton, the reporter narrating the quoted portion, asserts that the audience should “forget all that” because the “neighborhood today” no longer operates like that. *Id.*

61. *Id.* (“[T]his is how most people tell this part of the story, Chicago police have been so effective locking up the big gang leaders that the hierarchy of those gangs has crumbled.”).

62. *Id.* The new gangs have “no central leader, no hierarchy, no colors.” *Id.* And each gang may control “nothing more than the block [it] live[s] on.” *Id.*; *see also* Austen, *supra* note 16 (“The prevalence of gun crimes in Chicago is due in large part to a fragmentation of the gangs on its streets . . . with many of these groupings formed around a couple of street corners or a specific school or park.”).

63. Austen, *supra* note 17.

as the “population density problem.” There are a reported 70,000 gang members in Chicago, spread among 850 different cliques,<sup>64</sup> and each clique may control as little as a block or two.<sup>65</sup> For example, Harper High School draws from a district of a couple of square miles containing at least fifteen different gangs, each with its own territory.<sup>66</sup>

The population density problem affects how gangs claim their territory. Because there are so many gangs and a limited amount of space, gang territory is typically determined by residential location.<sup>67</sup> Gangs control the neighborhoods where their members live.<sup>68</sup> That control may extend slightly beyond the geographic scope of the neighborhood.<sup>69</sup> This Comment refers to this expansion as “geographic gang control.” Geographic gang control complicates the population density problem because the teenagers live in the same few-mile radius and attend the same school; therefore, they all know where their peers live.<sup>70</sup> Students who live in the same neighborhood walk the same route to school, which allows other students to see who is walking with whom and helps them determine each student’s gang affiliation.<sup>71</sup>

The population density problem and geographic gang control collide to form another key feature of Chicago gang subculture: the continuous building of tensions between different gangs.<sup>72</sup> Because these

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64. *Id.*

65. *See id.*; *see also This American Life*, *supra* note 18 (“Your gang might control nothing more than the block you live on.”); Shalhoup, *supra* note 47 (interviewing an author of a book discussing Chicago gangs, who commented when discussing current gangs: “It’s not the same kind of organization. Now you just have these street crews. Chicago, with its segregation, has such a nation-state mentality. Your block is your world.”).

66. *See This American Life*, *supra* note 18 (“In Harper’s attendance area alone, which is a couple square miles, there are more than 15 gangs . . .”).

67. *See id.* (“Today, whether or not you want to be in a gang, you’re in one. If you live on pretty much any block near Harper High School, you have been assigned a gang. Your mother bought a house on 72nd and Hermitage? You’re S Dub. You live across the street from the school? That’s D-Ville.”).

68. *See id.*

69. *See id.*

70. *Id.*

71. *See id.* The police officer explained, “The way they get to school, they have to come to school with one of these factions, one of these gangs. They’re going to come to school with them. They don’t have a choice.” *Id.*

72. *See This American Life*, *supra* note 18.

[Y]ou can be shot for reasons big and small. If you ask the police or school officials or kids what the shootings are about, they’ll mention girls, money owed. There was a paintball incident that led to real guns going off. Petty stuff, like losing a fist fight. He-said she-said arguments. Often, they’ll tell you a shooting is over nothing. Retaliation for earlier shootings is a big reason for getting shot. Shootings can ping pong back and forth between rival gangs for years. Of course, you can also be shot for walking off your block.

tensions are agitated by the close quarters shared by rival gangs, retaliation shootings are especially prevalent, and teenagers find themselves forced to affiliate with gangs for protection because every gang has guns.<sup>73</sup> Walking alone is no longer an option for teenagers in gang-controlled neighborhoods because they are automatically and involuntarily affiliated with the clique on their block, and any tension between their clique and other gangs comes with a genuine threat of territorial or retaliatory violence.<sup>74</sup>

Recognizing the effect of the constant tension among rival gangs on teenagers living in those areas is crucial to understanding how modern gang membership occurs in light of geographic gang control. The traditionally held belief is that gang members make a volitional choice to join a gang or, at the very least, choose to succumb to peer pressure and join a gang.<sup>75</sup> Regardless of whether this belief is an accurate assessment of gang membership in the past, current examinations of gang neighborhoods suggest it is not accurate in certain areas of the city today.<sup>76</sup> Several reports demonstrate that teenagers, and even children, no longer exercise a choice in joining a gang; instead, they are assigned to one.<sup>77</sup> Many argue that not only do these youths no longer possess the power to decide whether to join a gang, they also do not choose which gang they join.<sup>78</sup> They are assigned membership based on their residential location, termed “geographical gang assignment” for purposes of this Comment.<sup>79</sup>

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*Id.*

73. When interviewing a freshman student at Harper High, the reporter asked him why he walked with others to and from school, hence affiliating himself with a gang. In reply, the student answered, “It’s not trying to get jumped on and shot. Because there be fighting and shooting up here almost every day. Because won’t nobody mess with somebody in a group, walking in a group.” *Id.* This is not just a false impression under which students alone operate. The report contains an interview with a Chicago police officer assigned to Harper High for security purposes, confirming the student’s sentiment: “[A] police officer assigned to Harper. . . . [who is] there seven hours a day, [and] seems to know every kid in the school. . . . says that for protection, for survival, kids walk to school with the kids in their clique, often through enemy territory.” *Id.* “Some don’t have anyone in charge, but they do have guns. That’s what every kid has told me. Otherwise, why would you call yourself a gang, they say.” *Id.*

74. *See id.*

75. Santo, *supra* note 21, at 289.

76. *See infra* notes 80–90 and accompanying text.

77. Lisa Belkin, “*This American Life*” Harper High School Feature: “*Whether or Not You Want To Be in a Gang, You’re in One*,” HUFFINGTON POST (Feb. 15, 2013), [http://www.huffingtonpost.com/2013/02/15/this-american-life-harper-high-school\\_n\\_2698105.html](http://www.huffingtonpost.com/2013/02/15/this-american-life-harper-high-school_n_2698105.html); Chicago Kids Say They’re Assigned to Gangs, NPR (Feb. 21, 2013, 12:00 PM), <http://www.npr.org/2013/02/21/172593743/chicago-kids-say-theyre-assigned-to-gangs> (interviewing Linda Lutton about *This American Life*); *This American Life*, *supra* note 18.

78. *See sources cited supra* note 77.

79. *See This American Life*, *supra* note 18; *see also id.*

Geographical gang assignment is especially visible when observing students who attend Harper High School, located in Chicago's Englewood neighborhood. The high school made headlines in February 2013 when WBEZ's program *This American Life* sent reporters to observe the school for a semester after learning of its tragic history: twenty-nine of its students were shot in less than one year.<sup>80</sup> Eight of these students died.<sup>81</sup> Most reports link these shootings to gangs and gang activity.<sup>82</sup> Gang life is such a pervasive, powerful force in Englewood's culture that parents and even police officers do not know how to counteract it.<sup>83</sup> This gang life carries into the school, as the reporters noted that gangs are the "defining social structure" of the school.<sup>84</sup> "It's the water everybody swims in."<sup>85</sup>

According to the journalists, the assistant principal at Harper estimates that approximately 10% of the gang members are actually involved in criminal activity.<sup>86</sup> The rest, he asserts, were dragged into it because of where they live.<sup>87</sup> A Chicago police officer assigned to security duty at the school remarked that in the past, some students could avoid gang affiliation and were considered neutral, or "neutrons."<sup>88</sup> This is no longer true. He commented,

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80. *Id.*; see also Belkin, *supra* note 77; David Carr, "This American Life" Looks at a High School Marooned in Violence, N.Y. TIMES (Feb. 15, 2013), [http://mediadecoder.blogs.nytimes.com/2013/02/15/this-american-life-looks-at-a-high-school-marooned-in-violence/?\\_r=0](http://mediadecoder.blogs.nytimes.com/2013/02/15/this-american-life-looks-at-a-high-school-marooned-in-violence/?_r=0).

81. *This American Life*, *supra* note 18.

82. See *id.*; see also Natasha Korecki, "Hadiya Pendleton Was Me, and I Was Her," CHI. SUN-TIMES, Apr. 11, 2013 (explaining that one of the victims, Hadiya Pendleton, was shot by a gang member at a local park because she was mistaken for a rival gang member); Katherine Skiba, *Harper H.S. Students Meet Michelle Obama*, CHI. TRIB., June 6, 2013; *First Lady Joins Gun Violence Debate with Emotional Speech in Chicago*, CHI. DAILY HERALD, Apr. 11, 2013.

83. See *This American Life*, *supra* note 18 (noting that a police officer, discussing his role in attempting to prevent gang formation, remarked "I'll put it like this. I'm not saying it's OK to be in a gang. And I'm not saying I approve of it, I agree with it. If I could take them all and say, '[H]ey, look here, ain't no gangs,' I'd do that. But this ain't a fairy tale."); see also Belkin, *supra* note 77 (reporting that, in a recorded conversation between the father of a murdered teen and the boy's friends, "[that dad] did 'all the right things, everything that every parent really does, like signing the kid up for citywide football leagues and trying to keep him out of trouble.' But the friends tell the father—gently but definitely—that the gangs are stronger than any parent. 'You reach a certain height and people start shooting at you.'"). Belkin also highlighted that another reporter present in the conversation, "who has made a career of writing about life in 'bad' neighborhoods, and who reported through the prism of Harper's on-site social workers, said this series made him see that . . . parents can't protect their children." Belkin, *supra* note 77.

84. See *This American Life*, *supra* note 18.

85. *Id.*

86. *Id.* ("Assistant principal Adams guesses that fewer than 10% of Harper students are actually gangbanging. That is, active on the block, involved in crime. He thinks all the rest of the kids in the school are just caught up by where they live.")

