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The Third Generation of Loitering Laws Goes to Court: Do Laws That Criminalize Loitering with the Intent to Sell Drugs Pass Constitutional Muster

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COMMENT

The Third Generation of Loitering Laws Goes to Court: Do Laws That Criminalize "Loitering With the Intent to Sell Drugs" Pass Constitutional Muster?

I. INTRODUCTION

Citizens across the country fear drugs and those who deal them. According to at least one prominent politician, drug dealers should be put in concentration camps.[1] This attitude toward the growing drug problem is widely held.[2] As drug abuse has increased in this country, politicians frantically have sought for ways to nip the growth in the bud.[3] One increasingly popular strategy has been to arrest drug dealers before their merchandise reaches the street. In pursuit of this goal, legislators have enacted laws forbidding "loitering with the intent to sell drugs."[4] These laws identify and criminalize the activity of drug dealers before they have a chance to sell any drugs,[5] in effect giving police authority to predict which citizens "are to become future criminals."[6]

Despite their apparent usefulness, these new loitering laws represent a clear departure from longstanding constitutional principles which forbid laws that criminalize mere suspicion of future unlawful conduct.[7] All criminal laws must include some criminal act, or actus reus.[8] Loitering laws make the constitutionally protected activity of loitering the actus reus of the crime; there is no forbidden *criminal act*.[9] Similarly, federal courts also have struck down loitering statutes as unconstitu-

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1. Jim Morrill, *Myrick's Legacy Mixed*, CHARLOTTE OBSERVER, Dec. 1, 1991, at 1A, 8A (citing Sue Myrick, former mayor of Charlotte, North Carolina).

2. After declaring her "war on drugs," Sue Myrick proposed drug testing, concentration camps for drug dealers, and armed military police at high schools. *Id.* at 8A. Others have echoed Myrick's views, which have earned her rumors "in Republican circles to be a candidate to replace drug-policy chief William Bennett." *Id.*

3. *See, e.g., id.* Such efforts have not always been successful, however. After Myrick declared war on drugs, violent crime increased 52% during her first three years in office. *Id.*

4. *See, e.g.*, CHARLOTTE, N.C., CODE § 15-31 (1990); FAYETTEVILLE, N.C., CODE § 21-55(c)(5) (1989); GREENSBORO, N.C., CODE § 18-46 (1989); HIGH POINT, N.C., CODE § 12-1-9 (1989).

5. Many city ordinances equate activity such as loitering on public property in high crime areas with manifesting an intent to sell drugs in the future. *See supra* note 4.

6. Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972).

7. *See id.* at 169.

8. *See* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

9. *See, e.g., id.*; Sawyer v. Sandstrom, 615 F.2d 311, 316 (5th Cir. 1980); Waters v. McGuriman, 656 F. Supp. 923, 926 (E.D. Pa. 1987); *see also Papachristou*, 405 U.S. at 164

tional on the grounds of vagueness and on Fourth Amendment principles.[10]

Nevertheless, loitering with intent statutes and ordinances have been recently enacted in several North Carolina cities.[11] When a criminal law forgoes the requirement of an actus reus, it may run afoul of the United States Constitution in several respects. First, the laws may infringe the First Amendment right of association.[12] They also may fail to provide adequate notice to police and citizens of what behavior is criminal, thereby chilling innocent activity and possibly encouraging arbitrary and discriminatory enforcement by the police.[13] Finally, they may facilitate circumvention of the Fourth Amendment's probable cause requirement by allowing police to search "suspicious" citizens.[14]

Furthering the impact of these new laws, their enactment coincides with interpretations of the Fourth and Fifth Amendments that afford criminal defendants little protection.[15] Courts that once invalidated loitering laws may respond differently now that such laws are drug-related loitering laws, and not just vagrancy laws regulating "bums."[16] If courts do uphold such laws, the police will have greater freedom from the restrictive constitutional principles under which they traditionally have operated.[17] At issue is whether this greater freedom violates the Constitution.

In Parts II and III, this Comment provides a brief overview of the history of loitering laws and discusses specifically how laws prohibiting "loitering with the intent to sell drugs" evolved from previous vagrancy

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("The difficulty is that [walking, strolling, and wandering] are historically part of the amenities of life as we have known them.").

10. *See infra* notes 96-137 and accompanying text.

11. *See supra* note 4 and accompanying text.

12. *See infra* notes 148-243 and accompanying text.

13. *See infra* notes 244-316 and accompanying text.

14. *See infra* notes 317-408 and accompanying text.

15. *See infra* notes 338-55 and accompanying text.

16. In Kalamazoo, Michigan, "[c]ourtroom spectators cheered . . . as a judge upheld an anti-loitering ordinance designed to rid streets of drug dealers." *Judge Upholds Law Targeting Drug Dealers*, WASH. TIMES, July 19, 1989, at A1. One judge, facing overwhelming public outcry against drugs, said that Kalamazoo had a " 'compelling interest to stem the flow of drugs' that outweighed any potential infringement on the right of people to associate with drug dealers." *Id.* (quoting District Judge Quinn Benson).

17. When the Elgin, Illinois city council was debating whether to pass a "loitering with intent to sell drugs" law, Police Chief Charles Gruber exemplified the new trend by saying, "There might be some bleeding-heart liberal out there who doesn't like it, but that's too bad. . . . We've got real problems and we've got to find new and creative ways to deal with them." Colin McMahon, *Elgin to Deal With Lingering Evils: Proposed Loitering Law Aimed at Drugs and Prostitutes*, CHI. TRIB., May 22, 1991, at 6.

laws.[18] Part IV examines a typical "loitering with the intent to sell drugs" law, how and where such a law is enforced, and how the judicial system has reacted to such a law.[19] Part V offers a doctrinal discussion of the three main constitutional issues implicated by loitering laws: overbreadth, vagueness, and the Fourth Amendment.[20] Part VI asks whether any loitering law can survive constitutional scrutiny.[21] This Comment concludes by questioning whether the war on drugs is exacting too high a price by eroding traditional individual freedoms.[22]

II. A BRIEF HISTORY OF LOITERING LAWS

Societies have had loitering laws for over one thousand years.[23] English vagrancy laws, the precursors to modern loitering statutes, existed as long ago as the reign of King Ine in 700 A.D.[24] English royalty first designed these "poor laws" in the seventh century[25] in an attempt to keep peasants from leaving their feudal lords.[26] Despite vigorous enforcement of the poor laws, the feudal system deteriorated, and serfs began to leave their fiefs in search of higher wages.[27] Severe labor shortages resulted.

In response to this migration, the sovereign enacted other similar laws designed to maintain the social order.[28] These efforts proved futile, however. A violent outbreak of the bubonic plague ravaged England in 1348,[29] killing much of the work force.[30] By 1349, King Edward III responded with the Statute of Labourers, the first "fully fledged vagrancy

18. *See infra* notes 23-68 and accompanying text.

19. *See infra* notes 69-140 and accompanying text.

20. *See infra* notes 141-408 and accompanying text.

21. *See infra* notes 409-17 and accompanying text.

22. *See infra* notes 418-23 and accompanying text.

23. C. J. RIBTON-TURNER, A HISTORY OF VAGRANTS AND VAGRANCY AND BEGGARS AND BEGGING 7 (1887).

24. *Id.*

25. *Id.*

26. *Id.* King Ine imposed severe penalties on those who wandered away from their lord: "If any one go from his lord without leave, or steal himself away into another shire, and he be discovered, let him go where he was before, and pay to his lord LX [60] shillings." *Id.* (quoting LAWS OF KING INE, ch. 39, 688-725 (Eng.)). In this period, one shilling was worth approximately the value of a cow. *Id.* Penalties also applied to those who harbored vagrants. *Id.* at 6-7.

27. Jordan Berns, Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717, 717-18 (1989).

28. *Id.*

29. RIBTON-TURNER, *supra* note 23, at 42-43.

30. *Id.*

statute."[31] The Statute of Labourers was designed to force peasants to work,[32] but it was ineffective in mitigating labor shortages.[33]

After this futile attempt to use vagrancy laws to control the labor market,[34] these laws were redirected toward crime prevention.[35] The Crown believed that people without visible means of employment were more likely to be involved in criminal activity.[36] Harsh penalties, including whipping the offender and cutting off his ear, were imposed on those caught loitering for the second time.[37] Vagrancy laws permitted police to round up large numbers of people, determine which were criminals, and release the rest.[38] One such law stated that "[o]fficers of cities are authorized to direct searches by night for ruffelers, sturdy vagabonds, and valiant beggars, and all persons are required to assist in such searches."[39]

Little changed in the New World.[40] For centuries in America, police found loitering laws useful tools for keeping undesirables off the

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31. Peter Archard, *Vagrancy—a Literature Review, in* VAGRANCY, SOME NEW PERSPECTIVES 11, 17 (Tim Cook ed., 1979).

32. RIBTON-TURNER, *supra* note 23, at 42-47. The Statute of Labourers stated:

> Because a great part of the people, and especially of workmen and servants, late died of the pestilence, many seeing the necessity of masters and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness than by labour to get their living . . . . That if a workman or servant depart from service before the time agreed upon, he shall be imprisoned.

Statute of Labourers, 1378, 2 Rich. 2, stat. 1, ch. 8 (Eng.), *cited in* RIBTON-TURNER, *supra* note 23, at 43-44.

Scholars have noted a variety of factors, in addition to the Black Death, which contributed to the enactment of these laws: "the demobilization of soldiers after the Wars of the Roses, the rising population, unemployment and economic depression arising out of the fall in the demand for textiles, inflation, the enclosure of common agricultural land, harvest failures, and the dissolution of the monasteries." Archard, *supra* note 31, at 18.

33. The 1349 Act proved futile in regulating the flow or wages of laborers. RIBTON-TURNER, *supra* note 23, at 46.

34. *Id.*

35. Archard, *supra* note 31, at 18. Vagrants were deemed gypsies in a 1530 Act; these vagrants were presumptively guilty of every crime from murder to crimes that were "to the high displeasure of God." RIBTON-TURNER, *supra* note 23, at 72-73 (quoting Vagrancy Act, 1530, 22 Hen. 8, ch. 12 (Eng.)).

36. Archard, *supra* note 31, at 18. By 1535, vagrancy laws had taken a new direction; the new statutes controlled repeat offenders. *Id.* The new laws were "explicitly designed to protect the property of commercial travellers in a society increasingly developing its commercial and industrial infra-structures." *Id.*

37. RIBTON-TURNER, *supra* note 23, at 82.

38. *Id.*

39. *Id.*

40. The English vagrancy laws served as models for the loitering laws enacted in the United States. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972). Some statutes even contained the same language as the old English laws. *Id.* at 161-62.

streets.[41] Those violating the loitering laws were guilty only of arousing the suspicion of police officers.[42] For example, a police officer could arrest a vagrant for the crime of making an officer uncomfortable by his presence.[43] Almost all of these first generation loitering laws, however, were held to be vague and were invalidated by the United States Supreme Court in the 1960s and 1970s.[44] The Court held that the vagrancy laws were so vague that ordinary citizens could not know what activity constituted a crime and that police could enforce these laws in an arbitrary and discriminatory manner.[45]

Lawmakers responded to the Supreme Court's admonition by requiring a specific intent to engage in an unlawful activity.[46] By adding a mens rea element, legislators hoped to wrap the same unconstitutional law in a prettier package that was more likely to receive judicial sanction.[47] The first of these laws to gain popularity sought to lessen the standard for arresting prostitutes[48] by criminalizing "loitering with the intent to solicit prostitution."[49] The laws were a response to the difficulty prosecutors had in convicting prostitutes[50] because the police rarely

41. *See id.* at 171 ("Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the roundup of so-called undesirables."); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1171 (2d Cir. 1974) ("[The loitering statute] represented New York's formulation of a dragnet approach to the maintenance of public order that had its roots in feudal England and which has survived, despite considerable disapproval, in urban America."), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975).

42. *See* Powell v. Stone, 507 F.2d 93, 96 (9th Cir. 1974) (holding that vagrancy statutes "authorize arrest and conviction for conduct that is no more than suspicious"), *rev'd on other grounds*, 428 U.S. 465 (1975).

43. *See* JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1965), *quoted in Papachristou*, 405 U.S. at 156-57 n.1.

44. *See, e.g., Papachristou*, 405 U.S. at 169-71.

45. *Id.* at 170.

46. *See, e.g.*, CHARLOTTE, N.C., CODE § 15-31 (1990) (loitering for the purpose of engaging in drug-related activity); GREENSBORO, N.C., CODE § 18-46 (1989) (same); HIGH POINT, N.C., CODE § 12-1-9 (1989) (same).

47. *See* McMahon, *supra* note 17, at 6.

48. *See* N.C. GEN. STAT. § 14-204.1 (1979).

49. *See, e.g., id.*

50. In People v. Williams, 55 Misc. 2d 774, 775, 286 N.Y.S.2d 575, 577 (N.Y. Crim. Ct. 1967), the court commented:

> These defendants are 41 of a group of alleged prostitutes who have been arrested and detained 2500 times for disorderly conduct and loitering in New York City since August 18th. . . . This Court of its own knowledge is aware that except for a few isolated instances where defendants pleaded guilty, the . . . cases were dismissed. In many instances, "the girls" were arrested after 11:30 P.M., too late to be arraigned, night court had been adjourned, then kept overnight in a cell. In the morning they were brought to Court and released because the offenses for which they had been arrested could not be proven to have been committed by them.

could catch prostitutes in the act.[51] This second generation of loitering laws went largely unnoticed, however, because it was extremely narrow in scope,[52] police were careful to apply it only to prostitutes, and those prosecuted rarely appealed because, by the time of the trial, most had been released from jail on time served.[53]

III. THE WAR ON DRUGS

Widespread illegal drug use has spawned cries for effective solutions. Consider the responses of two jurors after acquitting six police officers for the killing of a drug dealer:[54] "[The victim was] only a drug dealer anyway,"[55] and "the guy was an out-and-out drug dealer—probably got what he deserved anyway."[56] These statements illustrate society's disdain for affording drug dealers constitutionally protected rights.[57]

Unlike the above-mentioned case, most alleged civil rights violations fueled by the war on drugs involve criminal defendants accused of using drugs.[58] People generally are not sympathetic towards a defendant ac-

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Id. (*quoted in* United States *ex. rel.* Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975)).

51. *See generally* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 96-109 (2d. ed. 1975) (detailing the various ways in which prostitutes avoid arrest).

52. *See, e.g.*, N.Y. PENAL LAW § 240.37 (McKinney 1976).

53. *See, e.g.*, Dominguez v. Beame, 603 F.2d 337, 339 (2d Cir. 1979) (observing that the District Attorney dropped all charges against women accused of prostitution after they had spent one night in jail).

54. Andy Court, *Unreasonable Doubt*, AM. LAW., Apr. 1991, at 76. In the trial of six police officers, the government's case was weakened by the legally irrelevant fact that the victim was a drug dealer. Counsel for the defense successfully painted the trial as a battle between good and evil: "Ladies and gentlemen, this is a trial about a single battle in the war on drugs." *Id.* The jury subsequently acquitted the police officers of all homicide charges and of charges of conspiring to deprive the drug dealer of his civil rights. *Id.* The jurors probably did not want to send veteran officers to jail for killing a drug dealer. As Herbert Ross, one of the jurors, stated, "I've heard a little too much [about] civil rights in my lifetime. I feel that criminals give their civil rights away when they elect to lead a life of crime." *Id.*

55. *Id.*

56. *Id.* There was overwhelming evidence that four Miami police officers beat Leonardo Mercado to death while he lay defenseless, curled on the ground. *Id.*

57. Drug Czar William Bennett explained his position in his nomination hearings before the Senate Judiciary Committee, stating that he favored limiting constitutional liberties if there were " 'compelling reasons' to do so in the war on drugs." Douglas Jehl, *Bennett Would Limit Rights in War on Drugs*, L.A. TIMES, Mar. 3, 1989, § 1, at 1. Bennett also reasoned that the "Constitution is not a suicide pact. Lincoln did suspend habeas corpus rights, and I don't think that was a terrible thing to do." *Id.*

58. The most visible abuses of rights in the war on drugs come from police. This Comment focuses on the opportunity for police abuses created by loitering laws. This does not mean, however, that the criminal justice system is free from abuse after the courts take over.

cused of a drug-related offense[59] and fear that the drug problem will spread, further infecting mainstream families.[60] Even moderate political groups now believe the drug problem is so urgent that some individual rights must be sacrificed in order to fight the war on drugs.[61] Without tough drug laws, law enforcement officers often feel powerless to combat increasing drug use.[62]

One judge, prompted by an overwhelming public outcry, stated that Kalamazoo, Michigan had a " 'compelling interest to stem the flow of

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In today's courtrooms, according to Kevin Zeese, vice president of the Drug Policy Foundation, " '[v]irtually all of the first ten [amendments] have been greatly abridged by the drug war, and I don't see an end to it.' " Dawn M. Weyrich, *Drug War Alarms Civil Libertarians*, WASH. TIMES, Sept. 5, 1990, at A1.

