FOURTEENTH AMENDMENT – DUE PROCESS CLAUSE – CHICAGO'S ANTIGANG LOITERING ORDINANCE IS UNCONSTITUTIONALLY VAGUE – *CITY OF CHICAGO V. MORALES*, 527 U.S. 41 (1999).

Boris Mankovetskiy

That the terms of a penal statute creating 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; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[1]

I. INTRODUCTION

Concern over increasing crime rates has led many municipalities to enact anti-loitering laws prohibiting loitering generally or loitering for a specific purpose, such as drug activity, prostitution, or criminal gang activity.[2] Although anti-loitering statutes have long been part of the American criminal justice system, these statutes trace their roots to the early English vagrancy laws.[3]

In the fourteenth century, the collapse of feudalism and depopulation caused by the Black Death plague created a labor shortage in England.[4] As a result, landowners offered higher wages to increase their depleted work forces and laborers began to travel the country offering their services to the highest bidder.[5]

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[1] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

[2] Frank J. Wozniak, Annotation, *Validity, Construction, and Application of Loitering Statutes and Ordinances*, 72 A.L.R. 5th 1 (1999).

[3] Mark Malone, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L.J. 749, 752-54 (1982).

[4] *Id.* at 754 n.16.

[5] *Id.*

In response, Parliament passed the Statute of Labourers, which compelled laborers to remain in certain areas and established a fixed wage.[6] Able-bodied vagrants who did not offer themselves for work were subjected to such penalties as whipping, scourging, and bodily mutilation.[7] Thus, originally, vagrancy and loitering statutes had an economic rationale.[8]

The focus of those laws soon shifted to crime prevention.[9] Lack of work or poor working conditions continually forced laborers to remain on the move until "the roads of England were crowded with masterless men and their families."[10] To prevent these people from supporting themselves by criminal means, Parliament passed laws like the "Slavery Acts," which provided for two years' enslavement for anyone who "liveth idly and loiteringly, by the space of three days."[11]

Similar laws soon made their way to America under "the theory that society must have a means of removing the idle and undesirable from its midst before their potential for criminal activity is realized."[12] Thus, "paupers" and "vagabonds" were excluded from the Privileges and Immunities Clause of the Articles of Confederation and its promise of "free ingress and egress to and from any other state."[13] During the nineteenth century, the United States Supreme Court noted that it is "as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against the physical pestilence."[14]

While crime prevention always was the stated purpose of vagrancy laws in the United States,[15] these laws were sometimes used to accomplish invidious

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[6] *Id.*

[7] *Id.*

[8] *Id.* at 754.

[9] Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 615-16 (1956).

[10] *Id.* at 616.

[11] Malone, *supra* note 3, at 754 n.17.

[12] *Id.* at 755-56.

[13] Foote, *supra* note 9, at 616.

[14] *Id.* (quoting City of New York v. Miln, 36 U.S. 102, 142-43 (1837)).

[15] *See, e.g.*, Salt Lake City v. Savage, 541 P.2d 1035, 1036 (Utah 1975), *cert. denied*, 425

goals. Following the end of the Civil War, southern states broadened their vagrancy statutes to limit the freedom of former slaves in an attempt to keep them in a "state of quasi-slavery."[16] Furthermore, by the middle of the twentieth century, the police could arrest individuals as they deemed appropriate under vagrancy laws to maintain order in public places, often with discriminatory results.[17] Many citizens were at the mercy of the police and arrested under catch-all vagrancy laws that criminalized their status because they were unwelcome in the "besieged modern metropolis."[18] Some of the laws sought to punish "rogues," "vagabonds," or "habitual loafers," and even extended to jugglers.[19] In 1948, Justice Felix Frankfurter stated that these laws constituted "a class by themselves" in which exact statutory language was "designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."[20] The police used their authority primarily against those typically subjected to increased police attention, namely, persons generally unable to adequately assert their rights through the political process, including juveniles, minorities, and the poor.[21]

Virtually all of these laws went unchallenged until 1963, when the Court recognized that indigent defendants in felony criminal prosecutions in state courts had the right to counsel.[22] Until that time, those who were most likely to be ar-

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U.S. 915 (1976) (upholding ordinance proscribing loitering where circumstances justify suspicion that the person may be engaged in or about to engage in a crime); State v. Ecker, 311 So. 2d 104, 106 (Fla. 1975), *cert. denied*, 425 U.S. 1019 (1975) (upholding a statute forbidding loitering at a time or in a manner not usual for law-abiding citizens, under circumstances that warrant justifiable and immediate concern for the safety of persons or property in the vicinity).

[16] City of Chicago v. Morales, 527 U.S. 41, 54 n.20 (1999).

[17] Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 595 (1997).

[18] Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209, 216 (1989).