87. *Id.*

88. *Id.*

There is [sic] no neutrons anymore. It used to be if you play sports, or you were academically better than the average kid, they didn't bother you. Now it's different. It doesn't matter. If you live here, you're part of them. You live on that block, or you live in that area, you're one of them. The way they get to school, they have to come to school with one of these factions, one of these gangs. They're going to come to school with them. They don't have a choice.<sup>89</sup>

In a community ruled by violence, such as Harper High, where it is normal for teenagers to be shot, the threat of being the next bullet's victim is substantial: "It becomes clear early on that the adults and children who live, work[,] and learn in this environment are not hardened to the violence; they are wounded and scared, even if the bullets hit someone else. They worry their time will come."<sup>90</sup>

### C. City of Chicago v. Morales

In order to accurately understand Chicago's Revised Antigang Loitering Ordinance, it is necessary first to examine its predecessor and the Supreme Court's treatment of it in *Morales*. The tensions, legal issues, and judicial conclusions present in *Morales* contextualize the current analysis of the Revised Ordinance.

At issue in *Morales* was the Chicago Gang Congregation Ordinance, the city's first antigang loitering ordinance.<sup>91</sup> The Original Ordinance authorized police officers to order any group of two or more people loitering "with no apparent purpose" to disperse if the officers "reasonably believe[d]" at least one person was a gang member.<sup>92</sup> Police officers could arrest the individuals if they did not disperse on the initial warning.<sup>93</sup> In total, Chicago Police made over 42,000 arrests in three years and issued over 89,000 orders to disperse.<sup>94</sup>

Jesus Morales was one of the people arrested under the Original Ordinance.<sup>95</sup> His group caught the attention of a police officer who subsequently ordered them to disperse.<sup>96</sup> They were eventually ar-

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89. *Id.*

90. Carr, *supra* note 80.

91. CHI., ILL., MUN. CODE § 8-4-015 (1992), *invalidated* by City of Chicago v. Morales, 527 U.S. 41 (1999) (plurality opinion).

92. *See id.* § 8-4-015(a), (c)(1); *see also Morales*, 527 U.S. at 47; Strosnider, *supra* note 10, at 102.

93. *See* CHI., ILL., MUN. CODE § 8-4-015.

94. *Morales*, 527 U.S. at 49; *see also* Strosnider, *supra* note 10, at 102 ("*Morales*, the case that thrust the nation's war on gangs before the Court, was an attack on the [Original Ordinance], under which police issued more than 89,000 dispersal orders and made more than 42,000 arrests in three years." (footnote omitted) (citing *Morales*, 527 U.S. at 49)).

95. City of Chicago v. Morales, 687 N.E.2d 53, 57 (Ill. 1997).

96. *See Morales*, 527 U.S. at 41.

rested.<sup>97</sup> The police officer admitted that he initially became suspicious of the group because he noticed that the group consisted of Hispanic teenagers in a primarily white neighborhood.<sup>98</sup> The city justified the arrest by arguing that Morales knew he was with gang members, though it could not prove he was a gang member.<sup>99</sup> The American Civil Liberties Union, arguing for Morales, brought suit to challenge the constitutionality of the Original Ordinance and Morales' arrest under it.<sup>100</sup>

Ultimately, the Supreme Court struck down the Original Ordinance as void for vagueness and thus unconstitutional.<sup>101</sup> The Court produced a majority in the judgment, but disagreed on the analysis.<sup>102</sup> The main conclusions the Court reached were that the Original Ordinance conferred too much discretion on police in determining who appeared to be in a gang and what loitering "with no apparent purpose" looked like,<sup>103</sup> and that the Ordinance did not provide adequate notice to citizens regarding what conduct was criminal and what conduct was innocent.<sup>104</sup> Justice John Paul Stevens' opinion did not, however, provide much guidance on crafting a constitutionally sound ordinance.<sup>105</sup> Justice Sandra Day O'Connor's concurring opinion was the sole source of direction for lawmakers seeking to implement a constitutional ordinance, proposing that "the gang loitering [O]rdinance could have been construed more narrowly."<sup>106</sup> She suggested that "[t]he term 'loiter' might possibly be construed in a more limited fashion to mean 'to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activi-

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97. *See id.* at 50.

98. Brief of Respondents at 31 n.25, *Morales*, 527 U.S. 41 (No. 97-1121); *see also* Strosnider, *supra* note 10, at 120-21.

99. *Morales*, 527 U.S. at 62 n.34 ("[Thirty-four] of the [sixty-six] respondents in this case were charged in a document that only accused them of being in the presence of a gang member.").

100. Strosnider, *supra* note 10, at 120-21.

101. *Morales*, 527 U.S. at 64; *see also id.* at 52 ("[A]n enactment . . . may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests."); *id.* at 56 ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . ." (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966))).

102. *See id.* at 41.

103. *Id.* at 64.

104. *Id.*

105. Strosnider, *supra* note 10, at 102 ("In the ultimate irony, *Morales* demonstrated that the flaw in the Court's modern vagueness jurisprudence is that the doctrine itself is so vague.").

106. *Morales*, 527 U.S. at 68 (O'Connor, J., concurring).

ties.’”<sup>107</sup> She reasoned that “[s]uch a definition . . . would avoid the vagueness problems of the [Original Ordinance].”<sup>108</sup>

#### D. Chicago's Revised Antigang Ordinance

Chicago lawmakers took Justice O'Connor's suggestions seriously; in fact, they used her words verbatim as a roadmap for creating a new ordinance in 2000.<sup>109</sup> Like its predecessor, the Revised Ordinance's framework begins with an initial police warning to disperse.<sup>110</sup> If the targeted individuals ignore or violate the dispersal orders, the Revised Ordinance allows the police to implement criminal sanctions.<sup>111</sup> Unlike the Original Ordinance, the Revised Ordinance provides a definition for gang loitering:

*Gang loitering* means remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities.<sup>112</sup>

Additionally, the Revised Ordinance attempted to address the overinclusiveness problems in the Original Ordinance<sup>113</sup> by empowering the police superintendent to select specific target areas, or “gang hot spots,” in which the Ordinance applies exclusively.<sup>114</sup> Law enforcement officers do not announce which neighborhoods are targeted in

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107. *Id.*

108. *Id.*

109. Compare *id.*, with CHI., ILL., MUN. CODE § 8-4-015(d)(1) (2015). See also Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125, 1128, 1141–42, 1148 (2000); Penley, *supra* note 3, at 1192; Gary Washburn & Eric Ferkenhoff, *City Targets 86 Hot Spots for Gangs, Keeps List Secret*, CHI. TRIB., Aug. 23, 2000, § 1, at 1, available at [http://articles.chicagotribune.com/2000-08-23/news/0008230243\\_1\\_lawrence-rosenthal-hot-spots-loitering](http://articles.chicagotribune.com/2000-08-23/news/0008230243_1_lawrence-rosenthal-hot-spots-loitering) (“We have followed a remarkably detailed map that the Supreme Court provided, which we believe reflects the [C]ourt's own view that these kinds of laws serve a proper purpose,” said Lawrence Rosenthal, deputy corporation counsel.”).

110. CHI., ILL., MUN. CODE § 8-4-015(a).

111. *Id.* § 8-4-015(e).

112. *Id.* § 8-4-015(d)(1).

113. The Supreme Court found that the Original Ordinance was overinclusive in many ways. For example, Justice Stevens concluded the Original Ordinance was overinclusive because it “broadly cover[ed] a significant amount of . . . activity” other than its purpose of prohibiting certain intimidating gang-related conduct. *Morales*, 527 U.S. at 52. Further, he stated that the “broad sweep” of the Original Ordinance violated the constitutional requirement of minimal guidelines to govern law enforcement because the Original Ordinance did not establish any. *Id.* at 60. Additionally, Justice Kennedy, in his concurrence, concluded that the Original Ordinance would reach a “broad range of innocent conduct” and thus was too broad. *Id.* at 69.

114. See CHI., ILL., MUN. CODE § 8-4-015(b).

an effort to prevent gang members from circumventing the law by moving their illegal activities elsewhere.<sup>115</sup>

Even though the city closely followed Justice O'Connor's guidance in writing the statute, the Revised Ordinance was challenged as unconstitutional shortly after its enactment.<sup>116</sup> Three men arrested under the Revised Ordinance filed suit, arguing that the law gave police officers too much power to discriminatingly target gang members.<sup>117</sup> Cook County Circuit Judge Mark Ballard ruled that the Revised Ordinance fell within the confines of Justice O'Connor's concurrence in *Morales* and allowed the criminal charges to go to trial, writing that "[i]f [the Supreme Court's] guidance is labeled a roadmap, then the Chicago framers of the [Revised Ordinance] knew how to read the map."<sup>118</sup> Despite this conclusion, the Ordinance is widely criticized, including arguments that it "enables—even codifies—a more systemic targeting of the poor and racial minorities"<sup>119</sup> as well as critiques of its effectiveness.<sup>120</sup> For example, one opponent of the Revised Ordinance explained that "the percentage of gang-related murder [in Chicago] increased approximately 10%—from about 25% to around 35%—since 2000, the year after the *Morales* decision," which she identifies as particularly troubling considering that "[t]he increase in Chicago gang activity was happening at a time when overall murder rates in Chicago and across the nation were on the decline."<sup>121</sup>

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115. Strosnider, *supra* note 10, at 136; *see also* Washburn & Ferkenhoff, *supra* note 109, § 1, at 18 ("But [Deputy Corporation Counsel] Rosenthal said secrecy was necessary because 'we don't want gangs to know where they can sell drugs. What we want them to do is move on when ordered. Gangs will have a much more difficult time establishing markets.'").

116. *See generally* Eric Ferkenhoff, *Anti-Gang Ordinance Passes Test*, CHI. TRIB., Mar. 20, 2002, § 2, at 3, *available at* [http://articles.chicagotribune.com/2002-03-20/news/0203200190\\_1\\_gang-members-supreme-court-lawrence-rosenthal](http://articles.chicagotribune.com/2002-03-20/news/0203200190_1_gang-members-supreme-court-lawrence-rosenthal).