59. There is a pervasive sense of civic responsibility to get tough on drug-related crime. James Neuhard, a member of the American Bar Association's Task Force on the Crisis in the Court System, compares the drug war mentality to McCarthyism. *See* Michael Tackett, *Drug War Chokes Federal Courts: Assembly-line Justice Perils Legal System*, CHI. TRIB., Oct. 14, 1990, at C1, C5.

60. Susan Beck et al., *The Cocaine War in America's Fruitbowl*, AM. LAW., Mar. 1990, at 82, 84. Richard Kayne, Washington state court-appointed counsel for drug defendants, admitted that "[d]rugs have become such a bugaboo that people are willing to trade almost anything to get rid of them." *Id.* In Yakima, Washington, all public schools participate in a

> somewhat Orwellian program called SAFE, or Student Assistance For Everyone. Every school day about a dozen students there attend an elective class in staying off drugs. Each of these students has already had a 'caring confrontation' with a member of the school's 'care team,' which was notified of the student's suspicious behavior by a teacher or fellow student. After the confrontation, the student was referred for treatment.

Id. at 84-85. The care team consists of teachers, counselors, and other students known as "natural helpers." *Id.* at 85. The natural helpers report the names of those of their peers who show signs of drug behavior. *Id.*

In a letter to the editor, one citizen of Seattle voiced the rage that ordinary people have against drug-related crime. "The police must have more power in dealing with these drug dealing mutants who take over our city streets, terrorizing the families, senior citizens and children who live there." Patti Whitehead-Crooks, SEATTLE TIMES, July 5, 1990, at A11.

61. A new group of scholars and activists have started a movement called "communitarianism." Alvin P. Sanoff & Ted Gest, *Battling the Rights Wings: A New Movement Brings Back an Old Word: Responsibility*, U.S. NEWS & WORLD REP., Nov. 25, 1991, at 28. This movement asserts that "politics has gone astray by catering to rampant individualism while virtually ignoring citizens' responsibilities to the wider community." *Id.* A wide circle of moderate politicians espousing communitarian ideas includes President Bill Clinton, Virginia Governor Douglas Wilder, New York Governor Mario Cuomo, and some of former President George Bush's aides. *Id.* One of the movement's key platforms is to give police "broader powers to arrest suspected dealers and to enforce anti-loitering laws to break up drug-sales operations." *Id.*

62. Drug dealers have learned to avoid police prosecution under current drug laws. Interview with Stephanie Webster, police attorney, in Charlotte, N.C. (Nov. 1991). Loitering with the intent to sell drugs laws are designed to catch dealers who exchange drugs and money in discreet ways. *Id.* Drugs often come in small packets which are exchanged through handshakes. *Id.* It is both difficult and resource-exhausting for the police to use existing drug laws under these circumstances. *Id.*

drugs' that outweighed any potential infringement on the right of people to associate with drug dealers."[63] Due to community pressures, alleged drug users are unlikely to receive impartial treatment at the hands of the criminal justice system.

The third generation of loitering laws arose out of this dismal environment.[64] Public pressure to support the war on drugs has caused politicians to enact harsh laws against drug-related activity.[65] Consequently, local governments have empowered police to arrest people who look or act like drug users or sellers through new "loitering with the intent to sell drugs" laws.[66] Lawmakers expected that adding an intent requirement

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63. *Judge Upholds Law Targeting Drug Dealers*, WASH. TIMES, July 19, 1989, at A1 (quoting District Judge Quinn Benson).

64. Responding to a court decision to strike down Alexandria, Virginia's 'loitering with the intent to sell drugs' law, Mayor James P. Moran, Jr. remarked that the "worst setback is to the lawful citizens living in these drug-infested neighborhoods, who are in desperate need of support from the criminal justice system. And instead, the criminal justice system continues to look for ways to protect the drug dealer." Robert F. Howe, *Alexandria Statute on Loitering Upset*, WASH. POST, Sept. 28, 1990, at D1.

65. Judge William Schwarzer, director of the Federal Judicial Center, summed up the situation:

> The popular political apparatus cries for harsher and harsher attacks for people involved with drugs and for more involvement of the courts. We get this blind, emotional commitment without looking at the facts and assume any war that the U.S. gets into it will automatically win. . . . I don't consider the courts a place to fight a war.

Tackett, *supra* note 59, at C5. As in any war, citizens are asked to make sacrifices toward the war effort. Former President Gerald Ford, commenting on the sacrifices that need to be made in the war on drugs, reflected a common feeling among the populous: "It is vital that we cooperate [in the drug war] over and above any rights that we have." *Ford's Idea for War on Drugs one Step Beyond Reagan's*, UPI, Sept. 16, 1986, *available in* LEXIS, Nexis Library, UPI File.

In fact, a recent study shows that a clear majority of Americans are willing to suspend the Constitution until the war on drugs is won. "Criminal Justice in Crisis," a study conducted by an ABA committee consisting of federal judges, state attorneys general, district attorneys, and police chiefs found that 62% of Americans would give up their rights to stop illegal drug use, *id.* at 21 (citing *Criminal Justice in Crisis*, 1988 A.B.A. CRIM. JUST. SEC. REP.); but "the public has been misinformed. The public believes that if they give up their own rights, they can trade them for a solution to the drug problem." *Id.*

There is not really a tradeoff, but there is tremendous pressure to do *something* in the war on drugs. As a result, "police [and prosecutors] have engaged in fruitless activity." *Id.* at 23. Prosecutors and judges, who are often elected, are forced to show they are tough on crime, but these efforts "are merely efforts to placate the public." *Id.* Unfortunately these 'battles' are all for show; in reality, fighting drugs through the criminal justice system is, as one police chief said, "like trying to bail out the Atlantic Ocean with a teaspoon." *Id.* at 20. In fact, "[i]nvoking the metaphors and images of battle, the government's 'war on drugs' has already made casualties of constitutional protections and personal dignity." United States v. Salas, 879 F.2d 530, 541 (9th Cir. 1989) (Ferguson, J., dissenting).

66. A typical "loitering with intent to sell drugs" law still allows arrests based on suspicion where "such person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is engaging in an unlawful drug-related activity." FAYETTEVILLE,

and the magic word "drugs" would insulate the third generation of loitering laws from constitutional challenge.[67] Law enforcement agencies were pleased to have a new tool to combat drug dealers, but the question remained: Was this new tool merely another unconstitutional "broom,"[68] a third generation of street-sweeping loitering laws?

IV. LOITERING WITH INTENT

As courts struck down this third generation of loitering laws, legislative bodies enacted new, more narrow laws to avoid the constitutional problems that plagued the previous laws. Although some city councils have already proposed and passed some "fourth generation" loitering laws addressing "unauthorized persons on parking lots"[69] or "begging without a permit,"[70] this Comment will focus primarily on "loitering for

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N.C., CODE § 21-55(c)(5) (1989); *see* GREENSBORO, N.C., CODE § 18-46(b)(4) (1989); HIGH POINT, N.C., CODE § 12-1-9(b)(4) (1989); *see also* Beck et al., *supra* note 60, at 82 (stating that such local ordinances give police broad powers to stop and question people, thereby allowing them to build up probable cause "in a stair-step fashion").

67. The third generation loitering laws make arrests, though not convictions, just as easy to accomplish as did the old loitering laws, because the police officer on the beat is given the discretion to decide who he thinks intends to sell drugs. *See* CHARLOTTE, N.C., CODE § 15-31 (1990); FAYETTEVILLE, N.C., CODE § 21-55(c) (1989); GREENSBORO, N.C., CODE § 18-46(b) (1989); HIGH POINT, N.C., CODE § 12-1-9(b) (1989).

68. Beck et al., *supra* note 60, at 82.

69. Charlotte officials are considering adopting a law modeled after an Atlanta, Georgia ordinance concerning "unauthorized persons on parking lots." *See* ATLANTA, GA., ORDINANCE § 17-1007 (1991). The proposed Charlotte ordinance reads as follows:

> It shall be unlawful for any person to remain on any property which is used primarily as a parking lot for vehicles unless such person has a vehicle parked on the property, or has other lawful business on said property; provided, such property is prominently marked by a posted notice which is easily seen from a distance of fifty feet which states substantially as follows: "No Person shall remain on any property which is used primarily as a parking lot for vehicles unless such person has a vehicle parked on the property, or is employed by the owner or manager of the property, or has lawful business on said property."

CHARLOTTE, N.C., CODE § 15-11 (Proposed Official Draft 1991). However, it would be difficult for police to tell whether someone owned a car in a parking lot or whether he was there for "lawful business."

70. A proposed Charlotte ordinance attempts to use the city bureaucracy to deter begging. *See* CHARLOTTE, N.C., CODE § 15-24 (Proposed Official Draft 1991). This proposed ordinance makes it entirely possible that a person may wait longer to obtain a permit than the time he actually is allowed to use it. Although the permit lasts only three months, the application process takes one month to complete:

> (a) *Permit required.*
>
> (1) It shall be unlawful for any person to beg or solicit alms or contributions, which include money or other things of value, from the public, on the public streets or other public property, without first obtaining a permit in the manner set forth in this ordinance.
>
> (2) Any person desiring to beg or solicit alms or charitable contributions on the

the purpose of engaging in drug-related activity" and, to a lesser degree, on "loitering with the intent to solicit prostitution."

A. *Typical "Loitering With Intent" Laws: North Carolina Ordinances*

Although Charlotte was not the first city in North Carolina to pass a drug-related loitering ordinance, it may have the most street-level drug activity because it is the state's largest city. Charlotte's ordinance, the product of a combined effort by North Carolina police attorneys to create a constitutional "loitering with intent" law, is generally representative of the other city ordinances in North Carolina. The ordinance reads as follows:

> (a) *Definitions.* For the purpose of this section, the following definitions shall apply:
> (1) *Known unlawful drug user, possessor or seller*: A person who has been convicted in any court within this state of any crime involving the use, possession or sale of any substance referred to in the North Carolina Controlled Substances Act, Chapter 90, Article 5, of the North Carolina General Statutes or has been convicted of any violation of any substantially similar law of any other state or of the United States.
> (2) *Public Place*: Any public street, public highway, public sidewalk, public vehicular area, . . . public park and/or plaza, other publicly owned or leased property, public transportation facility, school and school grounds or property, common areas of apartment and condominium communities, common areas of public housing projects, any place of business or amusement which is open to the public, any private property which adjoins any of the above-described areas and to which the public has ready access, any other property which is open to the public, whether publicly or privately owned, and any motor vehicle in or on the above-described areas.
> (3) *Repeatedly*: Three (3) or more times.

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public streets or other public property shall file with the City Manager an application for a permit, which application shall state the name of the applicant, the purpose for which the applicant intends to beg or solicit alms or charitable contributions, and the manner in which any property received as a result of such begging or solicitation is to be disbursed. The applicant shall also certify that such begging or solicitation will be conducted in a manner allowed pursuant to Section (b) of this ordinance. Upon receipt of a completed application and certification, the City Manager shall issue a permit to the applicant within four weeks of such receipt with such reasonable time, place and manner restrictions as are appropriate in the particular circumstances presented by the applicant and in light of the interests of public safety, peace, comfort and convenience. Such permits shall be valid for a period not exceeding three months.

Id.

(b) *Prohibited; violation determination.* It shall be unlawful for a person to remain or wander about in a public place for the purpose of engaging in a violation of any provision of the North Carolina Controlled Substances Act (North Carolina General Statutes 90, Article 5). The following conduct or factors can be considered in determining whether a person is remaining or wandering in a public place for the purpose of violating any provision of N.C.G.S. 90, Article 5:

(1) Repeatedly beckoning to, stopping or attempting to stop passersby or attempting to engage passersby in conversation; or

(2) Repeatedly stopping or attempting to stop motor vehicles; or

(3) Repeatedly interfering with the free passage of other persons; or

(4) Being a known unlawful user, possessor or seller; or

(5) Repeatedly passing to or receiving from passersby, whether on foot or in a vehicle, money or objects; or

(6) Attempting to flee or evade a police officer; or

(7) Being at a location frequented by persons who use, possess or sell controlled substances; or

(8) Occupying a vehicle which is registered to a known unlawful drug user, possessor or seller or which has been recently involved in illegal drug-related activity; or

(9) Stopping, conversing with the occupant(s) of, handing money or any object to the occupant(s) of or receiving money or any object from the occupant(s) of a vehicle which is registered to a known unlawful drug user, possessor or seller or which has been recently involved in illegal drug-related activity.

(c) *Possible arrest; penalty.* No arrest or charge is permitted hereunder unless the circumstances establish probable cause to believe that the person intended to violate one (1) or more of the provisions of N.C.G.S. 90, Article 5. A violation of any provision of this section shall subject the offender to the penalties set forth in section 1-7 of the city Code.

(d) *Severability.* If any subsection, paragraph, sentence, clause, phrase or portion of this section is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed severable, and such holding shall not affect the validity of the remaining portions hereof.[71]

Three similar ordinances have been enacted in other North Carolina cities. The first type, enacted in Greensboro and High Point, parallels

71. CHARLOTTE, N.C., CODE § 15-31 (1990).

the Charlotte ordinance,[72] except that section (a) does not include a definition of "known drug user" or "repeatedly," and the definition for "public place" is slightly different; section (b) requires that *each* circumstance used to manifest intent be for the purpose of violating North Carolina drug laws; section (b)(4) replaces being a "known drug" offender with "[s]uch person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is engaging in an unlawful drug-related activity"; and sections (b)(8) and (b)(9) of the Charlotte ordinance, concerning vehicles involved in drug trade, as well as section (c), which concerns probable cause, are omitted.

The second type of ordinance, enacted in Fayetteville, is also similar to the Charlotte ordinance.[73] Like the High Point and Greensboro ordi-

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72. HIGH POINT, N.C., CODE § 12-1-9 (1989); *see supra* note 71 and accompanying text. The High Point ordinance provides:

> (a) For the purpose of this section, "public place" means any area available to the public for common usage and access, including any street, sidewalk, bridge, alley or alleyway, plaza, park, playground, driveway, parking lot or transportation facility, or the doorways, entranceways, stairway, staircase, hall, roof, elevator, courtyard, passageway or common area to any building which fronts on any of those places or any motor vehicle in or on any of those places, or any property owned by the City. . . .
>
> (b) It shall be unlawful for a person to remain or wander about in a public place in a manner and under circumstances manifesting the intent to engage in a violation of any subdivision of the North Carolina Controlled Substances Act, N.C. General Statutes Chapter 90, Article 5. Such circumstances shall include the following when done for the purpose of violating the aforementioned state statutes:
>
> (1) Repeatedly beckoning to, stopping, or attempting to stop passers-by, or attempting to engage passers-by in conversation; or
>
> (2) Repeatedly stopping or attempting to stop motor vehicles; or
>
> (3) Repeatedly interfering with the free passage of other persons; or
>
> (4) Such person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is engaging in an unlawful drug-related activity; or
>
> (5) Such person repeatedly passes to or receives from passers-by, whether on foot, in a vehicle or by courier, money or objects; or
>
> (6) Such person takes flight upon the approach or appearance of a law enforcement officer; or
>
> (7) Such person is at a location frequented by persons who unlawfully use, possess or sell drugs.
>
> (c) All ordinances or parts of ordinances in conflict with this section are hereby repealed to the extent of such conflict.
>
> (d) If any subsection, paragraph, sentence, clause, phrase or portion of this section is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed severable, and such holding shall not affect the validity of the remaining portions hereof.

HIGH POINT, N.C., CODE § 12-1-9 (1989); *see* GREENSBORO, N.C., CODE § 18-46 (1989).

73. FAYETTEVILLE, N.C., CODE § 21-55 (1989); *see supra* note 71 and accompanying text. The Fayetteville ordinance provides:

> (a) For the purpose of this section, "public place" means any street, sidewalk,

nances, the Fayetteville ordinance allows police to find intent when "[s]uch person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is engaging in an unlawful drug-related activity."[74] Unlike the High Point and Greensboro ordinances, but like Charlotte's, the Fayetteville ordinance requires only that the circumstances, taken together, manifest intent to violate a drug law,[75] not that each circumstance itself must be performed with the intent to

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bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility, or the doorways and entranceways to any building which fronts on any of those places, or a motor vehicle in or on any of those places, or any property owned by the city.

(b) For the purposes of this section, a "known unlawful drug user, possessor, or seller" is a person who has, within the knowledge of the arresting officer, been convicted in any court within this state of any violation involving the use, possession or sale of any of the substances referred to in the North Carolina Controlled Substances Act, Chapter 90, Article 5 of the North Carolina General Statutes, or has been convicted of any violation of any substantially similar laws of any political subdivision of this state or of any other state or of federal law.

(c) It shall be unlawful for a person to remain or wander about in a public place in a manner and under circumstances manifesting the purpose to engage in a violation of any subdivision of the North Carolina Controlled Substances Act, North Carolina General Statutes, Chapter 90 , Article 5. Such circumstances shall include:

(1) Repeatedly beckoning to, stopping, or attempting to stop passers-by, or repeatedly attempting to engage passers-by in conversation; or

(2) Repeatedly stopping or attempting to stop motor vehicles; or

(3) Repeatedly interfering with the free passage of other persons; or

(4) Such person is a known unlawful drug user, possessor, or seller; or

(5) Such person behaves in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is engaged in an unlawful drug-related activity; or

(6) Such person repeatedly passes to or receives from passers-by, whether on foot or in a vehicle, money or objects; or

(7) Such person takes flight upon the approach or appearance of a police officer; or

(8) Such person is at a location frequented by persons who use, possess, or sell drugs; or

(9) Any vehicle involved is registered to a known unlawful drug user, possessor, or seller, or is known to be or have been involved in drug-related activities.