[19] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 158 n.1 (1972) (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1970)).

[20] Livingston, *supra* note 16, at 595 (quoting Winters v. New York, 333 U.S. 507, 540 (1948)).

[21] *Id.* at 596.

[22] *See* Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

rested and prosecuted under vagrancy laws, the homeless and indigent, lacked the means to bring any constitutional challenge.[23]

The two most frequent constitutional challenges to anti-loitering laws are the void for vagueness and overbreadth doctrines.[24] The void for vagueness doctrine stems from the Due Process clauses of the Fifth and Fourteenth Amendments.[25] This doctrine requires that a law give persons of "ordinary intelligence fair notice" of what conduct is prohibited and provide definite standards to police officers to prevent arbitrary and discriminatory enforcement.[26] The overbreadth doctrine, on the other hand, stems from the First Amendment.[27] Under this doctrine, if a law proscribes activities that are not constitutionally protected as well as those activities that are protected by the First Amendment, the law may be held overbroad.[28]

Anti-loitering laws have long been attacked under the vagueness doctrine because they are susceptible to arbitrary and discriminatory enforcement.[29] Moreover, the courts have become increasingly critical of loitering laws that fail to join the act of loitering with an additional element of criminal conduct.[30] The

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[23] *See* City of Chicago v. Morales, 527 U.S. 41, 54 n.20 (1999).

[24] *See* Wozniak, *supra* note 2, at 49-82.

[25] Rex A. Collings Jr., *Unconstitutional Uncertainty - An Appraisal*, 40 CORNELL L. REV. 195, 199 (1954). The Fifth Amendment provides, in relevant part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[26] *Papachristou*, 405 U.S. at 162.

[27] The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. CONST. amend. I.

[28] Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940). In order to fall within the overbreadth doctrine, a restriction on constitutionally protected activities must be substantial, not merely minimal and incidental, where the government has a legitimate interest in regulating an unprotected activity. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-31 (2d ed. 1988). The Court has therefore upheld laws where the limitation on the freedom of expression has been minimal. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 110 (1972); Cox v. Louisiana, 379 U.S. 559, 564 (1965).

[29] *See* John Calvin Jeffreys, Jr., *Legality Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 214-18 (1985).

[30] *See* City of Chicago v. Morales, 687 N.E.2d 53, 60 (Ill. 1997). Frequently, such an

term "loitering" is defined as "to be dilatory . . . to stand around or move slowly about; to stand idly around; to saunter; to lag behind; to linger or spend time idly."[31] As defined, the term "loitering" is normally not associated with illegal conduct. The difficulty with anti-loitering ordinances, then, is that they often reach innocent conduct.[32] Moreover, the ambiguity in the definition of loitering may lead to differing interpretations of the term.[33] Thus, although one observer may believe someone is loitering, another observer may believe that the same person's conduct has an apparent purpose.[34] That purpose may even include certain constitutionally protected rights such as freedom of association.[35]

This casenote will address the Court's latest treatment of an anti-loitering ordinance in *City of Chicago v. Morales*,[36] particularly focusing on the application of the void for vagueness doctrine.

II. STATEMENT OF THE CASE

In *Morales*, the United States Supreme Court granted certiorari to review the Illinois Supreme Court's decision that held Chicago's antigang loitering ordinance ("Ordinance") void for vagueness.[37] The Ordinance required a police officer, upon observing a person whom he reasonably believed to be a criminal street gang member loitering in a public place with at least one other person, to order all such persons to disperse, and made failure to disperse a punishable of-

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additional element of criminal conduct is satisfied when an anti-loitering law targets prostitutes or drug dealers. *E.g.*, City of Akron v. Holley, 557 N.E.2d 861, 864, 867 (Ohio Mun. Ct. 1989); State v. VJW, 680 P.2d 1068, 1070 (Wash. Ct. App. 1984).

[31] BLACK'S LAW DICTIONARY 942 (6th ed. 1990).

[32] *Morales*, 687 N.E.2d at 60-61.

[33] *See id.* at 61.

[34] *Id.*

[35] *See* City of Dallas v. Stanglin, 490 U.S. 19, 23-25 (1989). However, the *Stanglin* Court rejected the claim that the Constitution recognized a sweeping right of social association and determined that an ordinance regulating youth dances in such a way that older persons were prevented from attending did not infringe upon any constitutionally protected right. *Id.* at 25.

[36] City of Chicago v. Morales, 527 U.S. 41 (1999).