117. *Id.*

118. *Id.*

119. Strosnider, *supra* note 10, at 137–38 ("[The new Ordinance] is worse than the first version . . . . To date, [the targeted] hot spots have been concentrated on the city's poor and heavily minority South and West sides."). *See also* Dirk Johnson, *Chicago Council Tries Anew with Anti-Gang Ordinance*, N.Y. TIMES, Feb. 22, 2000, at A14, *available at* <http://www.nytimes.com/2000/02/22/us/chicago-council-tries-anew-with-anti-gang-ordinance.html> (quoting one councilwoman's argument that the Revised Ordinance "legalizes racial profiling" and another's that the Revised Ordinance is "anti-black," "inhumane," and would lead to a decrease in property values); Press Release, ACLU, Chicago City Council Adopts New Gang Loitering Ordinance (Feb. 16, 2000), *available at* [https://www.aclu.org/racial-justice\\_drug-law-reform\\_immigrants-rights\\_womens-rights/chicago-city-council-adopts-new-gang-](https://www.aclu.org/racial-justice_drug-law-reform_immigrants-rights_womens-rights/chicago-city-council-adopts-new-gang-) (arguing that the Revised Ordinance will ensure "that thousands of innocent persons of color will be arrested for no good reason").

120. *E.g.*, Penley, *supra* note 3, at 1193.

121. *Id.*

Opponents of the Revised Ordinance object to the text itself in addition to the practical effects of its implementation. The textual argument is that the Revised Ordinance lacks clarity in communicating what activities are illegal and therefore fails to remedy the Original Ordinance's vagueness.<sup>122</sup> For example, although the Revised Ordinance provides a definition of "gang loitering,"<sup>123</sup> it does not define or explain the elements of gang loitering.<sup>124</sup> The Revised Ordinance's opponents identify this as a crucial shortcoming: "[I]t is unclear what the city intended when it wrote of 'establish[ing] control over identifiable areas' . . . . What constitutes an 'identifiable area'? Does 'establish[ing] control' mean posting gang members on street corners? Tagging buildings with graffiti?"<sup>125</sup> Because the Revised Ordinance does not provide answers to these questions, critics assert that it does not adequately put potential violators on notice.<sup>126</sup>

A second common critique of the Revised Ordinance relates to the practical effects of its implementation—specifically, that it secretly targets particular areas. Critics oppose the targeting generally, and the clandestine nature of the targeting also receives widespread critique.<sup>127</sup> Because the hot spots in which the law exclusively applies are concealed from the public, there are obvious notice problems: individuals cannot anticipate whether they are in an area in which loitering is illegal until after they have been informed by a police officer that they are breaking the law.<sup>128</sup> Additionally, critics assert that the specific targeting nature of the statute flies in the face of general principles of due process because it is "not even facially applicable city-wide."<sup>129</sup> This is problematic because "applicability of the [Revised Ordinance] implicates more clearly than did the [Original Ordinance] the concerns . . . about the ability of legislatures to enact provisions that apply only to minority groups or segments thereof without facing

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122. See Strosnider, *supra* note 10, at 137; see also Penley, *supra* note 3, at 1202.

123. The Ordinance defines "gang loitering" as "remaining in any one place under circumstances that would warrant a reasonable person to believe that the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." CHI., ILL., MUN. CODE § 8-4-015(d)(1) (2015).

124. Strosnider, *supra* note 10, at 137.

125. *Id.* (second and third alterations in original).

126. *E.g., id.* at 137–38.

127. See sources cited *supra* note 119.

128. Penley, *supra* note 3, at 1203–04 ("The private nature of the [Revised] Ordinance's application does not even give people in hot spots a chance to change their behavior so as not to be its target.").

129. Strosnider, *supra* note 10, at 137–38.

the political accountability attending the passage of a generally applicable statute.”<sup>130</sup>

Inherent in the objections to the Revised Ordinance’s targeting policy is the recognition of the disparate impact it has on underprivileged racial minorities. The argument is that the hot spots are “mostly concentrated in the poor and heavily minority-populated areas in the city.”<sup>131</sup> Studies concede that the city’s highest crime rates are “geographically and socially concentrated in a few highly impoverished and socially isolated neighborhoods.”<sup>132</sup> However, critics stress that singling out these neighborhoods, and the poor minorities living in them, as exclusive targets of a criminal law is a systematic targeting of already marginalized groups.<sup>133</sup> Between the Revised Ordinance’s enactment in February 2000 and October 15, 2010, Chicago police officers distributed 1,815 orders to blacks, 1,082 to Hispanics, and 61 to whites.<sup>134</sup>

### E. Status Versus Behavior

The doctrine of status crimes—punishing individuals for their status rather than their conduct—derives from the Cruel and Unusual Punishment Clause of the Eighth and Fourteenth Amendments of the Constitution.<sup>135</sup> This clause applies when the law imposes criminal sanctions on an individual for holding a certain unchangeable, unchosen status.<sup>136</sup> In the landmark case *Robinson v. California*,<sup>137</sup> the

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130. *Id.* at 137; see also Penley, *supra* note 3, at 1203 (“While the discrimination in the first instance was happening on a person-by-person basis, the revision allows entire groups of people to be discriminated against and targeted simply because of the neighborhood in which they live.”).

131. Penley, *supra* note 3, at 1203.

132. *Homicide and Gun Violence in Chicago: Evaluation and Summary of the Project Safe Neighborhoods Program*, PROJECT SAFE NEIGHBORHOODS IN CHI., [http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief\\_v2.pdf](http://www.psnchicago.org/PDFs/2009-PSN-Research-Brief_v2.pdf) (last visited Apr. 22, 2015) (summarizing research by Tracey Meares (Yale), Andrew V. Papachristos (UMass, Amherst), and Jeffrey Fagan (Columbia)).

133. See Strosnider, *supra* note 10, at 137–38; see also Penley, *supra* note 3, at 1203; Press Release, *supra* note 119.

134. Penley, *supra* note 3, at 1201 (citing JAMES HICKEY, CHI. POLICE DEP’T, ARRESTS FOR 8-4-015 BY RACE AND AGE (2010)).

135. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”); U.S. CONST. amend. XIV, § 1; see also Santo, *supra* note 21, at 286; *id.* at 287 n.104.

136. *Robinson*, 370 U.S. at 666 (“[We] deal with a statute which makes the ‘status’ of narcotic addiction a criminal offense, for which the offender may be prosecuted ‘at any time before he reforms.’ . . . [I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”); see also Powell v. Texas, 392 U.S. 514, 551 (1968) (White, J., concurring) (arguing that, in some cases, where the

Court first developed the status-versus-behavior analytical framework. In *Robinson*, a California law<sup>138</sup> criminally punished individuals for being addicted to narcotics, even if they did not use or possess drugs within the state.<sup>139</sup> Because the statute criminalized the status of being a drug addict instead of the act of using drugs,<sup>140</sup> the Supreme Court reasoned that the statute was analogous to a statute that criminalized individuals for being “mentally ill, or a leper, or . . . afflicted with a venereal disease,” conditions that are indubitably unchosen and unchangeable.<sup>141</sup> The Court reasoned that laws of that character, although possessing a well-meaning and legitimate governmental goal, would, “in the light of contemporary human knowledge,” constitute cruel and unusual punishment because the individual has not intentionally engaged in criminal conduct.<sup>142</sup>

Six years later, the Court declined to extend the status versus behavior doctrine in *Powell v. Texas*.<sup>143</sup> In *Powell*, a Texas law<sup>144</sup> made it illegal for any individual to engage in public drunkenness.<sup>145</sup> The defendant challenged the law’s constitutionality, arguing that because of his “status” as an alcoholic, he could not control his public intoxica-

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conduct punished by the statute is involuntary and the individual has no real choice, cruel and unusual punishment of the Eighth Amendment may be triggered); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563–64 (S.D. Fla. 1992) (“As a number of expert witnesses testified, people rarely choose to be homeless. Rather, homelessness is due to various economic, physical or psychological factors that are beyond the homeless individual’s control. . . . [Therefore], class members rarely choose to be homeless. . . . The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless. Consequently, arresting homeless people for harmless acts they are forced to perform in public effectively punishes them for being homeless.”).

137. 370 U.S. 660.

138. CAL. HEALTH & SAFETY CODE § 11721 (repealed 1972).

No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. . . . Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail.

*Id.*

139. *Robinson*, 370 U.S. at 660–61.

140. See CAL. HEALTH & SAFETY CODE § 11721.

141. *Robinson*, 370 U.S. at 666.

142. *Id.* (“A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment . . .”).

143. 392 U.S. 514, 534–37 (1968) (plurality opinion).

144. TEX. PENAL CODE, art. 477 (1952) (“Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.”).

145. *Powell*, 392 U.S. at 517.

tion, and thus his violation of the Texas law was involuntary; therefore, convicting him under the law would constitute cruel and unusual punishment because it punishes his status as an alcoholic rather than his behavior.<sup>146</sup> The Court rejected his argument.<sup>147</sup> Instead, the Court limited the application of the status-versus-behavior doctrine on policy grounds, fearing an extension of the doctrine would exonerate too many crimes.<sup>148</sup> The Court also questioned the legitimacy of the defendant's argument that he could not control his intoxication because of his "unchangeable" condition as an alcoholic.<sup>149</sup>

In a concurring opinion, however, Justice Byron White was amenable to extending the doctrine, concluding that there must be some cases in which certain alcoholics, because of their social and economic environment, were actually unable to control their public drunkenness.<sup>150</sup> He opined,

The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.<sup>151</sup>

Some lower courts have used this reasoning to strike down laws that criminally punished individuals for conduct they could not avoid, such

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146. *Id.*

147. *See id.* at 532.

148. *Id.* at 534 ("If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering.'").

149. *See id.* at 535 ("Traditional common-law concepts of personal accountability . . . lead us to disagree with [the defendant]. We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general . . . suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication."); *see also* Santo, *supra* note 21, at 289 ("The [Powell] Court feared that by taking the alternative route and expanding *Robinson* to include 'irresistible impulses' stemming from a particular status, it would be developing a 'general constitutional doctrine of mens rea' that had never before been articulated." (quoting *Powell*, 392 U.S. at 535)).

150. *Powell*, 392 U.S. at 548–54 (White, J., concurring).