(d) A violation of any provisions of this section shall subject the offender to the penalties set forth in section 1-7 of this Code.

(e) If any section, paragraph, sentence, clause, phrase or portion of this section is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed severable and such holding shall not affect the validity of the remaining portions hereof.

FAYETTEVILLE, N.C., CODE § 21-55 (1989).

74. FAYETTEVILLE, N.C., CODE § 21-55(c)(5) (1989); *see* GREENSBORO, N.C., CODE § 18-46 (1989); HIGH POINT, N.C., CODE § 12-1-9 (1989).

75. *See* FAYETTEVILLE, N.C., CODE § 21-55 (1989); CHARLOTTE, N.C., CODE § 15-31 (1990).

violate a drug law.[76] The Fayetteville ordinance requires also that the arresting officer have knowledge at the time of arrest that a person is a "known unlawful drug user."[77] Fayetteville's ordinance also replaces sections (b)(8) and (b)(9) of the Charlotte ordinance with "[a]ny vehicle involved is registered to a known unlawful drug user, possessor, or seller, or is known to be or have been involved in drug-related activities."[78] Fayetteville's ordinance omits section (c) of the Charlotte ordinance concerning probable cause.[79]

The third type of ordinance, enacted in Durham, is similar to North Carolina's "loitering for the purpose of soliciting prostitution" law.[80] The Durham law differs significantly from the other cities' ordinances.[81] Essentially, if a person participates in any one of four activities for the purpose of violating North Carolina drug laws, that person is guilty of "loitering for the purpose of engaging in drug-related activity."[82]

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76. *See* GREENSBORO, N.C., CODE § 18-46(b) (1989); HIGH POINT, N.C., CODE § 12-1-9(b) (1989).

77. FAYETTEVILLE, N.C., CODE § 21-55(c)(4) (1989); *see* CHARLOTTE, N.C., CODE § 15-31(b)(4) (1990).

78. FAYETTEVILLE, N.C., CODE § 21-55(c)(9) (1989); *see* CHARLOTTE, N.C., CODE §§ 15-31(b)(8)-(b)(9) (1990).

79. *See* FAYETTEVILLE, N.C., CODE § 21-55(c)(9) (1989); *see also* CHARLOTTE, N.C., CODE § 15-31(c) (1990) (stating what constitutes probable cause).

80. *See* N.C. GEN STAT. § 14-204.1 (1986).

Durham's ordinance reads:

> (a) For the purpose of this section, "public place" means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility, or the doorways and entranceway to any building which fronts on any of those places or any motor vehicle in or on any of those places, or any property owned by the City Durham.
>
> (b) If a person remains or wanders about in a public place and
>
> (1) Repeatedly beckons to, stops, or attempts to stop passers-by or repeatedly attempts to engage passers-by in conversation; or
>
> (2) Repeatedly stops or attempts to stop motor vehicles; or
>
> (3) Repeatedly interferes with the free passage of other persons; or
>
> (4) Repeatedly passes to or receives from passers-by, whether on foot or in a vehicle, money or objects for the purpose of violating any subdivision of the North Carolina General Substances Act, North Carolina General Statutes, Chapter 90, Article 5, that person is guilty of a misdemeanor and, upon conviction, shall be punished in the manner prescribed by North Carolina Gen. Stat. 14-4.

DURHAM, N.C., CODE § 12-62 (1990).

81. *See* DURHAM N.C. CODE § 12-62 (1990); *cf.* CHARLOTTE, N.C., CODE § 15-31(b)(1), (b)(2), (b)(3), (b)(5) (1990) (listing prohibited activities).

82. *See* DURHAM, N.C., CODE § 12-62 (1990). The four activities listed in the Durham law are the same as those in § (b)(1), (b)(2), (b)(3) and (b)(5) of the Charlotte ordinance. *See* CHARLOTTE, N.C., CODE § 15-31 (1990).

B. *The Second and Third Generations of Loitering Laws*

It is helpful to look at the reasons behind the emergence of "loitering with intent" laws and to examine the possibility for abuse. It is a widely held view that the drug problem plaguing our nation has led to rampant crime. Nevertheless, many have questioned whether this view expresses the true motivation behind these laws. These critics argue that the new loitering laws were passed only to harass minority communities.[83] "Loitering with intent to engage in drug-related activity" laws are targeted at high-crime areas, which are usually minority neighborhoods. In many instances, however, it is the neighborhood leaders who ask lawmakers to declare their areas "drug-free zones."[84]

Others feel that lawmakers have enacted drug-loitering laws in response to both public pressure and the difficulty police have in keeping drug dealers off the streets under existing drug laws. Citizens and police have lost faith in a system that requires probable cause before an arrest. Probable cause "may be great in theory, but in practice it is worthless. Drug dealers hang out for hours on the same block and cut their deals with elaborate rituals designed to keep the drugs out of sight."[85] Lawmakers pass drug-loitering laws to drive these drug dealers out of neighborhoods.[86] Even if lawmakers enact drug loitering laws with good

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83. Comparing the arrest rates for black and white Americans does provide some insight into this issue. According to two studies, one by the FBI and the other by the National Institute for Drug Abuse, only 12% of the nation's drug users are African-Americans, but blacks constitute up to 92% of those arrested for drug offenses. *See Blacks and Drugs*, CHARLOTTE OBSERVER, July 13, 1992, at 8A. White Americans make up only 7% of those incarcerated for drug offenses. *Id.*

84. *Close to Home*, WASH. POST, July 1, 1990, at B8. In Alexandria, Virginia, local citizens pushed for a drug-loitering law to control drug-related activity. Minority leaders claimed "This is our ordinance. It was not foisted upon us. . . . [W]e asked the city to get rid of the dealers on the corners . . . . It soon became obvious that a new law was needed, so we took the issue to the police and later to the city council." *Id.* The drug loitering law the leaders sought described as was a "hard won victory for our community." *Id.*

85. *Id.*; *see supra* note 62 and accompanying text.

86. *Close to Home*, *supra* note 84, at B8. The intention is to make neighborhoods as uncomfortable as possible for the drug dealers in the hope that this will drive them away. *Id.* Drug-loitering laws allow police to tell suspected drug dealers "to move on or risk arrest." *Id.*

A Minneapolis lawyer experienced first hand just how arbitrary a "loitering with intent" law can be. He was sitting in a car talking to two clients, who were prostitutes, when they were approached by police officers. The officers became angry when the attorney advised the prostitutes not to answer the officers' questions. Incensed by the attorney's interference, the officers searched the lawyer and charged him under the city's "loitering with intent to commit prostitution" ordinance, remarking that "[t]his is for you, mister smartass-criminal defense lawyer. Maybe next time you'll let us reasonably question your client." Auston C. Wehrwein, *Lawyer Sues Over His Arrest*, NAT'L LAW J., Dec. 2, 1985, at 9. The officers involved were fired, but the police chief noted that "this is a classical case and this is a serious problem in law enforcement of citizens failing the officers 'attitude test.' " *Id.* While the lawyer was fortunate

intentions, good intentions often are not enough. Drug loitering laws eject dealers from neighborhoods, but they do so in a street sweeping fashion.[87]

C. *Ready to be Decided?*

The North Carolina ordinances are by no means the only "loitering with intent" laws in the United States; many cities and states have enacted similar laws.[88] While courts around the country have considered their validity,[89] the Supreme Court has yet to address the issue. The Court has, however, had the opportunity.

In *New York v. Uplinger*,[90] the Court considered a constitutional challenge to a statute forbidding "loitering 'in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature.' "[91] The highest court in New York held that the statute violated the United States Constitution.[92] Although the Court acknowledged the importance of the issues presented in the case, a majority of the Justices agreed that the case provided an "inappropriate vehicle for resolving the important constitutional issues raised by the parties."[93] The Court, after hearing oral arguments and reading the briefs, decided that the writ of certiorari had been granted improvidently and let the New York decision stand.[94]

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in that the charges were immediately dropped, similar police harassment of poor minorities could easily go unnoticed.

87. The scenario of "charge with loitering, search, charge with drug offense, and (sometimes) drop loitering" exemplifies the street sweeping method of search first, charge later. *See, e.g., Drug Arrests*, UPI, Feb. 4, 1984, *available in* LEXIS, Nexis Library, UPI File (stating that "[t]he officers swooped down . . . and arrested the nine men on various drug charges," including loitering and drug sale); Mitchell Freedman, *Eleven Face Drug Counts*, NEWSDAY, Nov. 28, 1988, at 30 (reporting that eleven people were charged with possession of controlled substance and loitering); Bill Van Haintze, *Four Charged in Crack Deal*, NEWSDAY, Apr. 23, 1988, at 16 (reporting that two people were charged with drug offenses, one substantive, one loitering).

88. *See* McMahon, *supra* note 17, at 6.

89. *See, e.g.*, Holliday v. City of Tampa, 586 So. 2d 64, 64-65 (Fla. Dist. Ct. App. 1991) (finding drug loitering law facially constitutional, but certifying the question to the Florida Supreme Court to decide); Christian v. City of Kansas City, 710 S.W.2d 11, 14 (Mo. Ct. App. 1986) (finding prostitution loitering law unconstitutionally overbroad).

90. 467 U.S. 246 (1984).

91. *Id.* at 247 (quoting N.Y. PENAL LAW § 240.35(3) (McKinney 1980)).

92. *Id.* (citing People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980)).

93. *See id.* at 249; *see also id.* at 251 (Stevens, J., concurring) (calling case an unwise vehicle for deciding the "gravest and most delicate" issue of constitutionality).

94. *Id.* at 248. Justice Stevens, concurring, wrote that "[f]undamental principles of constitutional adjudication counsel against premature consideration of constitutional questions

The dissent, authored by Justice White and joined by then-Chief Justice Burger and Justices Rehnquist and O'Connor, indicated that four Justices were ready to answer the question of the constitutionality of this "loitering with intent" statute.[95]

D. "Loitering with Intent" Laws in Lower Courts

Although "loitering with intent" ordinances are popping up in many of the nation's cities,[96] very few of these ordinances have faced appellate review. The two cases that were appealed to federal courts of appeals involved ordinances very similar to present-day loitering statutes.[97] In the first of these cases, *Sawyer v. Sandstrom*,[98] the challenged ordinance made it illegal to "[l]oiter[] in any place with one or more persons knowing that a narcotic . . . is being unlawfully used or possessed."[99] The Court of Appeals for the Fifth Circuit found the statute unconstitutional on grounds of overbreadth.[100] Finding that the statute's scienter requirement provided adequate notice to potential offenders,[101] the court held that the statute could withstand a constitutional challenge on vagueness grounds.[102] By making innocent acts the actus reus of a crime, the loitering ordinance was overbroad regardless of its scienter requirement. The court noted, however, that the intent element did nothing to help "absolve [the statute] of the vice of overbreadth."[103]

Generally, in order to be valid, loitering laws "cannot sweep so broadly as to infringe upon the constitutional and organic rights of the individual."[104] In determining the extent to which the statute infringed upon the First Amendment right to associate freely, the court held that the right to associate should be defined broadly to include more than

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and demand that such questions be presented in a context conducive to the most searching analysis possible." *Id.* at 251 (Stevens, J., concurring).

95. The full dissenting opinion reads as follows: "As I see it, the New York statute was invalidated on federal constitutional grounds, and the merits of that decision are properly before us and should be addressed. Dismissing this case as improvidently granted is not the proper course." *Id.* at 252 (White, J., dissenting).

96. *See, e.g.*, CHARLOTTE, N.C., CODE § 15-31 (1990) (banning loitering for the purpose of engaging in drug-related activity).

97. *See* Fields v. City of Omaha, 810 F.2d 830, 832 (8th Cir. 1987); Sawyer v. Sandstrom, 615 F.2d 311, 313 (5th Cir. 1980).

98. 615 F.2d 311 (5th Cir. 1980).

99. *Id.* at 313 (quoting METROPOLITAN DADE COUNTY, FLA., CODE § 21-31.1(b)(2) (1974)).

100. *Id.* at 318.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

political associations.[105] " 'The rights of locomotion, freedom of movement, to go where one pleases, and to use the public streets in a way that does not interfere with the personal liberty of others' are implicit in the First and Fourteenth amendments."[106] Because the First Amendment protects these rights, the court held that such laws may be upheld only if they prohibit "conduct which threatens the public safety or constitutes a breach of the peace."[107] Under such an analysis, the court found the loitering ordinance unconstitutional because it permitted arrest for constitutionally-protected conduct.[108] It also noted that "if the purpose of the ordinance is to nip crime in the bud by providing police with the means to arrest all suspicious persons, it is patently unconstitutional."[109]

Reasoning that the state still had adequate remedies for drug-related crime, the *Sawyer* court found that the "conduct which the state may punish without running afoul of the First Amendment is more than adequately covered by [existing drug] provisions."[110] Indeed, there is little reason to have an ordinance making loitering for the purpose of using drugs a crime when there are existing laws that make the sale of use of drugs illegal.

In *Fields v. City of Omaha*,[111] the U.S. Court of Appeals for the Eighth Circuit considered a loitering ordinance that criminalized loitering "in a place, at a time or in a manner not usual for law abiding individuals."[112] The *Fields* court struck down the ordinance, finding its vagueness a violation of due process.[113] Although the court did not reach the plaintiff's contention that the ordinance also violated the Fourth Amendment,[114] it hinted that the ordinance might violate this constitutional provision as well. The court noted that, under the ordinance, the police were authorized to make an arrest without even enough

105. *Id.* at 316.

106. *Id.*

107. *Id.* The court noted that a breach of the peace occurs " '[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety' " occurs. *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)).

108. *Id.* at 317.

109. *Id.*

110. *Id.*

111. 810 F.2d 830 (8th Cir. 1987). This case involved a civil suit in which a citizen, after being jailed for nine days under the loitering law, sued the city on the grounds that her constitutional rights had been violated by her arrest and incarceration. *Id.* at 832.

112. *Id.* at 833 n.1 (quoting OMAHA, NEB., MUN. CODE § 20-171 (1967)). The language of this ordinance implied that someone loitering "in a manner not usual for law abiding individuals" is actually loitering for an unlawful purpose.

113. *Id.* at 834.

114. *Id.* at 834 n.2.

suspicion for a "*Terry* stop,"[115] let alone an arrest for probable cause.[116] The court emphasized that "[w]alking in the middle of a street, even at night, is not a crime, nor does it lead a reasonable person to conclude that criminal behavior will soon occur."[117]

A greater number of cases at the district court level have tested the constitutional validity of loitering laws. *Waters v. McGuriman*[118] involved an ordinance nearly identical to the one in *Fields*.[119] Unlike the *Fields* court, the court in *Waters* overturned the law on both due process and Fourth Amendment grounds.[120] The main problem, again, was the ordinance's lack of a criminal act. The ordinance failed to "provide a person of ordinary intelligence fair warning regarding which acts are prohibited and [it failed to] provide sufficiently clear standards for enforcement of the Ordinance."[121] The court found that the statute criminalized innocent activities such as loafing or walking down a public street. "If 'loafing' were a criminal activity . . . one could expect that all the good citizens in th[e] community would at some time or other become defendants in a criminal action."[122] The court held that the phrase "without lawful business" failed to cure the constitutional defect. Even with the modifier, the ordinance remained a potential "trap for innocent acts."[123] The ordinance criminalized intent alone by "encourag[ing] arrests based on suspicion or anticipation of future criminality, concepts which are foreign to our legal system."[124]

According to the court, the ordinance also violated due process because it placed unfettered discretion in the hands of the police.[125] Under the ordinance, "a policeman may not only stop and detain a person, but can also arrest that person on less than reasonable suspicion of criminal activity, based on articulable facts and circumstances."[126] Allowing arrests based on suspicion alone does not comport with the Fourth Amendment.[127] For a search and seizure to comply with the Fourth

115. *See infra* notes 341-48 and accompanying text for a discussion of "*Terry* stops."

116. *Fields*, 810 F.2d at 834 n.2.

117. *Id.* at 835.

118. 656 F. Supp. 923 (E.D. Pa. 1987).

119. This ordinance forbids loitering "without lawful business." *Id.* at 925 (quoting BOROUGH OF LANSDALE, PA., ORDINANCE 942, ch. 89, §§ 1-3 (1967)).

120. *Id.* at 928-29.

121. *Id.* at 927.

122. *Id.*

123. *Id.*

124. *Id.* at 928.

125. *Id.*

126. *Id.*

127. *Id.* at 929.

Amendment, there must be probable cause to believe the person will commit a criminal act, not merely probable cause that a person is loitering with unlawful intent.