[37] *Id.* at 51.

fense.[38] Affirming the Illinois Supreme Court's decision, the Court held that the Ordinance was unconstitutionally vague because it failed to provide fair notice of prohibited conduct and to establish minimal guidelines for enforcement.[39]

In 1992, the City Council of Chicago ("City Council") held hearings regarding gang related crime.[40] The findings, based on the testimony of residents and aldermen of high crime neighborhoods, indicated that street gangs were largely responsible for a recent increase in violent and drug related crimes and that gang members intimidated citizens and established control over a territory by loitering without committing crimes punishable under then existing laws.[41] Thus, gangs maintained control over their territory for illegal purposes without facing arrest.[42] Pursuant to these findings, the City Council enacted the Ordinance, which provided that:

> Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.
>
> It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.
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> As used in this section:
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> "Loiter" means to remain in one place with no apparent purpose.
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> "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having

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[38] *Id.* at 47.

[39] *Id.* at 56-64.

[40] *Id.* at 45-47.

[41] *Id.*

[42] *Morales*, 527 U.S. at 46.

> as one of its substantial activities the commission of one or more of the criminal acts . . . , and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.
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> . . .
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> (5) "Public place" means the public and any other location open to the public, whether publicly or privately owned.[43]

As it had promised the City Council in the preenactment hearings, the Chicago Police Department promulgated an administrative regulation ("General Order 92-4") to govern the enforcement of the Ordinance.[44] The General Order required the arresting officer to rely on his or her own knowledge and experience in determining whether the alleged offender was a gang member.[45] Such knowledge and experience could include known admissions of membership or an alleged offender's use of gang symbols.[46] Police officers could enforce the Ordinance only in the parts of the city "where loitering by street gangs . . . posed a demonstrable problem for the surrounding community."[47]

During the three years of its enforcement, the Ordinance resulted in approximately 89,000 dispersal orders and over 42,000 arrests.[48] Among those arrested

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[43] *Id.* at 47 n.2 (quoting CHICAGO, ILL., MUNICIPAL CODE § 8-4-015 (1992)).

[44] *Id.* at 48; Chi. Police Dep't, General Order 92-4 (1992). The Illinois Supreme Court noted that representatives of the Chicago police department informed the City Council that any limitations on the discretion police in enforcing the Ordinance would be best developed through police policy, rather than placing such limitations into the Ordinance itself. City of Chicago v. Morales, 687 N.E.2d 53, 59 (Ill. 1997).

[45] City of Chicago v. Youkhana, 660 N.E.2d 34, 37 (Ill. App. Ct. 1995) (quoting Chi. Police Dep't, General Order 92-4 (1992)).

[46] *Id.*

[47] *Id.*

[48] *Morales,* 527 U.S. at 49. In its brief to the Court, the City maintained that the Ordinance was directly responsible for a significant decline in gang-related homicides. *Id.* at 49 n.7. The City directed the Court's attention to statistics that showed that the gang related homicide rate fell by 26 percent in 1995, the last year the Ordinance was enforced, compared to an 11 percent increase in 1996, the year after the Ordinance was held invalid. *Id.*

was Jesus Morales.[49] He was arrested because his blue and black clothes (the colors of a local gang) led the arresting officer to believe that Morales belonged to a gang.[50] After the city began enforcing the Ordinance, its constitutionality was challenged in thirteen different trials.[51] Eleven trial court judges held the Ordinance unconstitutional; only two trial courts upheld it.[52] Morales and five other defendants were convicted and sentenced to jail terms ranging from one to twenty-seven days.[53] However, in *City of Chicago v. Youkhana*, a trial court held the Ordinance unconstitutional because it failed to notify persons as to what conduct was prohibited and encouraged arbitrary enforcement by the police.[54] The trial court also held that the Ordinance improperly permitted arrests based on a person's status and was "facially overbroad."[55]

The city appealed the trial court's decision in *Youkhana* to the Illinois Appellate Court.[56] The Illinois Appellate Court affirmed the lower court's decision and held that the Ordinance violated First Amendment freedoms of association and expression, violated due process because of vagueness, unconstitutionally criminalized status, and allowed arrests without probable cause in violation of the Fourth Amendment.[57] Based on the *Youkhana* decision, the Illinois Appellate Court consolidated other pending appeals and reversed Morales' conviction.[58]

The city appealed the consolidated cases to the Illinois Supreme Court in *City*

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[49] *Id.* at 50.

[50] *Youkhana*, 660 N.E.2d at 37.

[51] *Morales*, 527 U.S. at 49.

[52] *Id.* at 49-50.

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

[54] *Youkhana*, 660 N.E.2d at 38-39 (discussing the trial court's unpublished decision). While Mr. Morales' case represented one of the two trial court cases in which the Ordinance was found constitutional, the *Youkhana* case represented the eleven trial court cases in which the Ordinance was struck down. *Id.*

[55] *Id.*

[56] *Id.* at 36.

[57] *See id.* at 38, 40-42.