151. *Id.* at 551 (footnote omitted).

as vagrancy laws that made conduct in which homeless people typically engage, such as sleeping in public places, illegal.<sup>152</sup> Following Justice White's reasoning, these courts concluded that some people are forced into homelessness, and therefore breaking the law by sleeping in public places is not a volitional choice for them.<sup>153</sup>

Under this analytical framework, an *actus reus* element, or a voluntary act,<sup>154</sup> included within a statute, "saves the statute from criminalizing mere status and thus violating the Cruel and Unusual Punishment Clause."<sup>155</sup> In addition, the punishable conduct must be an *actus reus* that is overt.<sup>156</sup> The voluntary act should be one that more than a single "kind" of person can engage in to sever any potential ties between the criminal behavior and the status of the lawbreaker.<sup>157</sup> An *actus reus* operates as a law's saving grace in legitimizing its constitutionality under the cruel and unusual punishment doctrine because requiring a clear, volitional act ensures that there has been a violation of the law—independent of the status of the individual.<sup>158</sup> Therefore, the law punishes the conduct. Requiring a clear, volitional *actus reus* is especially crucial in criminal statutes because the criminal process can implicate one's liberty, due process, and other significant rights.

#### F. Restorative Justice

Restorative justice is a viable alternative to the criminal justice system and antigang ordinances in addressing Chicago gangs. Restorative justice is a different method of approaching criminal law.<sup>159</sup> Instead of utilizing an adversarial system that favors prosecution and punishment, the values of restorative justice focus on "healing rather than hurting, moral learning, community participation and community

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152. *E.g.*, *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563–64 (S.D. Fla. 1992); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994); *Wheeler v. Goodman*, 306 F. Supp. 58, 64 (W.D.N.C. 1969).

153. *Johnson*, 860 F. Supp. at 350; *Wheeler*, 306 F. Supp. at 64.

154. *See generally* Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B. C. L. REV. 1545 (2013).

155. *Santo*, *supra* note 21, at 288–89.

156. *See, e.g.*, *Johnson v. Carson*, 569 F. Supp. 974, 979–80 (M.D. Fla. 1983) ("A statute that penalizes actual solicitation for prostitution, . . . would not be unconstitutional on these grounds. But this type of ordinance seeks a shortcut, and shortcuts cannot trespass across constitutional rights." (alteration in original) (quoting *Farber v. Rochford*, 407 F. Supp. 529, 534 (N.D. Ill. 1975))).

157. *Santo*, *supra* note 21, at 288–89.

158. *See id.*

159. *See generally* Joan W. Howarth, *Toward the Restorative Constitution: A Restorative Justice Critique of Anti-Gang Public Nuisance Injunctions*, 27 HASTINGS CONST. L.Q. 717, 719–27 (2000).

caring, respectful dialogue, forgiveness, responsibility, apology, and making amends.”<sup>160</sup> The idea is to “bring[ ] together the individuals who have been affected by an offense and hav[e] them agree on how to repair the harm caused by the crime.”<sup>161</sup> Instead of asking how society should punish the offender, restorative justice asks what the harm of the crime is and how that harm can be remedied.<sup>162</sup> Restorative justice places a strong emphasis on cooperation between the victim and the offender in order to restore them to their communities.<sup>163</sup> While this approach to crime may seem radical to some in a society that has reached “unprecedented levels of punitiveness,”<sup>164</sup> it is practiced in various countries throughout the world and has been described as a “global social movement.”<sup>165</sup> From its basic core to its philosophical periphery, restorative justice is about relationships.<sup>166</sup>

Restorative justice’s focus on all interested parties is vital to its effectiveness.<sup>167</sup> While the current criminal justice system largely ignores the voice and desires of the victim—its focus instead is the government prosecuting the offender for his violation of its laws—restorative justice gives the victim a voice in determining the appropriate method by which the offender can make amends.<sup>168</sup> Additionally, restorative justice recognizes the community as a stakeholder,

160. John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 6 (1999).

161. John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

162. Willie McCarney, *Restorative Justice: An International Perspective*, 3 J. CENTER FOR FAMILIES, CHILDREN & CTS. 3, 5 (2001).

163. See Howarth, *supra* note 159, at 720–21.

164. See McCarney, *supra* note 162, at 3.

165. See Howarth, *supra* note 159, at 720–21 (noting that South Africa, New Zealand, Canada, and the United States all employ restorative justice practices); see also Braithwaite, *supra* note 161, at 1743.

166. Letter from David Kelly, Founder, Precious Blood Reconciliation Ministry, to author (Feb. 27, 2014) (on file with author); see also Telephone Interview with Elizabeth Vastine, The Stone Vastine Grp. (Feb. 20, 2014) [hereinafter Interview with Stone Vastine Grp.] (on file with author).

167. See, e.g., Susan Du & Gideon Resnick, *Repairing Circles: Chicago’s Restorative Justice Community Intercepts Youth Funneled Through “School-to-Prison Pipeline,”* CHI. BUREAU (Dec. 29, 2012), <http://www.chicago-bureau.org/repairing-circles-chicagos-restorative-justice-community-intercepts-youth-funneled-through-school-to-prison-pipeline/> (“By involving entire communities to reconcile interpersonal conflict and help individuals acclimate to life after incarceration, local social workers aim to rebuild neighborhoods by reconstructing their histories.”); McCarney, *supra* note 162, at 5 (arguing that one of the key features that contributes to the success of restorative justice is its “centrality of the victim”).

168. See McCarney, *supra* note 162, at 5 (“Our current system . . . gives first priority to the offender: Did the offender do this, or did he not do it? . . . The problem with this approach is that it does not take into account the victim’s interests. . . . For the victim, restorative justice offers the hope of restitution or other forms of reparation, access to information about the case, and the opportunity to be heard and to have input into the case . . .”).

which “does not trivialize the harm to the immediate victim, but rather . . . expands the scope of the offender’s accountability.”<sup>169</sup> This expansion may have a considerable deterrent effect.<sup>170</sup> “The most important part of this is that the offender has the opportunity to recognize that his choices have impacted someone and is able to take accountability.”<sup>171</sup>

Significantly, the restorative justice process may help restore the dignity of the offender, which can also have a considerable deterrent effect; scholars note that individuals who feel devalued or disrespected are more likely to act out.<sup>172</sup> In fact, studies have shown that the primary motivation for former offenders to stop committing crimes is “a sense of self-respect and personal worth.”<sup>173</sup> Furthermore, because restorative justice focuses on relationships, forming relationships through the process of restorative justice can act as another deterrent.<sup>174</sup> As it applies to young gang members, who arguably do not have any other place to belong, restorative justice can give them a sense of belonging in the community.<sup>175</sup>

Proponents of restorative justice argue that the community is better protected both in the short-term and the long-term under a restorative justice regime.<sup>176</sup> “The research literature of victimology instructs us that it is incorrect to expect that tougher sentences will leave crime victims, the police, or citizens any more satisfied with the justice system.”<sup>177</sup> Sweden provides an illustrative example of the effectiveness of restorative ideology: its criminal justice approach reflects basic principles of restorative justice, such as rehabilitating criminals instead

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169. Monya M. Bunch, Comment, *Juvenile Transfer Proceedings: A Place for Restorative Justice Values*, 47 HOW. L.J. 909, 931 (2004).

170. *Id.*

171. Interview with Stone Vastine Grp., *supra* note 166.

172. *E.g.*, Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 290 (“[I]ndividuals who feel unjustly devalued and lacking respect by society are likely to harbor disrespect for the values and laws of the community and will actively seek out respect from an alternative subculture [such as a gang].”).

173. *Id.*; see also Lynn S. Branham, *Plowing in Hope: A Three-Part Framework for Incorporating Restorative Justice into Sentencing and Correctional Systems*, 38 WM. MITCHELL L. REV. 1261, 1268 (2012) (“As offenders meet their responsibility to rectify ‘their wrong,’ they affirm . . . their own dignity and humanity . . . . Thus, through . . . restorative justice . . . those who are guilty of criminal wrongdoing can become instruments of healing rather than harm.”).

174. Interview with Stone Vastine Grp., *supra* note 166.

175. Du & Resnick, *supra* note 167 (“When families and schools fail to provide children with a sense of belonging, they invariably learn to find acceptance elsewhere.”); Interview with Stone Vastine Grp., *supra* note 166.

176. See Howarth, *supra* note 159, at 722–23.

177. Braithwaite, *supra* note 161, at 1737.

of incarcerating them.<sup>178</sup> The country is closing some of its prisons because they are empty, as compared to the United States, which has exceeded the capacity of its federal prisons by 40%.<sup>179</sup>

Additionally, advocates assert that restorative justice may better address the problem of race and criminal law. It uses “case-by-case identification and involvement of and engagement by the truly relevant communities, the people closest to the victim and to the offender,” which “directly challenge the racialized and class-based social constructions of crime and criminals that inform so much of current criminal and juvenile justice law and policy.”<sup>180</sup> Restorative justice has been held up by its participants—victims, offenders, community members, and even attorneys and judges—as an effective and redemptive alternative to the current punitive criminal justice regime.<sup>181</sup>

Despite its success, skepticism about restorative justice remains. The most common criticism is that restorative justice is too lenient: the individual is not really punished for his crime and, therefore, will not be deterred from reoffending.<sup>182</sup> Research refutes this argument. Studies reveal that there is a direct relationship between the severity of incarceration sentences and the likelihood to reoffend.<sup>183</sup> In fact, “[i]n California, youth recidivism—the rate at which youths return to prison—runs as high as 90[%]. Youth completing restorative justice programs, however, have a significantly lower recidivism rate, in the range of only 10 to 20[%].”<sup>184</sup> Restorative justice advocates see these

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178. See Adam Clark Estes, *Sweden Is Closing Prisons due to Lack of People To Put in Them*, GIZMODO (Nov. 12, 2013, 1:20 PM), <http://gizmodo.com/sweden-is-closing-prisons-due-to-lack-of-people-to-put-1462950734>.

179. *Id.*

180. Howarth, *supra* note 159, at 725–26.

181. See, e.g., Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543, 571–72 (2004) (“[Restorative justice interventions] are more satisfying to victims and their communities of care, and no evidence suggests that restorative practices are less effective at achieving public safety than traditional treatment or punitive responses.”).

182. See Bunch, *supra* note 169, at 923 (discussing and refuting criticisms of restorative justice).

183. See Du & Resnick, *supra* note 167.

Several studies conducted by the MacArthur Foundation Research Network, based in Chicago, found that the severity of punishment is directly related to crime and recidivism rates. The old adage that being “tough on crime” would ultimately deter it was disproven when researchers found that youth prosecuted in adult courts were at greater risk of reoffending. And once reincarcerated, they also face harsher settings and challenges to behavioral development.