To date, all federal courts that have heard constitutional challenges to modern "loitering with the intent to sell drugs" ordinances have stricken them.[128] Most recently, in 1990, a federal district court, in *Northern Virginia Chapter, American Civil Liberties Union v. City of Alexandria*,[129] invalidated a loitering for drug use law because of overbreadth.[130] The court's analysis focused on the ordinance's language "delineat[ing] seven circumstances that unequivocally manifest an unlawful purpose."[131] The ordinance did not require that each of the seven circumstances be done with unlawful intent; in effect, it criminalized the seven activities, although all seven are innocent ones encompassing a wide variety of First Amendment activities.[132]

The court in *Alexandria* noted that courts have upheld three types of "loitering with intent" ordinances against overbreadth challenges.[133] Most of the ordinances found to withstand constitutional scrutiny make loitering with an unlawful purpose illegal, and list factors that may be

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128. *See* Northern Virginia Chapter, American Civil Liberties Union v. City of Alexandria, 747 F. Supp. 324, 329 (E.D. Va. 1990); Johnson v. Carson, 569 F. Supp. 974, 980 (M.D. Fla. 1983).

129. 747 F. Supp. 324 (E.D. Va. 1990).

130. *Id.* at 329. The ordinance provided:

> (a) It shall be unlawful for any person to loiter in a public place for the purpose of engaging in the sale, gift, distribution, possession or purchase of a controlled substance . . . . Circumstances manifesting such purpose on the part of a person shall include: (1) the person is in the same general location for at least 15 minutes; (2) while in the same general location and in a public place, the person has two or more face-to-face contacts with other individuals; and (3) each of such contacts (a) is with one or more different individuals, (b) lasts no more than two minutes, (c) involves actions or movements by the person consistent with an exchange of money or other small objects, (d) involves actions or movements by the person consistent with an effort to conceal an object appearing to be or have been exchanged, and (e) terminates shortly after the completion of the same apparent exchange. . . .
>
> (b) No person shall be arrested or convicted for a violation of this section unless each of the circumstances identified in subsection (a) is present.

Id. at 325 (quoting ALEXANDRIA, VA., ORDINANCE 3471, § 13-1-24.1 (1990)).

131. *Id.* at 327.

132. *Id.* at 328. These activities include:

> speaking in a public place for 15 minutes, shaking hands, and exchanging small objects such as business cards or phone numbers on small pieces of paper. Enforcement of the ordinance may result in the conviction of individuals for distributing campaign literature, approaching persons to sign petitions, collecting organizational dues, soliciting community support, and directing voters to polls.

Id.

133. *Id.* at 327.

considered in finding the requisite intent.[134] Others merely proscribe loitering with an illegal purpose, without enumerating any factors that demonstrate purpose.[135] Finally, there are ordinances that make loitering for an unlawful purpose illegal and list factors that may manifest intent only if *each* of the factors is done with an unlawful purpose.[136] No court has upheld an ordinance that "delineates seven circumstances that unequivocally manifest an unlawful purpose."[137]

State courts have upheld some "loitering with intent" laws and invalidated others.[138] In 1988, a Florida appellate court struck down a loitering with intent to sell drugs ordinance based on vagueness, overbreadth, and the Fourth Amendment.[139] Again, the main constitutional deficiency with the statute was its lack of an actus reus; the ordinance criminalized common conduct. The court remarked that the only loitering statute that can withstand constitutional scrutiny is one that "proscribes loitering that threatens public safety or a breach of the peace."[140]

V. DOCTRINAL ATTACKS ON LOITERING LAWS

Litigants frequently challenge loitering laws on the constitutional grounds that the ordinances attempt to criminalize the behavior of a suspected criminal *before* she actually commits an act in furtherance of a crime. As the actor nears completion of the criminal act, it becomes easier to define and prove the criminal conduct. Conversely, an incomplete or inchoate act is difficult to define and prove. When the actor is merely thinking of and planning an act, for example, it is difficult to de-

134. *Id.* (citing Lambert v. City of Atlanta, 242 Ga. 645, 645, 250 S.E.2d 456, 457 (1978); City of Cleveland v. Howard, 40 Ohio Misc. 2d 7, 7, 532 N.E.2d 1325, 1326 (1987); City of Milwaukee v. Wilson, 96 Wis. 2d 11, 14-15, 291 N.W.2d 452, 455 (1980)).

135. *Id.* (citing People v. Smith, 44 N.Y.2d 613, 615, 378 N.E.2d 1032, 1035, 407 N.Y.S.2d 462, 465 (1978)).

136. *Id.* (citing Ford v. United States, 498 A.2d 1135, 1137 (D.C. 1985)).

137. *Id.*

138. Two of the most recent cases are: City of Akron v. Dixon, 62 Ohio Misc. 2d 218, 221, 594 N.E.2d 208, 210 (1992); City of Tacoma v. Luvene, 118 Wash. 2d 826, —, 827 P.2d 1374, 1383 (1992) (en banc); *see also* State v. Calloway, 589 So. 2d 326, 327 (Fla. App. 1991) (upholding lower court decision finding drug loitering law unconstitutional); People v. Goodwin, 136 Misc. 2d 657, 662-63, 519 N.Y.S.2d 189, 193 (1987) (finding drug loitering law constitutional); State v. Evans, 73 N.C. App. 214, 219, 326 S.E.2d 303, 306 (1985) (upholding prostitution loitering law as constitutional); City of Akron v. Holley, 53 Ohio Misc. 2d 4, 10, 557 N.E.2d 861, 886 (1990) (holding drug loitering law constitutional); Coleman v. City of Richmond, 5 Va. App. 459, 467, 364 S.E.2d 239, 244 (1988) (holding prostitution loitering law to be unconstitutional); City of Seattle v. Slack, 113 Wash. 2d 850, 857, 784 P.2d 494, 496 (1989) (upholding prostitution loitering law as constitutional).

139. City of Pompano Beach v. Wright, 28 Fla. Supp. 2d 114, 115-16 (1988).

140. *Id.*

scribe accurately what constitutes a crime.[141] Loitering laws are troublesome in this respect because they criminalize only the intent to commit a future crime:

> Loitering, then, is a highly incipient crime, falling far short of an attempt. It establishes the earliest boundary of criminality, and one who approaches its line is not to be compared to the criminal already in the act of kidnapping who is merely quibbling about the nature of ransom. The issue . . . is the "drawing of a line between legal conduct and illegal conduct."[142]

This dilemma engenders constitutional challenges based on three closely related arguments. First, loitering statutes may impermissibly make constitutionally protected activity criminal, thereby invoking the overbreadth doctrine.[143] Second, loitering statutes inadequately define exactly what conduct is prohibited. The vagueness doctrine voids these criminal statutes on due process grounds since they fail to give defendants adequate notice.[144] Third, this vagueness also implicates Fourth Amendment protections.[145]

A review of the Supreme Court's treatment of these doctrines is therefore necessary to analyze modern drug loitering laws. Where possible, this Comment discusses these doctrines in the context of their application to criminal statutes in general and, more specifically, to laws regulating loitering. All three doctrines are subject to inconsistent and often contradictory interpretations because, in many instances, the Court does not spell out the doctrines clearly or indicate which doctrine applies in a given case, but instead it frequently blurs the three doctrines into a confusing, all encompassing "loitering doctrine."[146] This larger "loitering doctrine" provides a more analytically coherent means to examine loitering laws.[147] Initially, however, one must examine the individual doctrines of overbreadth and vagueness, as well as the principles underlying the Fourth Amendment, to understand how they interrelate in the context of loitering laws.

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141. Without an overt criminal act or omission in connection with an unlawful intent, a law attempts to make mere thoughts criminal. By associating lawful acts with an unlawful intent, a law can circumvent the requirement of a criminal act.

142. McSherry v. Block, 880 F.2d 1049, 1060 (9th Cir. 1989) (Candy, J., dissenting).

143. *See infra* notes 148-243 and accompanying text.

144. *See infra* notes 244-316 and accompanying text.

145. *See infra* notes 316-408 and accompanying text.

146. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (alluding to overbreadth, vagueness, and probable cause, but concentrating its analysis generally on why loitering is constitutionally protected).

147. The three arguments relate to each other because they all are triggered by loitering laws' lack of criminal intent.

A. *The Overbreadth Doctrine*

Every legitimate criminal statute targets some core criminal conduct encompassing activities that lawmakers may proscribe, including instances of unprotected speech and association.[148] The core criminal conduct—the criminal act or actus reus—defines the statute's permissible scope. The Constitution, however, limits the scope of conduct that may be proscribed.[149] This limitation leads to a difficult question: Can an individual whose conduct is legitimately proscribed by a statute challenge that statute on constitutional grounds because it also impermissibly proscribes some other, protected conduct?

The general rule of standing for constitutional adjudication is that a person may challenge a statute only if it is unconstitutional as applied to him.[150] Thus, a statute cannot be challenged based on how the government might apply it to other people.[151] The rationale supporting this rule is that constitutional rights belong to the individual, and it is up to the individual to assert them.[152] An exception to the rule arises when someone not party to a lawsuit is nevertheless affected by it,[153] and who otherwise would never have the opportunity to air her constitutional claims and to preserve her rights.[154]

This exception is necessary to protect certain forms of expression under the First Amendment.[155] Courts always have given special consti-

148. Houston v. Hill, 482 U.S. 451, 459-63 (1987). *See generally* Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 853-56 (1970) (emphasizing that overbroad statutes have the undesirable effect of deterring certain lawful conduct as well as punishing people who engage in such conduct).

149. Note, *supra* note 148, at 853-56. In Thornhill v. Alabama, 310 U.S. 88 (1940), the Supreme Court commented on the impermissible scope of some criminal statutes:

> [A threat like censorship] is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.

Id. at 97.

150. *See, e.g.*, United States v. Raines, 362 U.S. 17, 21 (1960); Yazoo & Miss. V. R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912); Supervisors v. Stanley, 105 U.S. 305, 311-15 (1881).

151. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) (finding that statute could not be challenged "on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court").

152. *Id.*

153. *Id.* at 611.

154. *Id.*; *see, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 444-46 (1972); NAACP v. Alabama, 357 U.S. 449, 458-60 (1958).

155. For cases involving associational rights, see United States v. Robel, 389 U.S. 258, 262-68 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 605-10 (1967); Aptheker v. Secretary of State, 378 U.S. 500, 509-12 (1964). For cases involving spoken words, see Gooding v. Wil-

tutional scrutiny to statutes possibly infringing upon the First Amendment[156] because such rights need "breathing space":[157] "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."[158] Therefore, a statute, even if it has valid aims,[159] may regulate First Amendment rights only within a narrow range.[160]

When a legislature enacts laws affecting constitutionally protected conduct, an individual will tend to avoid that conduct instead of risking punishment by asserting his rights.[161] It is not, however, in society's collective best interest to encourage individuals to decline to exercise their First Amendment rights in an effort to avoid possible punishment.[162] The overbreadth doctrine emerged from this concern and represents an exception to standing.

This narrow range of First Amendment rights that can be regulated is at the core of overbreadth doctrine, but overbreadth is often misunderstood.[163] The theory protects constitutional rights by "focus[ing] directly on the need for precision in legislative draftsmanship to avoid conflict with First Amendment rights."[164] By transforming the standing rules to allow litigants to assert third party rights,[165] the overbreadth doctrine increases the probability of constitutional challenge. Once challenged in court, a law proven to be overbroad is declared invalid in its

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son, 405 U.S. 518, 520 (1972); Cohen v. California, 403 U.S. 15, 18 (1971); Street v. New York, 394 U.S. 576, 590-94 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

156. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Herndon v. Lowry, 301 U.S. 242, 258 (1937).

157. NAACP v. Button, 371 U.S. 415, 433 (1963).

158. *Id.*

159. Houston v. Hill, 482 U.S. 451, 459 (1987); Kolender v. Lawson, 461 U.S. 352, 358-59 n.8 (1983); Thornhill v. Alabama, 310 U.S. 88, 106 (1940).

160. *Button*, 371 U.S. at 433 (citing Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)).

161. This phenomenon is called the "chilling effect." *See generally* Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978) (analyzing and applying the "chilling effect" doctrine).

162. The Court has emphasized the importance, to all of society, of free exercise of First Amendment rights: "Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

163. This is partially because of the confusion with vagueness, *see infra* notes 308-11 and accompanying text, and is also because courts do not understand the constitutional basis for the overbreadth doctrine. *See infra* notes 167-77 and accompanying text.

164. Hobbs v. Thompson, 448 F.2d 456, 459-60 (5th Cir. 1971).

165. Osborne v. Ohio, 495 U.S. 103, 112 n.8 (1990).

entirety.[166]

The constitutional basis for the overbreadth doctrine has never been fully explained by courts.[167] The overbreadth doctrine is derived from both personal rights-based theory and prophylactic theory.[168] The personal rights theory derives directly from the Constitution.[169] It asserts that everyone has a right "to be judged in accordance with a constitutionally valid rule of law."[170] If the law restricts constitutionally protected activity, a court must invalidate the whole law, unless the unconstitutional aspect of the statute is severable from the whole statute.[171]

The prophylactic theory provides safeguards that supplement the protections of the constitutionally mandated rights-based theory.[172] The prophylactic theory is essentially a procedural departure from the rules of standing.[173] Although facial challenges based on the assertion of third party rights generally are disfavored, courts are more open to such challenges when First Amendment rights are involved.[174] The judicially created prophylactic theory is designed to protect First Amendment activity by eliminating the chilling effect of overbroad statutes on constitutionally protected expression.[175] Thus, the prophylactic theory does not involve any personal constitutional rights[176] because the only rights asserted are those of third parties who are not present in court.[177]

Loitering laws and overbreadth claims have been bedfellows since the first enumerations of the overbreadth doctrine more than fifty years ago.[178] In the first overbreadth cases, the Court addressed statutes used

166. Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 577 (1987).

167. Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 875 (1991).

168. *Id.* at 867-75.

169. *Id.* at 871.

170. Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3; *see also* Fallon, *supra* note 167, at 875 (employing a rationale similar to that noted for the constitutional basis of the vagueness doctrine).

171. Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985).

172. Fallon, *supra* note 167, at 870.

173. *Id.* at 867. Professor Fallon, when he uses the term "prophylactic," means to suggest two things: first, the central constitutional concern is to protect the expressive rights of persons other than the specific individual involved in the litigation, and second, this aspect of the overbreadth doctrine is judge-made law, so the Supreme Court retains discretion to change the doctrine depending on its perception of the doctrine's effects. *Id.* at 868 n.94.

174. Osborne v. Ohio, 495 U.S. 103, 112 n.8 (1990).

175. Fallon, *supra* note 167, at 868.

176. *See* Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 958 (1984).

177. Eisenstadt v. Baird, 405 U.S. 438, 444-46 (1972).

178. In Thornhill v. Alabama, 310 U.S. 88 (1940), the Supreme Court heard a constitutional challenge to a loitering statute. *Id.* at 91. The Court changed First Amendment overbreadth analysis from traditional case-by-case "as applied" challenges to "facial" attacks on

to quiet discussion of views outside the mainstream.[179] Lawmakers could effectively quash unpopular groups' activities through the use of these laws.[180] Because the statutes usually regulated only spoken words,[181] the Court compared overbroad laws to censorship.[182] With the passage of time, however, overbreadth analysis encompassed all First Amendment freedoms.[183]

The overbreadth doctrine applies to statutes that encompass First Amendment activities.[184] The First Amendment rights frequently abridged in loitering statutes include the freedoms of assembly[185] and association.[186] A person has a right to associate with other individuals or organizations for the purpose of engaging in activities protected by the

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statutes "which [do] not aim specifically at evils within the allowable area of state control but, on the contrary, [sweep] within [their] ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." *Id.* at 97. Many scholars point to *Thornhill* as the first case that used the modern overbreadth theory. *See, e.g.*, Fallon, *supra* note 167, at 853 (noting that the overbreadth doctrine had its inception in *Thornhill*); Monaghan, *supra* note 170, at 11 (asserting that *Thornhill* was the "fountainhead of the overbreadth doctrine"); Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 NW. U. L. REV. 1031, 1038-39 (1983) (noting that facial challenges to overbroad statutes date back to *Thornhill*).

179. *See Thornhill*, 310 U.S. at 97-98.

180. These statutes provide authorities an avenue to employ harsh and discriminatory enforcement against people whom they do not like. *Id.*

181. *See* Gooding v. Wilson, 405 U.S. 518, 520 (1972); Cohen v. California, 403 U.S. 15, 16 (1971); Street v. New York, 394 U.S. 576, 577-78 (1969).

182. As the Court explained in *Thornhill*:

> It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. . . . A like threat is inherent in a penal statute . . . which does not aim specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities . . . .

Thornhill, 310 U.S. at 97.

183. The Court has applied the overbreadth doctrine in a variety of cases, including those involving rights of association, *see* United States v. Robel, 389 U.S. 258, 261 (1967), Keyishian v. Board of Regents, 385 U.S. 589, 605-10 (1967), Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964), those regulating time, place, and manner of expressive conduct, *see* Grayned v. City of Rockford, 408 U.S. 104, 114-21 (1972), Zwickler v. Koota, 389 U.S. 241, 249-50 (1967), and those giving local officials standardless discretionary power to regulate First Amendment rights. *See* Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969); Cox v. Louisiana, 379 U.S. 536, 556-58 (1965).

184. The overbreadth analysis is particularly applicable to loitering statutes because such laws usually are written to facilitate the arrest of people whose conduct is on the borderline between the innocent and the criminal. *See supra* notes 133-40 and accompanying text.

185. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (declaring loitering statute unconstitutional because "it subjects the exercise of the right of assembly to an unascertainable standard").

186. *See, e.g.*, Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (requiring a more stringent vagueness test for cases interfering with the right of free speech or association).

First Amendment.[187] Freedom of association incorporates freedom of assembly and other constitutionally protected liberties.[188] The freedom of association recognized by the Supreme Court protects two overlapping rights: the "freedom of intimate association" and the "freedom of expressive association."[189] In *Roberts v. United States Jaycees*,[190] the Court explained the interplay between these two distinct aspects of the freedom of association:

> [C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty . . . . [There is] a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech [and] assembly . . . . The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.
>
> The intrinsic and instrumental features of constitutionally protected association may . . . coincide.[191]

Freedom of association protects the rights of citizens to engage in a variety of interpersonal relationships[192] and in basic social intercourse.[193] Loitering laws, in the name of crime prevention, limit these associational

187. Roberts v. United States Jaycees, 468 U.S. 609, 662 (1984); *see Coates*, 402 U.S. at 615-16 (holding that defendants have the constitutional right to assemble on public sidewalk with three others and annoy people); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (recognizing the right of individuals to associate for the advancement of political beliefs); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding freedom of association violated when right to marital privacy denied by statute outlawing contraceptives); NAACP v. Button, 371 U.S. 415, 428-29 (1963) (holding that a law forbidding NAACP from soliciting clients violated freedom of association); Shelton v. Tucker 364 U.S. 479, 490 (1960) (declaring that schools cannot force teachers to reveal all associations).

188. *Roberts*, 468 U.S. at 617-18.

189. *Id.* at 618.

190. 468 U.S. 609 (1984).

191. *Id.* at 617-18.

192. The Court sought to preserve the diversity of culture and traditions in the United States through protecting personal relationships. *See id.* at 618-19 ("[P]ersonal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.").

193. *Id.* at 619-20. Freedom of association is not restricted to expression of political, religious, or social beliefs. *Id.* This broad freedom protects not just "strident, contentious or divisive" expression but also "quiet persuasion, inculcation of traditional values, instruction of the young, and community service." *Id.* at 636 (O'Connor, J., concurring in part and concurring in the judgement).

rights by criminalizing their exercise.[194]

Loitering laws usually target associational activity that occurs on the streets or in other public places.[195] These laws should be scrutinized carefully because the streets and public places have always been protected locations for First Amendment activity.[196] The state cannot deny citizens the free exercise of their First Amendment freedoms in public streets and parks under the guise of regulation.[197] As the Court stated in *Hague v. C.I.O.*:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[198]

The only way the government may regulate First Amendment activity in a public forum is if the regulation complies with the time, place, and manner test.[199] Under this test, if a statute is content-neutral, "narrowly tailored to serve a significant government interest, and leave[s] open ample alternative channels of communication," it then may regulate the conduct, but only by affecting the time, place, and manner of expression.[200] The nature of the place is central to this analysis, as is the associational conduct; these factors determine what is a reasonable restriction on the time, place, and manner of expression.[201]

A statute, however, cannot criminalize ordinary associational conduct that is not a breach of the peace.[202] Statutes that affect First

194. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 616 (1971) (An ordinance that disallowed the gathering of three or more people on the sidewalk "ma[de] a crime out of what under the Constitution cannot be a crime. It [was] aimed directly at activity protected by the Constitution.").

195. *See, e.g.*, Sawyer v. Sandstrom, 615 F.2d 311, 313 (5th Cir. 1980) (holding unconstitutional a statute forbidding loitering with persons known to use or possess narcotics).

196. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 105-06 (1940) ("[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.") (quoting Schneider v. State, 308 U.S. 147, 163 (1939)).

197. Hague v. C.I.O., 307 U.S. 496, 515-16 (1939).

198. *Id.*

199. Frisby v. Schultz, 487 U.S. 474, 481-82 (1988).

200. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

201. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."); *see, e.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147, 155-56 (1969) (finding that city cannot allow two parades to march simultaneously on the same place).

202. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972); Chaplinsky v. New

Amendment rights in public places are subject to heightened overbreadth scrutiny.[203] The standard of scrutiny is even higher if the statute imposes criminal penalties, as do loitering ordinances.[204]

The Supreme Court's present approach to the overbreadth doctrine is very basic. For the overbreadth doctrine to apply, the statute must criminalize constitutionally protected activity,[205] and the alleged overbreadth must be real[206] and substantial in relation to the statute's "plainly legitimate sweep."[207] After these requirements are met, a litigant may challenge all possible applications of the statute.[208] Once a court finds that a statute is overbroad, it must examine lower state court attempts to limit the overbreadth.[209] If the state court limiting constructions fail to cure the overbreadth, then the court (a higher state court or a federal court) must try to find a limiting construction that would solve the constitutional problem.[210] Only after all attempts to eliminate the overbreadth concerns have failed can a court invalidate the entire statute.[211]

The first question to consider when examining a potentially over-

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Hampshire, 315 U.S. 568, 573-74 (1942). In evaluating the associational overbreadth of a loitering statute, the Court of Appeals for the Fifth Circuit held that "[a loitering law] can be upheld only if it proscribes conduct which threatens the public safety or constitutes a breach of the peace." Sawyer v. Sandstrom, 615 F.2d 311, 316 (5th Cir. 1980). The Supreme Court has offered insight into the type of breach of peace necessary: The "power of the state to prevent or punish" arises "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other *immediate* threat to public safety, peace, or order, appears . . . ." Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

203. *See* Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 572-75 (1987) (discussing public fora analysis and declaring statute forbidding First Amendment activities in airports overbroad); Coates v. City of Cincinnati, 402 U.S. 611, 614-16 (1971) (declaring statute proscribing three or more people loitering on a sidewalk overbroad).

204. Houston v. Hill, 482 U.S. 451, 459 (1987); Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983); Winters v. New York, 333 U.S. 507, 515 (1948).

205. *Kolender*, 461 U.S. at 358 n.8.

206. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); *see* City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 801 (1984) ("[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.").

207. *Broadrick*, 413 U.S. at 615; *see Jews for Jesus*, 482 U.S. at 574; *Hill*, 482 U.S. at 458-59; *Taxpayers for Vincent*, 466 U.S. at 801; New York v. Ferber, 458 U.S. 747, 769 (1982).

208. *Broadrick*, 413 U.S. at 615; *see also* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985) (The statute may be challenged because it "threatens others not before the Court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.").

209. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982); *Broadrick*, 413 U.S. at 613.

210. *Jews For Jesus*, 482 U.S. at 574-77; *Broadrick*, 413 U.S. at 613.

211. *Jews For Jesus*, 482 U.S. at 577; *Broadrick*, 413 U.S. at 613; Dombrowski v. Pfister, 380 U.S. 479, 491 (1965).

broad statute is: does the statute attempt to regulate conduct or "pure speech?" If pure speech is sanctioned, the next step is to determine if the overbreadth is real.[212] The Court has never explicitly articulated the definition of 'real,' but it did provide some insight in *Houston v. Hill*.[213] Quoting from Justice Brennan's dissent in *Broadrick v. Oklahoma*,[214] the Court proclaimed, "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application . . . ."[215] Justice Brennan had argued in his *Broadrick* dissent that there was always, implicit in the overbreadth doctrine, some threshold point beyond which its application would be absurd.[216]

The *Broadrick* majority held that where a statute sanctions conduct rather than "pure speech," the challenger must demonstrate "substantial overbreadth" to continue the overbreadth analysis.[217] The *Broadrick* Court attempted to incorporate a balancing test to determine standing for an overbreadth attack.[218] *Broadrick* envisioned two poles—"pure speech" and criminal behavior—and put constitutionally protected conduct somewhere in the middle. As the statute shifts from criminalizing "pure speech" to criminalizing expressive conduct, a greater degree of overbreadth is required to satisfy the "substantial overbreadth" requirement.[219] A law may criminalize expressive conduct if it "falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct."[220] The degree of constitutionally protected conduct a statute may criminalize depends on the size of overbreadth in relation to how great the "statute's plainly legitimate sweep" is.[221] The Court called for a case-by-case analysis of whether substantial overbreadth is present.[222]

Justice Brennan disagreed with the *Broadrick* Court's use of the

212. *Broadrick*, 413 U.S. at 615.

213. 482 U.S. 451, 458 (1987).

214. 413 U.S. 601 (1973).

215. *Hill*, 482 U.S. at 458 (quoting *Broadrick*, 413 U.S. at 630 (Brennan, J., dissenting)).

216. *Broadrick*, 413 U.S. at 630-31 (Brennan, J., dissenting).

217. *Id.* at 615.

218. *Id.* at 612-15.

219. *Id.* at 615.

220. *Id.*

221. *Id.*

222. *Id.* at 615-16. Justice Brennan noted that there was no reason, for purposes of the overbreadth analysis, why "deterrence of conduct should be viewed differently from deterrence of speech, even where both are equally protected by the First Amendment." *Id.* at 631 (Brennan, J., dissenting).

term "substantial overbreadth."[223] Justice Brennan questioned how much more stringent, if any, the new standard would be compared to the "real" standard.[224] Hindsight suggests that, in the case of loitering laws, the "substantial overbreadth" requirement may have only been a cosmetic change because recent Supreme Court decisions merely mention the requirement before deciding if the statutes are overbroad on other grounds.[225]

Once a court finds a statute either "substantially overbroad," in the case of conduct, or "real," for pure speech, those challenging it have standing to attack the statute "on its face."[226] A litigant may argue that the statute's very existence will cause others to stop exercising their First Amendment rights.[227] This enables litigants to avoid questions regarding their own conduct, even if criminal, and emphasizes the effect that the statute could have on others.[228] Once a statute is vulnerable to a facial overbreadth attack in the instant case, it is, by its definition, ripe for attack by every person who is arrested pursuant to it.[229] If the court finds a statute facially overbroad in one instance, then the law is invalid in every application.[230] A statute that has many legitimate applications still may be facially invalid as long as it criminalizes a substantial amount of constitutionally protected conduct.[231]

For these reasons, the *Broadrick* Court referred to the application of the overbreadth doctrine as "strong medicine. It has been employed by the Court sparingly and only as a last resort"[232] after the Court has attempted to find a limiting construction[233] in a lower court interpretation[234] or on its own.[235]

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223. *Id.* at 630-31 (Brennan, J., dissenting).

224. *Id.* at 630 (Brennan, J., dissenting) ("Whether the Court means to require some different or greater showing of substantiality is left obscure by today's opinion . . . .").

225. *See* Kolender v. Lawson, 461 U.S. 352, 359 n.8, 361 (1983) (discussing the "substantial overbreadth" requirement, but deciding case on First Amendment vagueness grounds); *see also* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982) (following a statement of the "substantial overbreadth" requirement, the Court decided that overbreadth does not apply to commercial speech).

226. *Broadrick*, 413 U.S. at 610-14.

227. *Id.* at 612.

228. *Id.* at 611-13.

229. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); *see Broadrick*, 413 U.S. at 629 (Brennan, J., dissenting).

230. Steffel v. Thompson, 415 U.S. 452, 474 (1974).

231. Houston v. Hill, 482 U.S. 451, 459 (1987); Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983).

232. *Broadrick*, 413 U.S. at 613.

233. *Id.*

234. Gooding v. Wilson, 405 U.S. 518, 520 (1972); Dombrowski v. Pfister, 380 U.S. 479, 491 (1965).

The Court has provided some guidance to lower courts in arriving at a limiting construction. When a state court hears a constitutional challenge to a law before it reaches a federal court, the state court must attempt to sever all overbroad portions of the law.[236] If this severance does not remedy the overbreadth, the state court must construe the law to bring it within constitutional standards.[237] Courts have assumed that a narrowing construction that severs overbroad portions of the statute will effectively cure the statute.[238]

The resulting statute must be narrowly tailored.[239] This does not necessarily mean that just because the statute has clear lines of innocence and guilt, it will survive an overbreadth challenge;[240] even a clear and precise statute may be overbroad if constitutionally protected conduct is still proscribed with criminal conduct.[241] The statute may stand only if there are no alternate ways to achieve the desired result without less infringement on First Amendment activity.[242] A lawmaking body cannot use subterfuge to foreclose constitutional rights, and it cannot criminalize constitutionally protected behavior through the use of "mere labels."[243]

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235. Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987); *see, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); *Dombrowski*, 380 U.S. at 497. If courts cannot find an adequate limiting construction, they must declare the statute invalid. Massachusetts v. Oakes, 491 U.S. 576, 584 (1989); *Broadrick*, 413 U.S. at 613 ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.").

236. *See Jews for Jesus*, 482 U.S. at 575 (finding statute that regulated "all First Amendment activities" to be unsalvageable).

237. *See* Shuttlesworth v. Birmingham, 394 U.S. 147, 153-54 (1969) ("It is true that in affirming the petitioner's conviction in the present case, the Supreme Court of Alabama performed a remarkable job of plastic surgery upon the face of the ordinance."); *see also* Kolender v. Lawson, 461 U.S. 352, 355 (1983) (" '[A] federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.' ") (quoting Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982)).

238. *See, e.g.*, Osborne v. Ohio, 496 U.S. 103, 116 n.12 (1990) ("[O]nce a statute is authoritatively construed, there is no longer any danger that protected speech will be deterred . . . .").

239. Cox v. Louisiana, 379 U.S. 536, 562-64 (1965); Cantwell v. Connecticut, 310 U.S. 296, 307 (1940).

240. Zwickler v. Koota, 389 U.S. 241, 249-50 (1967).

241. *Id.*

242. Statutes that cover expressive First Amendment conduct are subject to the "least drastic means test":

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnotes omitted).

243. NAACP v. Button, 371 U.S. 415, 429 (1963).

B. *The Vagueness Doctrine*

The vagueness doctrine, at least in part, is closely related to the overbreadth doctrine. A separate, more stringent, vagueness standard has emerged for statutes affecting constitutionally protected rights. This section first examines the traditional vagueness doctrine and its applications to the "average" statute. Next, this section details the "right to loiter" and then discusses the more stringent standard for vagueness applied to loitering laws.

1. The General Vagueness Doctrine

The vagueness doctrine emerged in response to the belief that both citizens and police should have specific guidelines as to what constitutes unlawful activity under a statute.[244] The doctrine is rooted in the Due Process Clause of the Fourteenth Amendment.[245] A statute is unconstitutionally vague if it proscribes "the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[246] More specifically, the vagueness doctrine voices two related concerns: that citizens receive fair notice of what a statute prohibits and that they be protected against arbitrary enforcement of the statute.[247]

First, to avoid vagueness problems, a statute must provide citizens

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244. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983); Smith v. Goguen, 415 U.S. 566, 572-73 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

245. *See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611, 612-14 (1971). Vague statutes that permit arbitrary enforcement violate due process. *See* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497 (1982); *Grayned*, 408 U.S. at 108-09; Cox v. Louisiana, 379 U.S. 536, 552 (1965); Thornhill v. Alabama, 310 U.S. 88, 96-98 (1940); Herndon v. Lowry, 301 U.S. 242, 259 (1937); *see also* Lanzetta v. New Jersey 306 U.S. 451, 453 (1939) ("[T]he terms [the statute] employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the Due Process Clause of the Fourteenth Amendment.").

246. *Connally*, 269 U.S. at 391; *see also Lanzetta*, 306 U.S. at 453 (quoting *Connally*, 269 U.S. at 391).

247. *Kolender*, 461 U.S. at 357; *Hoffman Estates*, 455 U.S. at 498; *Goguen*, 415 U.S. at 572-73; *Papachristou*, 405 U.S. at 162; *Connally*, 269 U.S. at 391. The Court explained the two "values" underlying the vagueness doctrine in *Grayned*:

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give . . . [citizens] a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

Grayned, 408 U.S. at 108-09.

with clear notice of what activity constitutes the offense.[248] It must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."[249] Most loitering laws still employ vague language in defining the criminal act, thereby causing notice problems.[250] The Supreme Court held in *Lanzetta v. New Jersey*[251] that a criminal statute which "condemns no act or omission" does not give notice and "is condemned as repugnant to the Due Process Clause of the Fourteenth Amendment."[252] Without an actus reus, or equivalently, when a statute "makes criminal activities which by modern standards are normally innocent,"[253] there is no notice providing standard of conduct.[254]

Adding a scienter requirement to a statute may facilitate notice,[255] but it does not automatically solve the problem.[256] One reason a scienter

248. *Connally*, 269 U.S. at 391 ("[A] new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law."); *see Kolender*, 461 U.S. at 357; *Grayned*, 408 U.S. at 108; *Papachristou*, 405 U.S. at 162; *Lanzetta*, 306 U.S. at 453.

249. *Grayned*, 408 U.S. at 108 (observing that a vague statute "may trap the innocent by not providing fair warning" of the forbidden activity and the accompanying penalty); *see, e.g.*, United States v. Harriss, 347 U.S. 612, 617 (1954) (holding that a statute is void if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute"); *Lanzetta*, 306 U.S. at 453 ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

250. *See supra* notes 244-46 and accompanying text.