*Id.*

184. Eric K. Arnold, *Oakland Leads Way as Restorative Justice Techniques Enter Education Mainstream*, CENTER FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2012/07/11/9465/oakland-leads-way-restorative-justice-techniques-enter-education-mainstream>.

results as evidence that holding the offender directly accountable to the victim and his community brings about more effective results than severe punitive punishment.<sup>185</sup>

### III. ANALYSIS

Chicago should repeal the Revised Ordinance because it is unconstitutional and ineffective. Instead, Chicago should implement a revised restorative justice approach as the primary method of addressing gangs. This Part first argues that, because of the new gang patterns in the city, the Revised Ordinance now punishes status instead of behavior. Next, this Part argues that the Revised Ordinance is ineffective because it fails to address the underlying causes of gang formation and gang violence and thus should be replaced with a methodology tailored to address those causes. Lastly, this Part argues that the best replacement for the Revised Ordinance is a restorative justice approach that incorporates both preventative and rehabilitative elements.

Simply put, although the Revised Ordinance was intended to remedy the Original Ordinance's flaws, it is in many ways worse than the Original.<sup>186</sup> The Revised Ordinance does not resolve the constitutional issues recognized in *Morales* because it remains too vague, is applied selectively in contradiction of due process, and disparately impacts impoverished racial minorities, implicating equal protection. Furthermore, because of geographical gang assignment, the Revised Ordinance punishes status instead of behavior.<sup>187</sup> This is a novel constitutional criticism of the Ordinance and requires immediate action.

In addition to its constitutional problems, the Revised Ordinance is also ineffective. The number of murders in Chicago is well above the number of murders in more densely populated cities like New York City or Los Angeles.<sup>188</sup> The Revised Ordinance is an unsuitable response to the city's gang problems because it is not tailored to the actual problem; gangs do not exist or commit violence because juveniles loiter on street corners. Gangs, and the violence that can accompany them, are the result of a broken system that marginalizes and isolates these groups.<sup>189</sup> Implementing and enforcing a criminal

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185. See, e.g., Howarth, *supra* note 159, at 725–26.

186. Strosnider, *supra* note 10, at 137–38; see also Penley, *supra* note 3, at 1202–06.

187. See *infra* notes 191–219 and accompanying text.

188. Austen, *supra* note 17 (reporting that there were over 500 murders in Chicago last year); see also Penley, *supra* note 3, at 1204–05 (arguing that dispersal orders are a “hollow political gesture” because “gang violence has not decreased with an increase in dispersal orders”).

189. JAMES DIEGO VIGIL, BARRIO GANGS: STREET LIFE AND IDENTITY IN SOUTHERN CALIFORNIA 9 (1988) (arguing that “the consequences of barrio life, low socioeconomic status, street

structure that further marginalizes gang members only perpetuates the problem.<sup>190</sup> Instead, the modified restorative justice approach focuses on preventative measures as well as redemptive techniques to restore the gang members back to society and to empower them to contribute positively, which is a more appropriate way to solve this problem.

*A. Chicago's Revised Ordinance Punishes Status Instead of Behavior and Is Thus Unconstitutional*

The Revised Ordinance is, on its face, a constitutionally questionable statute.<sup>191</sup> Several key features of the Revised Ordinance implicate various constitutional rights, and its disparate impact on racial minorities in disadvantaged neighborhoods raises even more constitutional concerns.<sup>192</sup> The statute is already problematic, but in light of geographical gang assignment,<sup>193</sup> the unconstitutionality of the Revised Ordinance is evident. If gang participation is not a true choice, the Revised Ordinance punishes unchosen, unchangeable status instead of volitional conduct in violation of the Cruel and Unusual Punishment Clause.

The Revised Ordinance intentionally singles out one particular kind of person based on characteristics that are out of his control, such as

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socialization and enculturation, and problematic development of a self-identity” are “gang features” resulting from a “web of ecological, socioeconomic, cultural, and psychological factors”); see also Beth Caldwell, *Criminalizing Day-to-Day Life: A Socio-Legal Critique of Gang Injunctions*, 37 AM. J. CRIM. L. 241, 260–61 (2010).

Ethnic minority youth who live in low-income communities face marginalization in virtually all facets of their lives. They are economically marginalized by lack of opportunity in their communities, economic insecurity among their families, and by the location of their communities—separated from those with more available jobs and resources. This spatial separation is significant because it is a direct result of the history of racial and ethnic discrimination and segregation, and it relates to a long history tied in with feelings of being “unwanted and discriminated against” . . . . The lack of resources including jobs, recreational opportunities, and other supportive services within most low-income communities, coupled with discrimination and a lack of tolerance within social institutions such as schools, further contributes to the sense of marginalization . . . .

Caldwell, *supra*, at 260–61 (footnotes omitted).

190. See Caldwell, *supra* note 189, at 262–63.

[G]ang injunctions promote marginalization among populations at risk of gang involvement, as well as among active gang members [by increasing their sense of isolation]. . . . [They also] limit gang members’ participation in activities that facilitate the maturing out process, thereby suggesting that the injunctions may increase the length of gang activity of some members.

*Id.*

191. See *supra* notes 122–134 and accompanying text.

192. See sources cited *supra* note 122.

193. See *supra* notes 55–90 and accompanying text.

race and residential location, because it applies only in neighborhoods with high levels of racial minorities and poverty.<sup>194</sup> The Revised Ordinance then punishes that person for engaging in activity that is not illegal for anyone else to engage in, such as standing on a street corner in a targeted neighborhood.<sup>195</sup> It is the “status” of being a gang member, based exclusively on the perception of the law enforcement officer at the moment, that makes the conduct criminal.<sup>196</sup> The behavior—hanging out on certain streets—is not illegal itself and is acceptable for any other individual to engage in; however, the status of being (perceived as) a gang member makes it illegal.<sup>197</sup> That punishes status instead of behavior.

Fundamental to the argument that the Revised Ordinance punishes status instead of behavior is the assumption that gang membership is not a volitional choice, which may seem radical. However, the realities of living in a community such as Harper High School’s demand that previous assumptions about gang membership are replaced with informed conclusions about why teens join gangs currently. In such communities, gang life is “the water everybody swims in.”<sup>198</sup> It is the driving social structure of the entire community and it affects racial minorities, even children as young as nine or ten, who live in neighborhoods that are largely impoverished.<sup>199</sup> Children and teenagers cannot choose where to live. They cannot choose to move neighborhoods. They cannot choose to go to another school. These teenagers have seen their peers take bullets, and they have seen some of their peers die due to gang violence.<sup>200</sup> The potential of being the next bullet’s target is tangible.<sup>201</sup> When the teens go to the same school and know where everybody lives, they know which gang each student is affiliated with. Significantly, it is assumed that everyone in a particular neighborhood belongs to its gang because gang life is the water everybody swims in.<sup>202</sup> Therefore, students who do not consider themselves members of their neighborhood’s gang are assumed to be members anyway.<sup>203</sup>

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194. See Strosnider, *supra* note 10, at 137–38; see also Penley, *supra* note 3, at 1203.

195. See CHL., ILL., MUN. CODE § 8-4-015 (2015).

196. See *id.* § 8-4-015(a) (applying the statute only to gang members who “gang loiter”).

197. See *id.* § 8-4-015.

198. See *supra* notes 55–90 and accompanying text.

199. See *supra* notes 55–90 and accompanying text.

200. See *supra* notes 55–90 and accompanying text.

201. See Carr, *supra* note 80 (“It becomes clear early on that the adults and children who live, work[,] and learn in this environment are not hardened to the violence; they are wounded and scared, even if the bullets hit someone else. They worry their time will come.”).

202. See *supra* notes 72–85 and accompanying text.

203. See *supra* notes 72–85 and accompanying text.

For teenagers in such an environment, it becomes readily apparent that walking alone without gang protection is not an option.<sup>204</sup> Students are not the only ones who see this reality. Even law enforcement officers affirm that in a community with a culture run by gangs, violence, and fear, the only choices teenagers have are to join their neighborhood's gang, or to walk alone, which makes them more vulnerable to violence because they are already assumed to be a member of their neighborhood gang.<sup>205</sup> Gang membership under such circumstances is not a meaningful choice.

After understanding how and why the teens targeted by the Revised Ordinance are forced to join gangs, it is important to recognize how this factor changes the constitutional analysis of the Revised Ordinance. When assessed under the cruel and unusual punishment doctrine, the problems with the inconsistent, selective nature of the Revised Ordinance are amplified. First, the *actus reus* of the Revised Ordinance, the saving grace for laws that face constitutional challenges on status grounds,<sup>206</sup> is a hollow placeholder—even without taking into account the new gang patterns. The Revised Ordinance's *actus reus* is contingent on the status of being a gang member and on being present in one of the neighborhood hot spots.<sup>207</sup> In many cases, the only “choice” the individual engages in is to be in a particular physical location, and because the hot spots are not publicly known, his choice cannot be an educated one.<sup>208</sup> Even if one were to argue that gang membership is a meaningful choice, the law is still unconstitutional because the gang member's commission of the *actus reus* is not volitional because he does not know—and cannot know—he is violating the law.<sup>209</sup> Generally, ignorance of the law is not an excuse to escape criminal liability for breaking a law.<sup>210</sup> However, when the law applies only to individuals holding a specific status, and they cannot know the law in order to avoid violating it, there is not a genuine choice to break the law and a subsequent volitional act. Additionally, it is not that the individual is ignorant of the law because he has failed to educate himself; it is that the law is intentionally hidden from

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204. See discussion *supra* note 73.