Loitering laws serve as good examples of statutes that do not specify a criminal act. These laws have problems defining a determinable actus reus. *See Papachristou*, 405 U.S. at 168-69 (noting the traditional lack of a criminal act in loitering laws); *cf.* Edelman v. California, 344 U.S. 357, 364-66 (1954) (Black, J., dissenting) (noting that vagrancy is a crime of status) (citing Robinson v. California, 370 U.S. 660 (1962)). By using the term "loitering," loitering laws turn innocent activity into criminal conduct. *Papachristou*, 405 U.S. at 163. It follows that a citizen could never know when a police officer would deem his particular "hanging around" as criminal loitering. *Id.* at 163-66. Even if the loitering law were aimed at a criminal purpose, it would still contain no criminal act: an arrest for loitering with intent is an arrest for suspicion of a future criminal act. *Id.* at 169. While this type of arrest would be condoned in a police state, the Supreme Court has rightly noted that such arrests are "foreign to our system." *Id.* at 168 n.12, 169 (noting that in Czarist Russia a particular code permitted a judge to convict a person "even when he had committed not act defined as a crime.") (citations omitted).

251. 306 U.S. 451 (1939).

252. *Id.* at 458.

253. *Papachristou*, 405 U.S. at 163.

254. *See, e.g.*, Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (finding that where "no standard of conduct is specified at all[,] . . . 'men of common intelligence must necessarily guess at its meaning' ") (citing *Connally*, 269 U.S. at 391).

255. The Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*." Colautti v. Franklin, 439 U.S. 379, 395 (1979) (citations omitted).

256. *See Papachristou*, 405 U.S. at 163-64; *see also Colautti*, 439 U.S. at 395 n.13 (" 'The

requirement may fail is that "[t]he poor . . . [or] the average householder . . . [is not] protected from being caught in the vagrancy net by the necessity of having a specific intent to commit an unlawful act."[257] Also, a statute that contains a scienter requirement may still provide inadequate notice if the mens rea is defined in such a way that it encompasses seemingly innocent activity.[258] Finally, a scienter requirement can merely help a vague statute solve notice problems;[259] the potential for arbitrary and discriminatory enforcement is not affected by the addition of an intent requirement.

In addition to providing notice to the public, a clear and precise statute provides notice to law enforcement agencies, and thereby protects citizens against arbitrary enforcement. Conversely, a vague statute "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application."[260] The Supreme Court noted that the second part of the vagueness doctrine, which establishes minimum standards to govern law enforcement, is the more important prong.[261] Without minimum guidelines, lawmakers give police and prosecutors the equivalent of a general warrant.[262] Under a vague law,

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requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain.' ") (quoting Screws v. United States, 325 U.S. 91, 101-02 (1945) (plurality opinion)).

257. *Papachristou*, 405 U.S. at 162-63.

258. *See, e.g.*, *id.* at 164 ("The qualification 'without any lawful purpose or object' may be a trap for innocent acts.").

259. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) ("[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."). The Court has recognized this fact since 1945:

> The requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . [It does not solve all vagueness problems], [b]ut it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

Screws, at 101-02 (plurality opinion) (quoted in *Colautti*, 439 U.S. at 395 n.13).

260. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); *see Papachristou*, 405 U.S. at 168; *see also Colautti*, 439 U.S. at 390 (noting that vague statutes encourage "arbitrary and erratic arrests and convictions").

261. Kolender v. Lawson, 461 U.S. 352, 358 (1983) ("[T]he more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' ") (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

262. *Id.*; *see also* Lewis v. City of New Orleans, 415 U.S. 130, 135 (1974) (Powell, J., concurring in the result) (A vague law "confers on police a virtually unrestrained power to arrest and charge persons with a violation."). The Supreme Court recognized this danger as early as 1876:

> It would certainly be dangerous if the legislature could set a net large enough to

police are free to make a "standardless sweep" to arrest those whom they subjectively believe deserve arrest, usually the poor and minorities.[263] The only way to safeguard all citizens from this treatment is to require penal statutes to include explicit guidelines for law enforcement.[264] Lawmakers should avoid loitering statutes because they lack explicit language and actually facilitate harsh, arbitrary enforcement.[265] These statutes often use "future criminality"[266] to justify the criminalization of innocent activity. Loitering laws are "in a class by themselves, in view of the familiar abuses to which they are put."[267]

Loitering laws often function as dragnet laws.[268] Dragnet laws are designed as misdemeanors that carry only light penalties and thereby avoid appellate review, which gives police virtually unlimited discretion to make arrests.[269] The "net cast is so large, not to give the courts the power to pick and choose but to increase the arsenal of police."[270] When legislatures draft loitering laws that function as dragnet laws they not only condone arbitrary enforcement, but actually encourage it.[271]

> catch all possible offenders, and leave it to the courts to step inside and say who could rightly be detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.

United States v. Reese, 92 U.S. 214, 221 (1875).

263. *Kolender*, 461 U.S. at 358. The victims of such arbitrary and discriminatory arrests are usually those who need protection the most: poor minorities. *Papachristou*, 405 U.S. at 163-64; *see* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE POLICE 184 (1967), *quoted in part in* Terry v. Ohio, 392 U.S. 1, 14 n.11 (1967); *see also* MICHAEL K. BROWN, WORKING THE STREETS: POLICE DISCRETION AND THE DILEMMAS OF REFORM 163-69 (1981) ("Race, the field observations reveal, is one of the most salient criteria to patrolmen in deciding whether or not to stop someone."). These are the "particular groups deemed to merit [the police's] displeasure," and they receive "harsh and discriminatory enforcement [of vague laws] by local prosecuting officials." *Papachristou*, 405 U.S. at 170. Under such enforcement, the poor and unpopular walk on the streets subject to "the whim of any police officer." Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965). It is a tragedy and a serious blow to this country's diversity that "poor people [and] non-conformists . . . may be required to comport themselves according to the lifestyle deemed appropriate to the . . . police." *Papachristou*, 405 U.S. at 170.

264. *Grayned*, 408 U.S. at 108.

265. *Papachristou*, 405 U.S. at 169-70.

266. *Id.* at 169.

267. Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting).

268. *Papachristou*, 405 U.S at 166-67 ("Where the list of crimes is so all-inclusive and generalized . . . those convicted may be punished for no more than vindicating affronts to police authority.").

269. *Id.* at 165-68.

270. *Id.* at 165.

271. If police believe someone is guilty but they cannot prove it, or if they believe that person is soon to be guilty, then they may charge him with loitering with little or no evidence.

> The Common ground which brings such a motley assortment of human troubles before the magistrates in vagrancy-type proceedings is the procedural laxity which

Lawmakers, however, may diminish the possibility of arbitrary enforcement of a vague statute by using regulations as a tool for narrowing the scope of the law.[272] In *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*,[273] the Supreme Court refused to hold a statute void for vagueness on a pre-enforcement challenge.[274] The Court let the law stand because the lawmakers had not yet been given the opportunity to adopt regulations that would "sufficiently narrow potentially vague or arbitrary interpretations of the ordinance."[275] The Court admitted that there was a risk of arbitrary and discriminatory enforcement, but it implied that the village could cure this risk through careful administrative restrictions.[276]

Nevertheless, it seems clear that arbitrary enforcement is best prevented by clear and specific statutory drafting.[277] Lawmakers must do their job of writing effective criminal statutes.[278] When President Franklin D. Roosevelt vetoed a vagrancy statute for the District of Columbia, he observed that

> [i]t would hardly be a satisfactory answer to say that the sound judgment and decisions of the police and prosecuting officers must be trusted to invoke the law only in proper cases. The law itself should be so drawn as not to make it applicable to cases which obviously should not be comprised within its terms.[279]

This is not to say that lawmakers must draft a law that will be understood with absolute certainty in all situations.[280] While no lawmaking

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permits 'conviction' for almost any kind of conduct and the existence of the House of Correction as an easy and convenient dumping ground for problems that appear to have no other immediate solution.

Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 631 (1956), *quoted in Papachristou*, 405 U.S. at 167-68.

272. *See* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 503-04 (1982).

273. 455 U.S. 489 (1982).

274. *Id.* at 503.

275. *Id.* at 504. It is important to note, however, that this case involved an economic ordinance, not a criminal ordinance. *Id.* at 491, 504.

276. *Id.* at 503-04. Though the Court did not state that the same analysis could apply to a criminal statute, there is no reason why a police department cannot, like any other city department, pass administrative restrictions on discriminatory and arbitrary enforcement.

277. *E.g.*, Smith v. Goguen, 415 U.S. 566, 574-75 (1974) ("Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.").

278. *See id.*

279. H.R. DOC. No. 392, 77th Cong., 1st Sess. 2 (1941), *quoted in* Papachristou v. City of Jacksonville, 405 U.S. 156, 167 n.10 (1972).

280. *See Goguen*, 415 U.S. at 581 ("There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision.").

body can design a statute with this kind of mathematical precision,[281] in *Kolender v. Lawson*,[282] the Supreme Court sent a message that lawmakers must make the law as precise as possible.[283] The Court stated: "Although due process does not require 'impossible standards' of clarity, this is not a case where further precision in the statutory language is either impossible or impractical."[284]

Generally, certain factors influence how precise the wording of a statute must be.[285] First, laws that regulate individual behavior must be more precise than laws that regulate the economy.[286] Second, statutes that carry criminal penalties must be more precise than ones that impose civil sanctions.[287] Third, a scienter requirement may mitigate any problems citizens may have understanding what conduct is made criminal under a statute.[288] Finally, the most important factor is whether a law "threaten[s] to inhibit the exercise of constitutionally protected rights."[289] Clearly, a criminal ordinance with no scienter requirement that regulates individual behavior related to constitutionally protected activity demands the highest scrutiny for vagueness.[290]

Unlike overbreadth, defendants challenging a statute based on vagueness must meet a stringent standing requirement. A litigant may always challenge the vagueness of a statute as it is applied to himself.[291] A litigant cannot, under the general vagueness doctrine, challenge the

281. *See* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

282. 461 U.S. 352 (1983).

283. *See id.* at 361.

284. *Id.* (citation omitted).

285. *See* Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982).

286. *See* United States v. National Dairy Prods. Corp., 372 U.S. 29, 36 (1963); *see, e.g.*, *Hoffman Estates*, 455 U.S. at 498 ("[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses . . . can be expected to consult relevant legislation in advance of action."); Papachristou v. City of Jacksonville, 405 U.S 156, 162-63 (1972) (stating that people "not in business and not alerted to the regulatory schemes of vagrancy laws . . . would have no understanding of their meaning and impact if they read them").

287. Winters v. New York, 333 U.S. 507, 515 (1948); *see, e.g.*, *Hoffman Estates*, 455 U.S. at 498-99 ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

288. *Hoffman Estates*, 455 U.S. at 499 ("[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.").

289. *Id.*; *see* Colautti v. Franklin, 439 U.S. 379, 391 (1979); Grayned v. City of Rockford, 408 U.S. 104, 109 (1972); *Papachristou*, 405 U.S at 165-66 & n.8.

290. *See Hoffman Estates*, 455 U.S. at 498-99.

291. *See, e.g.*, United States v. Raines, 362 U.S. 17, 21 (1960); Yazoo & Miss. V. R.R. v. Jackson Vinegar Co., 226 U.S. 217, 219-20 (1912); Supervisors v. Stanley, 105 U.S. 305, 311-15 (1881).

statute based on how police will apply it to others if the statute was *not* applied vaguely to that particular litigant.[292] If a statute is vague in all of its applications, however, a party may assert a facial challenge even prior to specific enforcement.[293]

2. The "Right to Loiter"

Constitutional freedoms associated with loitering are derived implicitly from the right to travel as guaranteed under Article IV, Section 2,[294] from the right to freedom of association under the First Amendment,[295] and from the general principles of the Constitution:

> The difficulty is that . . . [the] activities [of loafing and loitering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.[296]

In *Papachristou v. City of Jacksonville*,[297] the Supreme Court noted that "[p]ersons 'wandering or strolling' from place to place have been extolled by Walt Whitman and Vachel Lindsay."[298] In Puerto Rico, the Court noted, "loafing was a national virtue . . . and . . . should be encouraged."[299] Furthermore, loitering itself is an innocent activity in that it does not threaten harm to others. Additionally, loitering is arguably an act that everyone does.[300] In a penal statute, the term "loitering" is a "trap for innocent acts" such as wandering, walking, resting, or strolling;[301] there is no valid way to create a presumption that people who loiter are doing anything wrong.

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292. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 756 (1974) ("[O]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

293. *Hoffman Estates*, 455 U.S. at 497 (holding that a statute is not unconstitutionally vague on its face for lack of notice unless it is "impermissibly vague in all of its applications").

294. U.S. CONST. art. IV, § 2; *see* Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Kent v. Dulles, 357 U.S. 116, 126-27 (1958).

295. U.S. CONST. amend. I; *see supra* notes 184-94 and accompanying text.

296. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

297. *Id.* at 156.

298. *Id.* at 164.

299. *Id.* at 163.

300. *Id.* at 164-67.

301. *Id.* at 164-65, 164 n.7.

3. The Strict Standard of Vagueness Used for Loitering Laws

In cases in which a law regulates constitutionally protected rights, the void-for-vagueness doctrine has had particularly stringent application.[302] The Court's rationale is similar to that applied to the overbreadth doctrine: a vague law may force citizens to refrain from constitutionally protected activity rather than risk prosecution.[303] When a vague statute "abuts upon sensitive areas of [constitutional] freedoms, it operates to inhibit the exercise of those freedoms. . . . Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."[304]

In fact, over time a separate vagueness doctrine, related to the overbreadth doctrine, emerged for statutes that affect constitutionally protected activity.[305] When constitutionally protected activity is involved, the rules of standing under this more stringent vagueness doctrine are closely related to the overbreadth doctrine.[306] If a statute regulates the exercise of any constitutional rights, a litigant may challenge a statute's vagueness on its face as it is applied to others.[307]

The vagueness and overbreadth doctrines become difficult to distinguish when a statute encourages intrusion on First Amendment freedoms.[308] A vague statute may result in police making arrests outside the statute's permissible scope.[309] In this way, a statute's vagueness contributes to its overbreadth.[310] Despite this blurring between the doctrines in

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302. Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965).

303. *See Papachristou*, 405 U.S. at 165-66 ("[T]he infirmity the Court found was vagueness—the absence of 'ascertainable standards of guilt' in the sensitive First Amendment area.") (quoting Winters v. New York, 333 U.S. 507, 515 (1948)).

304. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (citations omitted).

305. *See* Fallon, *supra* note 167, at 904.

306. Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983) ("[The Court has] traditionally viewed vagueness and overbreadth as logically related and similar doctrines.").

307. *Id.* In *Kolender*, the Court rejected the dissent's assertion that a person may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." *Id.* at 370 (White, J., dissenting). The majority allowed, and "reaffirmed," the use of overbreadth standing principles for vagueness charges to statutes that affect constitutionally protected conduct. *Id.* at 361.

308. *See* Keyishian v. Board of Regents, 385 U.S. 589, 609 (1967).

309. *See* Cox v. Louisiana, 379 U.S. 536, 551 (1965) (finding the statute "unconstitutionally vague"). It does not follow, however, that a law that is facially unconstitutional because of overbreadth is therefore vague. *See, e.g.*, Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 964-67 (1984); Village of Schaumburg v. Citizens for a Better Env., 444 U.S. 620, 635-39 (1980); Erznoznik v. City of Jacksonville, 422 U.S. 205, 215-17 (1975).

310. *Kolender*, 461 U.S. at 358-59 n.8 (declaring that the Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines"); Village of Hoff-

First Amendment cases, they nevertheless remain distinct theories.[311]

As they do in the overbreadth context, states have an opportunity to find and implement limiting constructions of vague statutes.[312] The task of finding an instruction that solves a loitering law's constitutional problems is formidable, however, because overbreadth and vagueness are interrelated[313] and create a no-win situation for lawmakers. Overbroad laws that do not clearly draw the line between constitutional and criminal behavior suffer from the same pitfalls that beset vague laws: they permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[314] Loitering laws are plagued by both vagueness and overbreadth.[315] Judicial constructions that eliminate overbreadth may create vagueness.[316]

C. *Fourth Amendment Concerns*

The Supreme Court has recognized loitering laws' persistent and unconstitutional incursions into the Fourth Amendment.[317] The Court, however, has never relied solely upon the Fourth Amendment to invalidate a loitering law.[318] Rather, the cases involving loitering laws addressed by the Court have been ruled unconstitutional on other grounds. Nevertheless, lower federal courts have invalidated loitering laws on Fourth Amendment grounds.[319] Therefore, an overview of Fourth Amendment principles may prove helpful for a comprehensive understanding of how the amendment relates to loitering laws.

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man Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 & n.6 (1982) ("[T]he vagueness of a law affects overbreadth analysis.").

311. *See* NAACP v. Button, 371 U.S. 415, 433 (1963); *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1043 (1986) (recognizing that "not all overbroad laws are vague [e.g., 'No person may expressly advocate criminal conduct'], and not all vague laws are overbroad [e.g., 'No person may engage in any speech that the state may constitutionally restrict']").

312. *See* Gooding v. Wilson, 405 U.S. 518, 520 (1972); Dombrowski v. Pfister, 380 U.S. 479, 491 (1965).

313. *See* Aptheker v. Secretary of State, 378 U.S. 500, 515-17 (1964).

314. Smith v. Goguen, 415 U.S. 566, 575 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

315. *See* Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983).

316. *See, e.g., Aptheker*, 378 U.S. at 516 (construing overbroad statute to find "some core of constitutionality would inject an element of vagueness into the statute's scope and application").

317. *See Papachristou*, 405 U.S. at 169-71.

318. *See id.* (recognizing the argument but expressly declining to decide the issue); *Kolender*, 461 U.S. at 362 (Brennan, J., concurring) (same).

319. *See infra* notes 379-407 and accompanying text.

1. The Fourth Amendment

In an ordered society, there is inevitably a tension between the individual's right to privacy and society's collective right to security.[320] For society to maintain order, government must sometimes force its citizens to sacrifice their personal right "to the possession and control of [their] own person[s] free from all restraint or interference of others."[321] The Fourth Amendment was the framers' attempt to strike a balance between societal security and individual privacy.[322]

The Fourth Amendment's general rule against unreasonable searches and seizures is fundamental to securing individual rights: When the police conduct a search that intrudes on an individual's expectation of privacy, they must first obtain a warrant from a "neutral and detached magistrate."[323] The magistrate must base the warrant on probable cause, and he must particularly describe the person, place, or thing to be searched.[324] Courts have recognized exceptions to the warrant requirement only when police have no time to get the warrant,[325] but even here, probable cause must exist.[326]

Probable cause generally is required for a search or seizure to be considered reasonable under the Fourth Amendment.[327] The probable cause requirement derived from both the language of the Fourth Amend-

320. *See* Carroll v. United States, 267 U.S. 132, 161-62 (1925); Stacey v. Emery, 97 U.S. 642, 645 (1878).

321. Terry v. Ohio, 392 U.S. 1, 9 (1968) (quoting Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)).

322. *Id.* at 20-21. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

323. *See* Illinois v. Andreas, 463 U.S. 765, 771 (1983); *see also* Johnson v. United States, 333 U.S. 10, 14 (1948) ("[I]nferences [are to] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

324. U.S. CONST. amend. IV.

325. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 509-10 (1978) (allowing immediate search to investigate cause of a fire); Chimel v. California, 395 U.S. 752, 762-63 (1969) (permitting search incident to an arrest); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298-99 (1967) (excusing warrant requirement when police are in hot pursuit); Ker v. California, 374 U.S. 23, 42 (1963) (allowing search to prevent destruction of evidence); Carroll v. United States, 267 U.S. 132, 156 (1925) (upholding search of automobiles).

326. This is limited by a few exceptions. *See infra* notes 338-40 and accompanying text.

327. *See, e.g.*, Dunaway v. New York, 442 U.S. 200, 214 (1979) ("For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause.").

ment[328] and from the expressed intent of the framers of the Constitution.[329] In *Henry v. United States*,[330] the Supreme Court explained the deep constitutional roots of probable cause:

> The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance . . . both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of "probable cause" before a magistrate was required.
>
> . . . .
>
> Th[e] philosophy [rebelling against these practices] later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest. And that principle has survived to this day.[331]

The concept of probable cause has evolved from vague preliminary definitions to specific balancing tests.[332] The present treatment of probable cause is illustrated by *Illinois v. Gates*.[333] Under *Gates*, probable cause to search exists when "there is a fair probability that contraband or evidence of a crime will be found" during the search.[334] This definition, according to the Court, is not "readily, or even usefully, reduced to a neat set of legal rules."[335] Consequently, the Court moved away from seeking an all-encompassing definition of probable cause toward a more fluid "totality of the circumstances approach" in which courts make highly factual, individualized findings.[336] Probable cause now is based on whether a search will more likely than not uncover evidence of crimi-

328. U.S. CONST. amend. IV.

329. The Framers of the Constitution included the Fourth Amendment to protect citizens from general search warrants. Before the Revolution, general search warrants were a reality in the American Colonies. England had enacted writs of assistance to help authorities find American smugglers. The writs of assistance let the police search the person and belongings of anyone whom was suspected of smuggling. The searches were completely up to the discretion of the police.

330. 361 U.S. 98 (1959).

331. *Id.* at 100-01 (footnotes omitted).

332. To note the stark contrast between the Court's earlier and modern probable cause analysis, compare Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813) (stating that probable cause "means less than evidence which would justify condemnation") with Illinois v. Gates, 462 U.S. 213, 238 (1983) (holding that probable cause to search exists when "there is a fair probability that . . . evidence of a crime will be found").

333. 462 U.S. 213 (1983).

334. *Id.* at 238.

335. *Id.* at 232.

336. *Id.* at 230-31.

nal activity.[337]

The Supreme Court historically has recognized four exceptions to the probable cause requirement.[338] The first three exceptions are not rel-

337. *See id.* at 244 n.13 ("[P]robable cause requires only a probability or substantial chance of criminal activity.").

338. The first exception, approved in Camara v. Municipal Court, 387 U.S. 523 (1967), was for suspicionless administrative inspections. *Id.* at 538-39 (allowing searches for administrative safety inspections without individualized suspicion). The administrative inspection exception allowed general routine searches of facilities for health and safety inspections, so long as the inspectors obtained an administrative warrant. *Id.* at 540. The administrative officials could conduct these searches without any reason to suspect that the building in question had any code violations. *See* See v. City of Seattle, 387 U.S. 541, 546 (1967); *Camara*, 387 U.S at 538. The Court approved these suspicionless searches only for routine health and safety inspections. *Camara*, 387 U.S. at 535-37. The Court reasoned that administrative agents could conduct these searches because they were to enforce the safety codes, not for "discovery of evidence of crime." *Id.* at 537. This limited exception to the probable cause requirement was allowed for three reasons: the searches were non-personal, were the only way to enforce safety codes, and were not used for criminal investigation. *Id.*

The administrative inspection exception soon grew into a second category of exceptions that fit the three rationales set forth in *Camera*. Suspicionless customs and immigration searches are now allowed, so long as they are not for criminal investigative purposes. *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 592-93 (1983) (holding that documents aboard oceangoing vessels may be searched); United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 (1976) (upholding immigration checkpoints). The Court also permits warrantless inspections of highly regulated industries. *See, e.g.*, Donovan v. Dewey, 452 U.S. 594, 604 (1981) (mining operations); United States v. Biswell, 406 U.S. 311, 316-17 (1972) (firearms business); Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (liquor business). Lower courts have approved metal detector searches at airports and important public places. *See, e.g.*, McMorris v. Alioto, 567 F.2d 897, 901 (9th Cir. 1978) (courthouses); United States v. Albarado, 495 F.2d 799, 806 (2d Cir. 1974) (airports). In all of these cases, however, the searches fit the rationale of *Camera*: non-personal searches *not used for criminal investigation* that were the only way to enforce safety. *Camara*, 387 U.S. at 535-36. This exception obviously does not encompass loitering laws.

In New Jersey v. T.L.O., 469 U.S. 325 (1985), the Court created a third exception to the probable cause requirement by allowing searches and seizures based on reasonable suspicion relating to the "special needs" of the school environment. *Id.* at 333. *T.L.O.* also held that a teacher may search a student in the context of the school environment "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 342. The effect of this holding was to substitute the reasonable suspicion standard for the probable cause standard for searches of students by school officials. *See id.* at 341. The Court emphasized that the school environment was a special place where teachers need flexibility in disciplining children and maintaining order. *Id.* at 339-40. Once again, this exception was to be used only for maintaining a learning environment, and not for criminal investigation. *See id.* at 341 n.7 ("This case does not address" the "legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies.").

The Court has since applied the *T.L.O.* special needs rationale in two other cases. *See* Griffin v. Wisconsin, 483 U.S. 868, 873, 880 (1987) (holding that probation officer may search probationer's home if reasonable suspicion exists); O'Connor v. Ortega, 480 U.S. 709, 720-24 (1987) (per curiam) (allowing public employers to search employees' offices for both investigations of work-related misconduct and noninvestigatory, work-related purposes). The Court held that these were limited "special needs" exceptions from the probable cause requirement.

evant to loitering laws,[339] and the fourth, the *Terry* exception, should not alter the probable cause requirement for them.[340]

In *Terry v. Ohio*,[341] the Supreme Court made an exception to the probable cause requirement for brief, unintrusive searches based on a reasonable suspicion that the person being searched poses a threat to the officer.[342] The Court held that a police officer may "conduct a carefully limited search of the outer clothing of [dangerous persons] in an attempt

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See Griffin, 483 U.S. at 878 (finding the exception necessary to preserve the "deterrent effect of the supervisory arrangement"); *O'Connor*, 480 U.S. at 725 (allowing search to maintain the "efficient and proper operation of the workplace"). In both of these cases, the Court acknowledged explicitly that the searches were not for law enforcement purposes and that reasonable suspicion was a prerequisite for a search. *See Griffin*, 483 U.S. at 873 ("[W]e have permitted exceptions when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' ") (quoting *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment)); *O'Connor*, 480 U.S. at 725 (stating that there are special needs beyond law enforcement "for legitimate work-related, noninvestigatory intrusions as well as investigations of work-related misconduct"); *see also Griffin*, 483 U.S. at 875-76, 880 (finding that a tip that probationer was keeping guns at his house provided reasonable suspicion); *O'Connor*, 480 U.S. at 726 (holding that specific charges of employee misconduct provided employer reasonable suspicion). Because these "special needs" searches may not be used for law enforcement purposes, they do not apply to loitering laws.

Mass drug testing administered without individualized suspicion for safety-sensitive government positions also was excepted in the companion cases of National Treasury Employees Union v. Von Raab, 498 U.S. 656 (1989), and Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). The Court's reasoning was that, although these searches are highly personal and not the only means to enforce a drug-free work environment, the societal need of having sober employees in sensitive positions outweighed the intrusion from the searches. *See Skinner*, 498 U.S. 616-17, 620-21. Thus, both *Skinner* and *Von Raab* expanded the "special needs" exception to include suspicionless searches of employees. *See Skinner*, 498 U.S. at 619-21; *Von Raab*, 498 U.S. at 665-66. The Court, however, emphasized repeatedly that the drug tests were not administered for the purpose of criminal investigation. *See Skinner*, 498 U.S. at 607, 620; *Von Raab*, 489 U.S. at 663, 666. Loitering laws do not fit within this exception because of its non-criminal scope.

Finally, in Terry v. Ohio, 392 U.S. 1, 27 (1968), the Court created a fourth exception involving detentions based on "reasonable suspicion." *See infra* notes 341-48 and accompanying text.

339. None of these exceptions to the probable cause requirement, other than a *Terry* search, are relevant to loitering laws because they do not apply to criminal investigations. *See supra* note 338.

340. *See infra* notes 341-48 and accompanying text.

341. 392 U.S. 1 (1968).

342. *See id.* at 29-31. The test that *Terry* introduced essentially expanded reasonable searches to include, in addition to those made with probable cause, frisks for weapons based on a new reasonable suspicion standard. *See id.* at 30. The Court characterized reasonable suspicion as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. A police officer may not base any frisk on a hunch or unparticularized suspicion, but only on the "specific reasonable inferences" drawn from the facts of the case. *Id.* at 27. The Court cautioned that a weapons search made without probable cause "must . . . be strictly circumscribed by the exigencies which justify its initiation." *Id.* at 26. Any executed search which is not limited to the purpose of the discovery of weapons or is not "something less than a 'full' search" is an unlawful search. *Id.*

to discover weapons which might be used to assault [the police officer]."[343] Before conducting a search, the officer must have reasonable suspicion that the person in question is both armed and dangerous.[344] The Court reiterated that generally a search or seizure is reasonable only if probable cause exists, but that there are exceptions to the probable cause requirement.[345] In determining what is reasonable, one must first " 'focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search . . . against the invasion which the search . . . entails.' "[346] The need to search is based on the state's interest in protecting police officers from fatal risks.[347] This heavy state interest outweighs the effects of a brief search made only for the purpose of locating weapons on an individual.[348]

In addition to these specifically enumerated exceptions to the probable cause requirement, there is one case that does not fit into the doctrine. In *Michigan Department of State Police v. Sitz*,[349] the Court allowed police to erect roadblocks and, without suspicion, to stop motorists to check for signs of drunkenness.[350] The Court held that police did not need individualized suspicion to conduct these limited stops.[351] This is the only case in which the Court eliminated the individualized suspicion requirement for seizures made for criminal investigation.[352] The Court, however, limited the allowable scope of the search to looking through the window of the car.[353] The important aspect of *Sitz*, and the unknown factor, is the Court's elimination of the individualized suspi-

343. *Id.* at 30.

344. *Id.* at 27.

345. *See, e.g., id.* at 20 ("[I]n most instances failure to comply with the warrant requirement can only be excused by exigent circumstances.").

346. *Id.* at 20-21 (quoting Camera v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967)).

347. *Id.* at 23. The Court recognized also that effective police officers must approach people to investigate a crime even when the officers do not have probable cause to make an arrest. *Id.* at 22. It is unfair to make the police approach potentially hostile and armed suspects without allowing them to make sure the suspects are not "armed with a weapon that could unexpectedly and fatally be used against [them]." *Id.* at 23.

348. *See id.* at 27 (The "evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for the protection of police . . . .").

349. 496 U.S. 444 (1990).

350. *Id.* at 450-51.

351. *Id.* This case seems to be confined to motor vehicle cases; police may only briefly detain a suspect until further evidence comes up. *Id.*

352. *Id.*

353. *Id.*

cion requirement for criminal detentions.[354]

Moreover, it appears that the Court in *Sitz* intended to keep the individualized suspicion standard for searches more rigid than the less-than-*Terry* type stops at sobriety checkpoints:

> It is important to recognize what our inquiry is not about. No allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint. . . . We address only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers. Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard.[355]

2. The Evolution of the Fourth Amendment Attack on Loitering Laws

Although the Supreme Court has never explicitly based its analysis of loitering laws on the Fourth Amendment, it has recognized that loitering laws implicate the Fourth Amendment. Lower courts have furthered this recognition and have developed a body of law for analyzing loitering laws under the Fourth Amendment.

In 1972, the Court struck down a loitering statute for vagueness in *Papachristou v. City of Jacksonville*.[356] Initially, the Court held that the statute, which was modeled after old English vagrancy laws,[357] was unconstitutionally vague in violation of the Due Process Clause.[358] A subtext of the Court's "arbitrary and discriminatory" enforcement analysis is an argument applying the Fourth Amendment to loitering laws.[359] The Court explained that "[a]nother aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the . . . police."[360] To arrest a person purely on grounds that their activity seems suspicious, "like [arresting] a person for investigation, is foreign to our system."[361] In the United States, "[w]e allow our police to make arrests only on 'probable cause,' a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Govern-

354. *Id.*
355. *Id.*
356. 405 U.S. 156, 168-69 (1972).
357. *Id.* at 161; *see supra* notes 23-39 and accompanying text.
358. *Papachristou*, 405 U.S. at 165.
359. *See id.* at 168-71.
360. *Id.* at 168.
361. *Id.* at 169.

ment."[362] The doctrine and the Fourth Amendment arguments merge when "the legislature . . . set[s] a net large enough to catch all possible offenders."[363] By giving law enforcement universal probable cause, either with a vague law or by permitting arrest on suspicion alone, loitering laws circumvent the Fourth Amendment.

The most complete Supreme Court analysis of loitering and the Fourth Amendment is Justice Brennan's concurrence in *Kolender v. Lawson*.[364] The majority invalidated a California loitering statute for vagueness on due process grounds.[365] Because the statute violated the Due Process Clause, the Court found it unnecessary to address the Fourth Amendment issue.[366] Justice Brennan argued in his concurrence that he would also strike the statute on Fourth Amendment grounds.[367] He noted that although recently the Court had not found a statute void under the Fourth Amendment, "we have long recognized that the government may not 'authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct.' "[368]

The statute at issue in *Kolender* authorized the arrest of loiterers who refused to give the police an adequate reason for their loitering.[369] The Court struck down the statute because, absent applicable exceptions, police can arrest a suspect only when they have probable cause to believe that he has committed or is committing a criminal act.[370] Except for *Terry* stops,[371] police may not even temporarily detain suspects,[372] and even during these stops the suspect is not required to answer questions.[373]

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362. *Id.* (citing Johnson v. United States, 333 U.S. 10, 15-17 (1948)).

363. *Id.* at 165 (quoting United States v. Reese, 92 U.S. 214, 221 (1875)).

364. 461 U.S. 352, 362-69 (1983) (Brennan, J., concurring).

365. *Id.* at 361.

366. *Id.* at 361 n.10.

367. *Id.* at 362 (Brennan, J., concurring).

368. *Id.* at 362 n.1 (Brennan, J., concurring) (quoting Sibron v. New York, 392 U.S. 40, 61 (1968)). In *Sibron* and other cases, the question was always whether the *police*, through their specific conduct, had violated the Fourth Amendment. *Id.* (Brennan, J., concurring). The Court never had the opportunity to decide whether "*state law* purporting to authorize such conduct also offended the Constitution." *Id.* (Brennan, J., concurring) (emphasis added).