205. See *supra* notes 72–85 and accompanying text.

206. See *supra* notes 154–158 and accompanying text.

207. See CHI., ILL., MUN. CODE § 8-4-015 (2015).

208. See *supra* notes 127–128 and accompanying text.

209. See *supra* notes 131–153 and accompanying text.

210. See, e.g., *Lambert v. California*, 355 U.S. 225, 228 (1957) (asserting that the principle that “ignorance of the law will not excuse” is a fundamental principle “deep in our law”).

him.<sup>211</sup> Therefore, the *actus reus* element of the law is absent, and the statute is vulnerable to constitutional criticism.<sup>212</sup>

These concerns intensify when one considers the new gang patterns present in neighborhoods like Englewood, where gang affiliation and membership are not voluntarily chosen.<sup>213</sup> Under the Revised Ordinance, any individual not perceived as a gang member is not subject to police scrutiny.<sup>214</sup> This reveals that the law's application turns significantly on whether the individual is a gang member, which once again is especially problematic if gang membership is not a choice. For young minorities who are assigned to gangs or who join them for protection, the Revised Ordinance constitutes cruel and unusual punishment. Exclusively applying a law that depends on gang member status punishes status and not behavior. If that status is not chosen and, in some cases, may not be helped, punishing the groups for that status creates the quandary Justice White envisioned in his *Powell* concurrence.<sup>215</sup> This quandary reflects the same legal and constitutional issues recognized by those courts that have struck down laws criminalizing sleeping outdoors because the laws punished the homeless for conduct they could not control.<sup>216</sup> Similarly, the Revised Ordinance targets youths of racial minorities from disadvantaged neighborhoods that are run by gangs, whose lives are surrounded by threats of imminent violence—indeed, their peers have been shot or killed.<sup>217</sup> These youths are already isolated from the rest of society both physically and attitudinally,<sup>218</sup> and they lack resources to remedy their circumstances. These teens cannot change or control their race, residential location, and, in many cases, gang affiliation.<sup>219</sup>

Because residential location and gang affiliation trigger the Revised Ordinance's application, elements not chosen by the alleged "violators" of the statute, and because there is a lack of a true *actus reus*, the law punishes unchangeable, unchosen status, not conduct. This clearly contradicts the Constitution.

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211. See *supra* notes 131–153 and accompanying text.

212. Farrell & Marceau, *supra* note 154, at 1547 (concluding that "the voluntary *actus reus* concept . . . is constitutionally required").

213. See *supra* notes 55–90 and accompanying text.

214. See CHI., ILL., MUN. CODE § 8-4-015 (2015).

215. *Powell v. Texas*, 392 U.S. 514, 551 (1968) (White, J., concurring) (arguing that, in some cases, where the conduct punished by the statute is involuntary and the individual has no real choice, cruel and unusual punishment of the Eighth Amendment may be triggered).

216. See *supra* note 153 and accompanying text.

217. See *supra* notes 55–90 and accompanying text.

218. See *supra* notes 55–90 and accompanying text.

219. See *supra* notes 55–90 and accompanying text.

*B. Chicago Should Replace the Revised Ordinance with a Policy That Engages in a Holistic Approach with an Emphasis on Social Restoration*

Putting aside the constitutional issues, some might argue that law enforcement needs some kind of antigang loitering ordinance to address the problem of gangs. However, the Revised Ordinance is not only unconstitutional, but it is also ineffective. It has not solved the problem of gangs, nor has it reduced gang activity or gang violence; rather, gang violence has actually increased since the Revised Ordinance's implementation.<sup>220</sup> Simply put, the Revised Ordinance is not working, and its failure makes the constitutional violations that accompany it more egregious. Because the Revised Ordinance has had no positive effect on eliminating gangs, it is "nothing more than a symbolic tool used by legislatures to convince the public that methods are being implemented to solve Chicago's gang problem."<sup>221</sup> Chicago gangs do not exist or engage in disruptive and violent behavior because they hang out on street corners.<sup>222</sup> As evidenced by Harper High School, Chicago gang formation and affiliation is extremely complex. The Revised Ordinance is a temporary bandage that perpetuates the problem rather than solves it.<sup>223</sup>

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220. Penley, *supra* note 3, at 1193.

A look at post-*Morales* gang-crime rates informs the analysis of the Revised Ordinance's effectiveness. Between 1991 and 2004, there were 3,422 gang-motivated murders in Chicago. The percentage of gang-related murder increased approximately 10%—from about 25% to around 35%—since 2000, the year after the *Morales* decision. This increase in Chicago gang activity was happening at a time when overall murder rates in Chicago and across the nation were on the decline. Between January and August 2010, there were 313 murders, up from 308 murders in the same period for 2009. . . . [A]pproximately 45% of all murders with determined motives were gang related. Of all murders within this time period, 61.2% . . . involved gangs, meaning that either the victim or offender was associated with a gang or that the incident was gang related.

*Id.* (footnotes omitted).

221. *Id.* at 1206.

222. See JAMES DIEGO VIGIL, A RAINBOW OF GANGS: STREET CULTURES IN THE MEGA-CITY 7 (2002).

223. See Caldwell, *supra* note 189, at 262–63 (arguing that antigang statutes such as the Revised Ordinance "limit gang members' participation in activities that facilitate the maturing out process, thereby suggesting that the injunctions may increase the length of gang activity of some members" as well as "destabilize the community by limiting participation in positive community activities and by contributing to distrust between local residents and law enforcement"); see also Sean E. Boyd, Note, *Implementing the Missing Peace: Reconsidering Prison Gang Management*, 28 QUINNIPIAC L. REV. 969, 982 (2010) ("Scholars have criticized anti-gang legislation for placing unequivocal focus on punishment while ignoring the underlying causes of street gang membership.").

Researchers who study gangs have concluded that “the street gang is an outcome of marginalization, that is, the relegation of certain persons or groups to the fringes of society, where social and economic conditions result in powerlessness.”<sup>224</sup> Furthermore, they assert that “primarily those individuals who come from low-income, stress-ridden families and who are most alienated from public institutions, such as schools, . . . become gang members.”<sup>225</sup> These conclusions communicate that gang formation and membership are born of widespread societal issues that are multifaceted and complex.<sup>226</sup> Geographical gang assignment contributes a new host of complex factors that complicate the determination of why gangs form and why they sometimes commit violence.

Another key problem with the Revised Ordinance—aside from the constitutional issues already discussed—is its punitive nature. Teenagers and even young children face criminal sanctions for violating the Revised Ordinance.<sup>227</sup> Criminalizing children and sending them to jail marginalizes them and further eliminates their opportunity to positively engage in the community or find alternatives to gang life.<sup>228</sup> Research examining punitive discipline in schools has revealed that the “use of frequent disciplinary actions that remove students from the school community and academic instruction contribute[s] to delinquency.”<sup>229</sup> Furthermore, “zero tolerance” policies for misbehavior in middle and high schools are ineffective as a corrective measure; instead, studies show they actually contribute to entry into the school-

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224. VIGIL, *supra* note 189, at 7.

225. *Id.* at 150.

226. See Boyd, *supra* note 223, at 982 (“In order to diminish street gang membership and eliminate street gang activity, . . . scholars suggest shifting focus to the ‘factors that place [an individual] at risk for gang involvement,’ which include family/social structure and social and economic opportunities.” (alteration in original) (footnote omitted)).

227. Because the Revised Ordinance allows the city to impose criminal sanctions on gang members who do not follow police orders to disperse, CHI., ILL., MUN. CODE § 8-4-015, and because teenagers and pre-teens can be gang members. See, e.g., Steve Bogira, *In Chicago's War Zones, the Tragedy Extends Beyond the Kids Who Die*, CHI. READER (Aug. 20, 2014), <http://www.chicagoreader.com/chicago/neighborhoods-poverty-violence-trauma-stress-ptsd-children/Content?oid=14643402>, it follows that teenagers and pre-teens may be arrested under the Revised Ordinance.

228. See Boyd, *supra* note 223, at 981 (“Instead, some have suggested that these [antigang] legislative measures may actually strengthen street gangs and ‘mak[e] U.S. cities more dangerous’ by ‘strengthen[ing] gang ties, rais[ing] [gang members][’] stature[,] and further marginaliz[ing] angry young men.’” (second, third, fourth, fifth, and eighth alterations in original) (quoting *Antigang Crackdowns Are Ineffective, Report Says*, L.A. TIMES, July 18, 2007, at B6)).

229. Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J.L. & EDUC. 281, 287–88 (2012).

to-prison pipeline.<sup>230</sup> On the other hand, “[s]tudies focused on school safety find that when schools approach discipline through responsive, reintegrative, and restorative mechanisms, they are more effective at maintaining safe communities.”<sup>231</sup> While these studies are centered around punishment in the school context, the principle remains the same: harsh punishment that further marginalizes people does more harm than good—especially with children who are, by nature, still in formative stages of cognitive development.<sup>232</sup> Surely, wrongdoing should be addressed and condemned, and the wrongdoer should take responsibility for his actions, but this should not be achieved in a way that eliminates any meaningful chance to reintegrate back into the community.

Chicago should supplant the Revised Ordinance with an approach that instead focuses on the causes underlying gang formation and gang violence<sup>233</sup> and is properly tailored to combat them. Restorative justice is a more suitable technique for dealing with Chicago gangs because it takes a holistic, restorative approach that more effectively addresses the underlying causes of gangs, holds juveniles properly accountable for crimes they commit, and has a track record of success.<sup>234</sup>

### C. *Restorative Justice Is a More Appropriate Approach for Remediating the Chicago Gang Problem*

The central features and goals of restorative justice are better tailored to address the complexity of Chicago’s gang problem. Instead of criminalizing trivial activities in a way that further labels and

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230. *Id.* at 292.

231. *Id.* at 297; *see also* Bunch, *supra* note 169, at 912 (“A ‘one size fits all’ approach to addressing juvenile offenders has proven ineffective in both rehabilitating and deterring youthful offenders.”).

232. *See* Charlyn Bohland, Comment, *No Longer a Child: Juvenile Incarceration in America*, 39 *CAP. U. L. REV.* 193, 198 (2011).

Science consistently shows that teenagers’ brains are far less developed than previously thought, and they should not be held to the same stringent standards as adults. Specifically, research demonstrates that “children’s brains are still developing in ways that affect their impulse control and their ability to choose between antisocial and acceptable courses of action.”

*Id.* (footnote omitted) (quoting MICHELE DEITCH ET AL., *FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM*, at xiv (2009)).

233. Examples of some of these underlying causes, according to scholars, are low socioeconomic status, street socialization, housing patterns, and marginalization due to poverty. *See* VIGIL, *supra* note 189, at 9.