369. *Id.* at 362 (Brennan, J., concurring).

370. *Id.* at 363 (Brennan, J., concurring); *see, e.g.*, Dunaway v. New York, 442 U.S. 200, 214 (1979) (holding that for "all but those narrowly defined intrusions, the requisite balancing has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause").

371. Terry v. Ohio, 392 U.S. 1, 20-27 (1968).

372. *Kolender*, 361 U.S. at 363 (Brennan, J., concurring).

373. *Id.* at 365 (Brennan, J., concurring). Justice Brennan cited Justice White's concurrence in *Terry* to illustrate the scope of a *Terry* search:

By criminalizing failure to respond to police officers in a *Terry* stop, the *Kolender* statute attempted to circumvent the Fourth Amendment probable cause requirement.[374] The California statute in *Kolender* attempted to expand the *Terry* standard by making it a crime to not cooperate with police during a *Terry* search.[375] The statute did not criminalize activity that would justify a *Terry* seizure;[376] rather, it made it a crime not to answer questions in the context of a *Terry* stop.[377] This enactment, in Justice Brennan's view, violated the Fourth Amendment.[378]

Lower courts have followed Justice Brennan's lead in examining loitering statutes in the context of the Fourth Amendment. The Court of Appeals for the Ninth Circuit clearly articulated two different Fourth Amendment arguments in *Powell v. Stone*.[379] The *Powell* court first maintained that loitering laws circumvent probable cause because they

> authorize[] arrest and conviction for conduct that is no more than suspicious. A legislature could not reduce the standard

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> [T]he person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

Id. (Brennan, J., concurring) (quoting *Terry*, 392 U.S. at 34 (White, J., concurring)).

374. *See, e.g., id.* at 366-67 (Brennan, J., concurring) ("California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a *Terry* encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody.").

375. *See id.* (Brennan, J., concurring).

376. To define the circumstances that justify a *Terry* search as criminal activity would infringe on the Fourth Amendment one step more that the California statute in *Kolender*. Indeed, to make acts which only lead to a reasonable suspicion a crime would surely be a more drastic step than simply failing to comply completely with *Terry*'s limitations. In both cases the state attempts to allow an arrest based on certain activity. In the statute voided by *Kolender*, the state allows an arrest for refusing to talk to the police after they have detained a person pursuant to a *Terry* stop. A loitering statute would allow an arrest even if the detainee agreed to talk because the standards for reasonable suspicion are codified as criminal activity. A person could be arrested for activity that only provided police with reasonable suspicion; there would be not reason to ever ask any questions, because the police could already make an arrest (and a search pursuant to that arrest).

377. *See id.* at 368-69 (Brennan, J., concurring). Justice Brennan argued that to allow these types of arrests would "make a mockery" of Brown v. Texas, 443 U.S. 47, 53 (1979). *Kolender*, 461 U.S. at 351 (Brennan, J., concurring). In *Brown*, the Supreme Court held that states may not criminalize a suspect's refusal to provide identification to police "in the absence of reasonable suspicion." *Id.* at 368 (Brennan, J., concurring) (citing *Brown*, 443 U.S. at 53).

Note that where the *Kolender* statute only made it criminal to fail to answer police questions in the context of a *Terry* search, the law in *Papachristou* went a step further by actually making suspicious persons criminals.

378. *Kolender*, 461 U.S. at 362 (Brennan, J., concurring).

379. 507 F.2d 93, 96-97 (9th Cir. 1974), *rev'd on other grounds*, 428 U.S. 465 (1976).

> for arrest from probable cause to suspicion; and it may not accomplish the same result by making suspicious conduct a substantive offense. Vagrancy statutes do just that, for they authorize arrest and conviction for the vagrancy offense if there are reasonable grounds to suspect that the accused may have committed, or if left at large will commit, a more serious offense.[380]

In describing the second way that loitering statutes violate the probable cause requirement, the court also elaborated on the connection, mentioned in *Papachristou*, between the vagueness and Fourth Amendment arguments.[381] A loitering law's "language is so general and vague, the elements of the offense so obscure, that they afford no reasonable criteria by which an officer may determine whether the ordinance has or has not been violated."[382] Because of this problem, "an officer cannot 'gauge justification for [vagrancy] arrests consistently with Fourth Amendment principles.' "[383]

In *United States ex rel. Newsome v. Malcolm*,[384] the Court of Appeals for the Second Circuit discussed another instance in which loitering laws circumvent the probable cause requirement. In that case, police approached the defendant as he stood in a hallway of a building and made a brief *Terry* detention to ask the suspect questions.[385] When the suspect failed to produce identification, the police officer arrested him for loitering.[386] Once the police officer had made an arrest, he was free to search the defendant incident to that arrest, which he did.[387] The defendant had heroin and a hypodermic instrument in his pockets.[388] When the patrolman found the contraband, he also charged the defendant with possession of dangerous drugs[389] and criminal possession of a hypodermic

380. *Id.* at 96.

381. *Id.* at 96-97.

382. *Id.* at 96.

383. *Id.* at 96-97 (quoting Hall v. United States, 459 F.2d 831, 837 (D.C. Cir. 1972) (en banc)).

384. 492 F.2d 1166 (2d Cir. 1974), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975).

385. *Id.* at 1168.

386. *Id.* The loitering statute provided:

> A person is guilty of loitering when he: . . . Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and, upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes.

N.Y. PENAL LAW § 240.35(6) (McKinney 1965).

387. *Malcolm*, 492 F.2d at 1168.

388. *Id.*

389. *Id.*; *see* N.Y. PENAL LAW § 220.05.

instrument.[390] The defendant was convicted of the loitering charge and "attempted possession of dangerous drugs."[391]

The elements of the loitering law at issue in *Malcolm* include: first, one must be loitering, remaining, or wandering without apparent reason;[392] and second, the loitering must establish "circumstances which justify suspicion that [a person] may be engaged or about to be engaged in crime."[393] The court noted that the grounds for arrest provided by these two elements are even "less compelling than the reasonable and articulable factors which are required to sustain a mere on-the-scene frisk."[394]

The *Malcolm* court found that the loitering statute was merely a tool that enabled police to undertake a search without probable cause.[395] Under the loitering statute, if the police had a hunch that someone was about to engage in criminal activity, they could arrest that person.[396] Pursuant to that arrest, the police could subsequently search the suspect to find any evidence of her "loitering" and use that evidence to prosecute the defendant of the "future" crime.[397] By criminalizing suspicious behavior, the loitering law essentially circumvented the probable cause requirement for searches.[398] The *Malcolm* court found that this violated the Fourth Amendment.[399]

More recently, two federal district courts have limited loitering statutes in recognition of conflicts with the Fourth Amendment. In *Porta v. Mayor, City of Omaha*,[400] and *Timmons v. City of Montgomery*,[401] the courts reached a similar result: Police must comply with the probable cause and *Terry* standards.[402] *Porta* did not explicitly invalidate the Omaha loitering statute, but it did hold that the statute could be enforced only if it was used in compliance with *Terry* standards and probable cause.[403] Ironically, the court found that police could use the loitering

390. *Malcolm*, 402 F.2d at 1168; *see* N.Y. PENAL LAW § 220.45.

391. *Malcolm*, 402 F.2d at 1168-69; *see* N.Y. PENAL LAW § 110.05(6).

392. *Malcolm*, 402 F.2d at 1172-73.

393. *Id.* at 1173 (quoting N.Y. PENAL LAW § 240.35(6)).

394. *Id.* (citing Terry v. Ohio, 392 U.S. 1 (1968) and Sibron v. New York, 392 U.S. 40 (1968)).

395. *Id.*

396. *Id.*

397. *Id.* at 1174-75.

398. *Id.*

399. *Id.*

400. 593 F. Supp. 863, 869 (D. Neb. 1984).

401. 658 F. Supp. 1086, 1093 (M.D. Ala. 1987).

402. *See Timmons*, 658 F. Supp. at 1093; *Porta*, 593 F. Supp. at 869.

403. *Porta*, 593 F. Supp. at 869-70. The ordinance provided: "It shall be unlawful for any

ordinance only when there "was sufficient probable cause to arrest for the underlying crime."[404] But the police could already search a suspect if they had probable cause to believe he had committed a crime, so the loitering ordinance, as construed by the court, was essentially useless.

The *Timmons* court took a more direct approach, declaring the loitering statute at issue void under the Fourth Amendment.[405] Police may arrest a person only when there is probable cause to believe that person either is about to commit or has committed a criminal act.[406] The court found that the loitering ordinance violated this constitutional requirement "by authorizing the arrest and conviction for conduct that is at most suspicious."[407] The essence of these holdings is that loitering is not criminal, but rather a prevalent activity in which the entire population participates, so the probable cause standard cannot be attached to it.

Loitering laws sidestep the Fourth Amendment protections by allowing an arrest on less than probable cause.[408] They are useful tools for police to make arrests that they otherwise could not make.[409] As the Supreme Court held in *Papachristou*: "A vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest."[410]

VI. CAN ANY LOITERING LAW BE CONSTITUTIONAL?

The main problem with loitering laws is that they make an entirely innocent activity the actus reus of a crime. "Loitering with intent" laws

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person to loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." *Id.* at 865 (quoting OMAHA, NEB., MUN. CODE § 20-171 (1967)).

404. *Id.* (quoting United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1173 (2d Cir. 1974), *aff'd sub nom.* Lefkowitz v. Newsome, 420 U.S. 283 (1975)).

405. *Timmons*, 658 F. Supp. at 1093. The Court also found that the statute violated the Fourteenth Amendment. *Id.* at 1088. The Montgomery ordinance provided:

> (a) Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:
>
> . . . .
>
> (6) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

Id. (quoting MONTGOMERY, ALA., CODE § 29-15(a)(6) (1964)).

406. *Id.* at 1091.

407. *Id.*

408. *Id.*

409. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972).

410. *Id.*

narrow the scope of activity deemed criminal, but essentially have the same problem as their predecessors. The ordinances remain impermissibly overbroad in that they have the potential to deter constitutionally protected conduct. Furthermore, police still retain unfettered discretion in determining who has the necessary intent to commit the crime. In essence, by making the actus reus such broad activity, lawmakers have eliminated the criminal act, a shortcoming exacerbated by defining innocent, common behavior as criminal.

Law enforcement agencies often rely on *United States v. Sokolow*[411] to argue that lawful and innocent behavior can lead to lawful arrest. *Sokolow* implicitly suggests, and prosecutors often argue, that the essential point of the case is that innocent activity can provide reasonable suspicion of guilt.[412] Even if this assertion is true, there is no reason to enact "loitering with the intent to sell drugs" laws. If police can concoct probable cause from the 'suspicious factors' enumerated in the loitering laws, there is no need to have loitering laws. Police could make the same arrests under existing drug laws.

If lawmakers could draft a law that conclusively connected behaving in a certain manner with drug use, the law might survive constitutional scrutiny. If these acts exclusively meant that a drug activity was occurring, then that type of loitering could be the actus reus of the crime; the person performing these acts would already have done some overt criminal act toward completion of the crime. A person who knowingly performed such acts with criminal purpose would satisfy the mens rea of the crime. Such a law would be similar to "criminal possession of burglary tools with intent to commit burglary." The circumstances surrounding the burglar can show conclusively that he is using the tools to break into a building. If the alleged burglar is standing at the door of a building that does not belong to him, if it is night, and if he possesses a crowbar and lock pick, these factors strongly suggest that he is going to commit a burglary but do not suggest any innocent activity. Therefore, an ordinance that criminalizes these circumstances should survive constitutional scrutiny because it defines the criminal activity so specifically as not to deter other constitutionally protected activity. Such a statute would also survive Fourth Amendment scrutiny because the police would have more than a mere suspicion that the person intended to commit a crime.

411. 490 U.S. 1 (1989). In *Sokolow*, the Court allowed a drug courier profile to justify reasonable suspicion for a drug stop at an airport. The factors in the profile where similar to those used in loitering laws. The drug courier profiles were general enough to have a "chameleon-like way of adapting to any particular set of observations." *Id.* at 13 (Marshall, J., dissenting).

412. *Id.* (Marshall, J., dissenting).

This differs from the case of a "loitering with intent" law, because the factors used to show intent in these laws consist of a list of acts not exclusively, or even primarily, connected with drug use. Even if lawmakers devise a list of factors that tie loitering conclusively to drug use, a "loitering with intent" law is useless, because the presence of such factors would give police notice that a suspect is more probably than not engaging in drug-related crime. With this notice, police would have probable cause for a violation of *existing* drug laws and would not need a loitering law to make an arrest or search.

The very fact that many "loitering for the purpose of selling drugs" laws equate "behav[ing] in such a manner as to raise a reasonable suspicion that he or she is about to engage in or is engaging in an unlawful drug-related activity"[413] with intent to sell drugs demonstrates that these laws make it a crime to act suspiciously. This is the very problem that prompted the Supreme Court to declare older vagrancy laws unconstitutional. Other factors, such as "[b]eing a known unlawful user, possessor or seller,"[414] "[b]eing at a location frequented by persons who use, possess or sell controlled substances,"[415] "[o]ccupying a vehicle which is registered to a known unlawful drug user, possessor or seller or which has recently involved in illegal drug-related activity,"[416] and "[s]topping [and] conversing with the occupant(s) . . . [of] a vehicle which is registered to a known unlawful drug user, possessor or seller or which has been recently involved in illegal drug-related activity,"[417] automatically create an excuse to arrest an enormous number of innocent people. A person with a prior conviction who lives in a poor, crime-ridden community and who converses with car-riding friends in similar circumstances has gone a long way toward showing intent. In fact, simply having a prior drug record and living in a poor neighborhood may be enough to show intent and is therefore sufficient to lead to arrest. Under the Charlotte ordinance, only one factor is required to show criminal intent.[418]

The laws that come the closest to passing constitutional muster are those like the Fayetteville ordinance, which requires that each circumstance that is used to show that a person is "loitering for the purpose of engaging in drug-related activity" must be committed with criminal in-

413. *See* FAYETTEVILLE, N.C., CODE § 21-55(c)(5) (1989); GREENSBORO, N.C., CODE § 18-46 (1989); HIGH POINT, N.C., CODE § 12-1-9 (1989).

414. *See* CHARLOTTE, N.C., CODE § 15-31 (1990).

415. *Id.*

416. *Id.*

417. *Id.*

418. Each of the factors are separated by the disjunctive "or," which indicates that each factor alone is enough to demonstrate illegal intent. *See id.*

tent. This version still has its shortcomings, however. What factors would the police use to find intent before making an arrest? Would police base intent merely on their suspicion that someone will sell drugs, or would they use the loitering law only when they had probable cause that the person is selling drugs? Again, either standard the police use makes "loitering with intent" laws useless. In the former case, where the standard for arrest is mere suspicion, the law is clearly unconstitutional under the overbreadth and vagueness doctrines.[419] In the latter case, any discussion of loitering laws is moot, because police can stop and search a suspect based on probable cause that he violated existing drug laws.

There are no factors that could possibly show probable cause of criminal intent that would not also demonstrate probable cause of violation of existing state drug laws. Lawmakers merely attempted to change the standard to make drug-related arrests easier for police; still, to seize and search people without probable cause for possession of drugs is unconstitutional. After all, if police don't even have probable cause for possession of drugs, it is absurd that lawmakers could create a standard for arrest that calls for less than probable cause. To allow lawmakers to circumvent the constitutional requirement of probable cause by defining probable cause as reasonable suspicion effectively would eliminate judicial review of the constitutionality of any criminal law. Lawmakers could, by altering definitions, criminalize virtually any common, innocent activity.

VII. CONCLUSION

"[In drug trials], the sense of justice unfortunately becomes itself generic, and we do not care whether it is the right individual or not. Somebody should be punished for this heinous crime."[420] Generic prejudice[421] describes the result of a massive governmental and media campaign against a social ill.[422] It causes jurors and judges to be prejudiced against a defendant based on the nature of the crime with which he is charged.[423] The drug war, and all of the publicity that surrounds it, "paints a defendant with an incriminating and indelible brush."[424] A

419. *See supra* notes 148-316 and accompanying text.

420. *Panel One: What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality, Annenberg Washington Conference*, 40 AM. U. L. REV. 547, 564-65 (1991) [hereinafter *Panel One*].

421. For a detailed discussion, see Jack C. Doppelt, *Generic Prejudice: How Drug War Fervor Threatens the Right to a Fair Trial*, 40 AM. U. L. REV. 821 (1991).

422. *Id.* at 828.

423. *Id.* at 824.

424. *Id.* at 822.

jury's community sense of justice can become so generic that the jury is blind to the defendant's guilt or innocence.[425]

Although generic prejudice usually afflicts jurors, a similar occurrence is happening with the third generation loitering laws. People are arrested because of the way they look, where they live, and whom they live with; they fit the "drug dealer stereotype." "Loitering with the intent to sell drugs" laws compound the generic justice problem. Once labeled, the police can arrest and prosecute whomever they choose merely in the name of fighting the war against drugs.

WILLIAM TROSCH

425. *Panel One, supra* note 420, at 564-65.