234. *See* McCarney, *supra* note 162, at 13 (“Establishing restorative justice as a response that operates at the heart of the criminal justice system is much more likely to result in real justice and avoid the problems of marginalization and subordination to other interests than are standalone programs or partially integrated compromise approaches.”).

marginalizes disadvantaged youth, a system that aligns itself with restorative justice focuses on healing the victim, healing the community, healing gang members, and restoring all parties back to healthy relationship.<sup>235</sup> Scholars suggest that combining prevention, intervention, and suppression techniques is the most successful way to resolve gang problems.<sup>236</sup> Restorative justice incorporates each of these elements.

Additionally, restorative justice holds youths who commit actual crimes, as opposed to merely standing on a street corner, accountable for their offenses.<sup>237</sup> The Revised Ordinance, on the other hand, fails to properly recognize the more significant crimes committed by gangs.<sup>238</sup> Instead of punishing gang members for the crimes that the community really cares about—such as violence or gun possession—the Revised Ordinance does little more than declare the gang members “annoying.”<sup>239</sup>

[T]he gang members are not really held responsible for anything significant. The litany of murders, robberies, and assaults combining to place the neighborhood under siege is used to justify dramatic steps to limit the freedom of the gang members. But the only accountability built into the [antigang] injunction is making suspected gang members responsible for trivial (at least as compared to the justificatory crimes) violations.<sup>240</sup>

When this is combined with the marginalization imposed by the Revised Ordinance, the result is essentially isolating certain groups from the community, removing them from the community, and holding them accountable for nothing.<sup>241</sup> Moreover, because the gang members are not held legally accountable for crimes other than standing on a street corner, such as gun violence for example, no one is held accountable for those crimes, and society is not vindicated for those losses.<sup>242</sup> This further damages the community because it isolates victims as well; they do not achieve any vindication of the wrong they have experienced.<sup>243</sup>

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235. See Walgrave, *supra* note 181, at 579 (“Restorative justice holds great promises for the future of juvenile justice. It offers benefits to victims, communities, and offenders, and it opens prospects for addressing problems with predominately rehabilitative juvenile justice systems. Restorative justice is more effective, even for reintegrating offenders.”).

236. See Caldwell, *supra* note 189, at 270.

237. Howarth, *supra* note 159, at 738–40.

238. See Penley, *supra* note 3, at 1206 (“The intent behind the adoption of the Revised Ordinance was clear from the outset: to make neighborhoods safer and remove gang presence in the streets.” (citing *City of Chicago v. Morales*, 527 U.S. 41, 47 (1999) (plurality opinion))).

239. See Howarth, *supra* note 159, at 739 (discussing an antigang injunction in California).

240. *Id.* at 738.

241. *Id.* at 739.

242. *Id.*

243. *Id.* at 739–40.

Alternatively, restorative justice allows the victim and the offender to work together in a way that is redemptive for both parties. This, in turn, positively impacts the community as a whole.<sup>244</sup> Forcing the offender to confront the harm he has caused and then cooperate to procure a satisfactory means of making amends is less likely to “displace remorse for the action into resentment of the punishment,” thus restoring him back to society.<sup>245</sup> Allowing the victim to directly hold the offender accountable is a natural vindication of the injury she has suffered as a result of the crime, thus restoring her back to society.<sup>246</sup> Additionally, this process breaks the false dichotomy the law creates between gang members on one side and the police and the rest of the community on the other.<sup>247</sup> Breaking down this division can bring a redemptive end to the wrong that has occurred instead of ignoring the victim, overpunishing and simultaneously underpunishing the offender, and keeping the community in perpetual fear.

Moreover, it is significant to take into account that in most cases, the offender is a juvenile. Some sources identify gang members as young as ten years old,<sup>248</sup> and other sources identify shooters as young as fourteen years old.<sup>249</sup> This is not only significant in regard to whether children of this age, given geographical gang assignment, choose to be members of gangs, but also to the way law enforcement treats them. While our criminal justice system allows for treating juveniles as adults in certain extreme circumstances, the Revised Ordinance allows juveniles to be treated the same as adults—with the potential for criminal sanctions—for merely standing on a street cor-

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244. See McCarney, *supra* note 162, at 5.

For the victim, restorative justice offers the hope of restitution or other forms of reparation . . . and the opportunity to be heard and to have input into the case . . . . For the community, there is the promise of reduced fear and safer neighborhoods, a more accessible justice process, and increased accountability, as well as the obligation to participate in sanctioning crime, restoring victims' sense of well-being, reintegrating offenders into the community, and preventing and controlling crime. For the offender, restorative justice requires accountability in the form of obligations to repair the harm to individual victims and victimized communities as well as the opportunity to develop new competencies, social skills, and the capacity to avoid future crime.

*Id.*

245. Barbara Hudson, *Restorative Justice: The Challenge of Sexual and Racial Violence*, 25 J.L. & Soc'y 237, 241 (1998).

246. Howarth, *supra* note 159, at 720–27.

247. See Caldwell, *supra* note 189, at 270–71.

248. *Chicago Gangs*, CHICAGOGANGS.ORG, <http://www.chicagogangs.org> (last visited Apr. 11, 2015).

249. Tonya Francisco, *New Face of Gangs: Chicago Gangs Younger, More Ruthless than Before*, WGN.TV.COM (July 8, 2013, 10:09 PM), <http://wgntv.com/2013/07/08/new-face-of-gangs-chicago-gangs-younger-more-ruthless-than-before/>.

ner.<sup>250</sup> The mission of the first juvenile court, ironically originating in Cook County, was to save and protect children, not punish them.<sup>251</sup> Now, juvenile courts reflect modern ideals of the purposes of criminal law: retribution, punitive sanctions, incapacitation, and deterrence.<sup>252</sup> This change is problematic because “children are still children, and they are still different from adults.”<sup>253</sup> Science has long accepted the developmental differences between juveniles and adults,<sup>254</sup> and the law should treat them accordingly. Despite that, the Revised Ordinance affords no difference between juveniles and adults but instead provides harsh penalties for standing on a street corner.<sup>255</sup> When considering the science behind the maturation of juveniles and the negative effects of incarcerating them at a young age, locking them up for standing on a street corner is reprehensible. This cannot be the most effective method of solving the city’s gang problem. Restorative justice proposes a more attractive, appropriate, and effective way to approach Chicago gangs.<sup>256</sup>

#### IV. IMPACT

Although restorative justice is a solution to Chicago’s gang problem, developing an effective implementation is challenging because of the complexities in gang formation, membership, and culture. This is especially difficult in neighborhoods such as Englewood, where gangs are deeply embedded in all aspects of local society. A better solution involves both preventative and disciplinary measures. Although there is no perfect approach that can completely solve the problem in all of

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250. See CHI., ILL., MUN. CODE § 8-4-015 (2015).

251. Bohland, *supra* note 232, at 195.

252. *Id.* at 197–98.

253. *Id.* at 198.

254. See, e.g., *id.* (citing DEITCH ET AL., *supra* note 232, at 17); see also HUMAN RIGHTS WATCH & AMNESTY INT’L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 3, 20–21, 45–49 (2005), available at <http://www.hrw.org/reports/2005/us1005/6.htm>.

255. See CHI., ILL., MUN. CODE § 8-4-015 (2015).

256. Bohland, *supra* note 232, at 225.

The restorative justice approach provides “a strong point of view and a value-driven vision for a more effective, fair[,] and humane juvenile justice system.” . . .

In the current system, youth adjudicated delinquent are determined to be offenders and not viewed as kids with serious needs. However, within the restorative framework, youth are much more than their crime and are given the opportunity to define themselves.

*Id.* (footnotes omitted) (quoting OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, BALANCED AND RESTORATIVE JUSTICE FOR JUVENILES: A FRAMEWORK FOR JUVENILE JUSTICE IN THE 21ST CENTURY 3 (1997), available at <http://www.ncjrs.gov/pdffiles/framwork.pdf>).

its intricacies, Chicago can and should do better than its current system.

While this Comment advocates for restorative justice, which is a responsive system, it is important to include preventative measures such as educational reform and community programs because the gang problem cannot be attributed solely to ineffective laws and law enforcement. Preemptive change is also required. Accordingly, a suitable response should take into account how to prevent gang formation and gang violence in addition to how to properly respond to them. This section proposes what a modified restorative justice approach in Chicago could look like as it pertains to gangs. This proposal will first suggest some preventative elements of the modified approach. Next, this section explains the responsive or disciplinary aspects of a modified restorative justice approach, first giving an example of a pilot program already in place in the city and then proposing a “three strike” program that the city could implement.

#### A. Preventative Methods

While there are many preventative strategies that would no doubt be helpful if properly utilized, the most significant are educational reform and community programs that are mostly non-police-involved. As to preventative measures, education is vital, and the ways schools respond to violence and delinquency is even more vital.<sup>257</sup> Undisputedly, education plays an important role in empowering youths to be successful in the future.<sup>258</sup> However, because of the school-to-prison pipeline and “zero tolerance” disciplinary policies in schools, suspensions and expulsions have negative cumulative effects by disconnecting the students from the school community and causing them to fall behind academically.<sup>259</sup> In realization of this, some schools utilize restorative justice policies.<sup>260</sup> These policies can teach teenagers

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257. See González, *supra* note 229, at 286 (arguing that restorative justice should be implemented in schools rather than zero tolerance punitive policies because “schools, unlike the legal system, have the capacity and knowledge to implement strategies that are long-term and sustainable”). González notes that a study shows that “punitive discipline policies have led to a tripling of the national prison population from 1987 to 2007.” *Id.* at 283.

258. See, e.g., GRACE CALISI CORBETT & TRACY A. HUEBNER, *RETHINKING HIGH SCHOOL: PREPARING STUDENTS FOR SUCCESS IN COLLEGE, CAREER, AND LIFE 1*, available at [http://www.wested.org/online\\_pubs/gf-07-02.pdf](http://www.wested.org/online_pubs/gf-07-02.pdf) (noting that 80% of the country’s fastest growing jobs will require some level of higher education); see also Arnold, *supra* note 184 (reporting high school drop outs are statistically much more likely to become incarcerated than high school graduates).

259. See González, *supra* note 229, at 291–97.

260. See generally *id.* at 303–21.

healthy ways of dealing with conflicts instead of angry retaliation. The policies are effective because

[r]estorative practices, proactive or reactive, emphasize the importance of relationships . . . . Schools that adopt restorative practices as alternatives to punitive policies establish environments where members of the community take responsibility to repair harm when it occurs, hold each other accountable, and build skills in collective problem solving. In such an environment, shared values of pro-social behavior are learned through modeling, conflict resolution, and mutual support.<sup>261</sup>

This may be one of the most powerful ways to address the gang population problem and geographical gang assignment because healthy conflict resolution practices in schools may have an impact on students' dealings with rival gangs. Violence may not be considered the only answer anymore.<sup>262</sup>

Outside of school, community-based, non-police-involved programs are another integral feature of an alternative method in approaching Chicago's gang problem. Both of the aforementioned characteristics are important to the success of the program. The community-based aspect is significant because it breaks down the dichotomy of "the community" versus "the gang members" and shows gang members the positive effects of contributing to the community.<sup>263</sup> An effective program should also contain non-police-involved elements because distrust of law enforcement is pervasive in many gangs, and allowing the gang members to build trust and relationships with the community is crucial.<sup>264</sup> By the same token, however, a successful program should have some components that encourage positive interactions between police officers and gang members to remedy the distrust and mutual misunderstanding between the two groups. An example of such a program could be police officers holding classes about self-defense or gun safety.

These community-based, non-police-involved programs should target additional areas of social distress in the community, such as poverty, family difficulties, and unemployment. Programs that have been successful in the past have provided family counseling, referrals for

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261. *Id.* at 300–01.

262. *See, e.g.,* Arnold, *supra* note 184 (reporting that schools in Oakland, California that have incorporated restorative justice practices have experienced significantly lower levels of reoffending, using the story of one particular youth as an example of its success).

263. *See* Penley, *supra* note 3, at 1208 (giving examples of successful programs in Chicago that focus on reintegrating gang members into the community, including inviting gang members into community members' homes).

264. *Id.*

jobs, social services, tutoring services, and group sports.<sup>265</sup> They have also included programs for parents, such as parenting classes and alcohol or drug treatment programs.<sup>266</sup> Additionally, communities could offer classes that teach practical skills like cooking, carpentry, or music lessons. Because so many gang members do not have a place of “belonging” outside of their gangs, encouraging involvement in the community may give them a new place to belong.<sup>267</sup> In light of this, setting up formal mentorship programs should be a key aspect of a successful alternative solution so that teenagers have an adult whom they trust to counsel them.<sup>268</sup>

*B. Responsive and Disciplinary Elements in a Modified Restorative Justice Approach*

There are pockets of different cities that practice restorative justice in schools or juvenile criminal courts.<sup>269</sup> In Cook County, Precious Blood Ministry of Reconciliation (PBMR) engages in restorative justice as a pilot project with the juvenile criminal court.<sup>270</sup> Per the project’s charter, the Cook County State’s Attorney’s Office refers an offender who has been arrested and has pled guilty or admitted his guilt to PBMR.<sup>271</sup> If the victim of the crime agrees, PBMR then offers the offender a “sentencing circle.”<sup>272</sup> The circle consists of the victim and her supporters, the offender and her supporters, a circle-keeper from PBMR, and members of the community with a stake in the case.<sup>273</sup> The goal of the sentencing circle, at times referred to as a consequence circle, is two-fold: first, to allow all stakeholders to communicate their perspectives; and second, for the group to collectively arrive at a consensus regarding how to repair the harm.<sup>274</sup> Each member holds a talking piece while she is speaking, and all others listen.<sup>275</sup> The talking piece travels around the circle, and each member has an

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265. *Id.* at 1208–09; *see also* JUDITH GREENE & KEVIN PRANIS, JUSTICE POLICY INST., GANG WARS: THE FAILURE OF ENFORCEMENT TACTICS AND THE NEED FOR EFFECTIVE PUBLIC SAFETY STRATEGIES 93 (2007), *available at* [http://www.justicepolicy.org/uploads/justicepolicy/documents/07-07\\_rep\\_gangwars\\_gc-ps-ac-jj.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/07-07_rep_gangwars_gc-ps-ac-jj.pdf).

266. Interview with Stone Vastine Grp., *supra* note 166.

267. *Id.*

268. *Id.* Ms. Vastine works in communities in which this is a practice.

269. *See, e.g.*, Arnold, *supra* note 184 (discussing the use of restorative justice techniques in Oakland, California).

270. Telephone Interview with David Kelly, Precious Blood Ministry of Reconciliation (Mar. 1, 2014) [hereinafter Interview with PBMR] (on file with author).

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

opportunity to speak.<sup>276</sup> Because the central aspect of restorative justice is relationships, the first few rounds of conversation work to establish trust and form relationships among circle members.<sup>277</sup>

Next, the victim, her support members, and the community members tell the offender what happened from their perspective and how the offender's conduct affected them.<sup>278</sup> After this, the offender is asked to explain the context in which she committed the crime—what caused him to commit the crime.<sup>279</sup> Finally, the group together decides what should happen to repair the harm, asking the victim what she needs to feel restored.<sup>280</sup> It is the responsibility of all circle members to continue to hold the offender accountable to the agreed-on sentence.<sup>281</sup> PBMR then reports back to the State's Attorney's Office that a circle occurred and a consensus was reached, but the content of the circle is protected by confidentiality.<sup>282</sup> The founder of PBMR, Reverend David Kelly, notes that a majority of the time, victims do not seek a sentence beyond the circle after receiving an apology from the offender; the process itself is sufficiently restorative for the victim.<sup>283</sup> Kelly asserts that the project has been quite successful, and the juvenile courts affiliated with the pilot project support it enthusiastically as a result.<sup>284</sup>

Primarily, the Chicago legislature should retract the Revised Ordinance in favor of a statute that imposes criminal sanctions only for actual criminal behavior, not merely hanging out on the street. The statute should apply to juveniles and should emulate the PBMR pilot project procedurally. Each offense may be considered "a strike." After receiving the first strike, a sentencing circle determines the proper sentence. Like the PBMR project, the group collectively decides how the offender should be held accountable for her conduct. Some aspect of the sentence could include forms of community service in the offender's community, encouraging him to give back to her community in a way that the community can tangibly recognize.<sup>285</sup>

The second strike should also involve a sentencing circle, but the second sentence may be more severe than the first. Additionally, at

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276. Interview with PBMR, *supra* note 270.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. Interview with PBMR, *supra* note 270.

283. *Id.*

284. *Id.*

285. *Id.*

the second strike, the community should become more involved in offering the juvenile alternatives to a criminal lifestyle by providing her with better education, skills, and relationships. The community's involvement is integral, and mentors should be assigned to the juvenile to continue to hold her accountable, teach her healthy ways to communicate, and empower her to seek alternatives to criminal behavior.<sup>286</sup> The third strike should lead to traditional judicial proceedings, and a judge may decide the appropriate sentence while remembering the general principles of restorative justice.

Also as a part of an alternative, restorative justice-oriented approach to Chicago gangs, there should be restorative justice-oriented shelters for offenders who commit severely violent crimes, such as rape and murder. That way, the offenders are temporarily removed from the community while they are dangerous, but they also have the benefit of victim-offender circles in which they can communicate with the victim (or the victim's family), see how their conduct affected her, and be held accountable directly for the harm they caused.<sup>287</sup> The shelters should be comprised of mentors and teachers to allow offenders to continue their academic education or learn a trade to provide them with other options on their release from the shelter.

While sentencing is an essential aspect of the restorative justice process, community involvement should begin before a sentencing circle.<sup>288</sup> Presentencing circles, oftentimes called peace-making circles, are also a significant characteristic of an effective restorative justice regime.<sup>289</sup> In peace-making circles, the offender is supported with important members of her community, like her parents or grandparents.<sup>290</sup> This gives the offender an opportunity to be heard and to learn healthy, nonviolent ways of expressing himself, which in turn establishes the trust necessary for a successful sentencing circle.<sup>291</sup> Elizabeth Vastine, who has acted as a circle-keeper for fourteen years in cases of juvenile delinquency, contends the presence of support

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286. Interview with Stone Vastine Grp., *supra* note 166 (explaining that community relationships can directly impact an individual's likelihood of reoffending).

287. *Id.*

288. *Id.* (describing the importance of community involvement before sentencing because it establishes trust and builds relationships).

289. Interview with PBMR, *supra* note 270 (noting that sentencing circles are significant because they give the offender an opportunity to talk and receive support from the community in a way that builds him up and helps restore his dignity).

290. *Id.*

291. *Id.*

people for the offender is especially significant.<sup>292</sup> She notes, “Their support people do not let them off the hook.”<sup>293</sup>

Lastly, unbridled judicial support is the most essential element of the revised regime.<sup>294</sup> Accordingly, judicial education should be one of the initial steps in reforming the system.<sup>295</sup> Judges must understand the merits of restorative justice, and they must support it completely because their treatment of the offender and of the case could undermine the integrity and intended effect of the circle.<sup>296</sup> Without judicial education and support, this regime is essentially useless.<sup>297</sup>

## V. CONCLUSION

Chicago is in need of major reform in the way it approaches the city's gang problem. The first step should be repealing the Revised Ordinance. The Revised Ordinance is unconstitutional; it targets and punishes the status of poor, marginalized racial minority children instead of their behavior. In communities run by geographical gang assignment, most children cannot exercise a meaningful choice to join gangs, and the Revised Ordinance unfairly targets them. Moreover, the Revised Ordinance has proven to be ineffective and fails to adequately address the problems underlying Chicago gangs and gang violence. It should be eradicated by the legislature, and the “principle[ ] of law which officials would impose upon a minority must be imposed generally.”<sup>298</sup> This principle of law should be restorative justice because of its holistic and redemptive approach to dealing with offenders, victims, and communities. If Chicago makes these changes, perhaps it will no longer be known as the country's Murder Capital.

*Jenna Marie Stupar\**

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292. Interview with Stone Vastine Grp., *supra* note 166.

293. *Id.*

294. *Id.* (explaining that the need for complete judicial support cannot be overstated).

295. *Id.* (“The judge's support goes directly to the success. It can be the door that is opened for the kids for so many other opportunities. Our most successful cases are those where the judge really gets it.”).

296. *Id.*

297. *Id.*

298. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

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