[58] *Morales*, 687 N.E.2d at 57.

of Chicago v. Morales.[59] The Illinois Supreme Court affirmed the consolidated appeals on vagueness grounds, holding that the Ordinance's broad definition of "loitering" provided insufficient notice to citizens and excessive discretion to the police.[60] The Ordinance was also found to unconstitutionally interfere with the substantive due process rights to associate with others and move about freely.[61] The court considered the limiting effect of General Order 92-4, but concluded that it failed to cure the potential for arbitrary enforcement.[62]

The United States Supreme Court affirmed the Illinois Supreme Court's decision that the Ordinance was unconstitutional.[63] Although the majority agreed with the Illinois Supreme Court that the Ordinance was impermissibly vague, the Justices' reasoning diverged. In a plurality opinion, Justice Stevens concluded that the Ordinance did not infringe upon the First Amendment, but that it did implicate a substantive due process interest.[64] Justice Stevens articulated a two-prong vagueness test: "[f]irst, [a criminal law] may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement."[65]

Five Justices agreed with Justice Stevens that the Ordinance was unconstitutionally vague because it gave too much discretion to the police.[66] The Justices reasoned that because "loitering" was defined expansively as "remain[ing] in any one place with no apparent purpose," police officers possessed broad discretion to determine what activities constituted loitering.[67] Furthermore, the majority

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[59] *Id.*

[60] *Id.* at 57-65.

[61] *Id.* at 64-65.

[62] *Id.* at 64.

[63] City of Chicago v. Morales, 527 U.S. 41, 64 (1999). Although a six-Justice majority agreed that the Ordinance was vague, there was no majority opinion written in this case. Justice Stevens wrote an opinion for three Justices (plurality) in which the Ordinance was held vague. *Id.* at 51. Three other Justices concurred in part and concurred in the judgment in separate opinions. *Id.*

[64] *Id.* at 52-55.

[65] *Id.* at 56.

[66] *Id.* at 64-70. Justices Ginsburg, Souter, O'Connor, Kennedy, and Breyer concurred in the judgment. *Id.*

[67] *Id.* at 60-61.

did not find that General Order 92-4 corrected the undue breadth of discretion.[68]

Only Justices Souter and Ginsburg agreed with Justice Stevens that the Ordinance failed the notice prong of the vagueness test.[69] Justice Stevens noted that a dispersal order given after a police officer has identified impermissible loitering could not possibly afford advance notice as to what type of loitering was prohibited.[70] He also stated that the dispersal order itself was vague because it gave no guidance as to how far and for how long a group of loiterers should disperse.[71]

Justice Scalia dissented, characterizing the Ordinance as a "minor limitation upon the free state of nature."[72] He reasoned that the Ordinance satisfied both the notice and discretion prongs of the test, and therefore, was not vague.[73] Justice Scalia further questioned whether Morales satisfied the burden necessary to facially challenge a statute, and whether a federal court should even hold a statute or ordinance unconstitutional in every application.[74] Justice Scalia also opposed the plurality's designation of loitering as a fundamental right, stating that there was no evidence of such right's existence.[75]

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, also dissented, arguing that the Ordinance was not unconstitutionally vague because "loitering" was not an ambiguous term, and because police officers traditionally had the power to issue dispersal orders.[76] In addition, Justice Thomas agreed with Justice Scalia that "there [was] no fundamental right to loiter."[77]

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[68] *Id.* at 63-64.

[69] *Morales*, 527 U.S. at 45, 56-60.

[70] *Id.* at 58-59.

[71] *Id.* at 59.

[72] *Id.* at 74. (Scalia, J., dissenting).

[73] *Id.* at 89-90 (Scalia, J., dissenting).

[74] *Id.* at 81-82 (Scalia, J., dissenting).

[75] *Morales*, 527 U.S. at 83-84 (Scalia, J., dissenting).

[76] *Id.* at 98, 112 (Thomas, J., dissenting).

[77] *Id.* at 113 (Thomas, J., dissenting).

III. PRIOR CASE HISTORY

Early vagueness cases arose outside of the loitering context.[78] In *Connally v. General Construction Co.*, the Court considered the constitutionality of an Oklahoma minimum wage statute which required that state employees be paid "not less than the current rate of per diem wages in the locality where the work [was] performed."[79] In holding the statute void for vagueness because it failed to put an ordinary person on notice of the prohibited conduct, the Court stated that due to the severity of criminal penalties, criminal statutes must be drafted with a certain level of specificity.[80] Namely, the terms of the statute must be explicit enough to inform those who may be subject to it specifically what conduct would make them subject to criminal penalties.[81] Applying this test, the *Connally* Court concluded that the statute's definition of the minimum wage was not sufficiently specific and left persons unsure as to its meaning; consequently, they could not reliably determine what level of wages was required.[82] The Court noted that without a clear definition of the minimum wage, the determination would be left to the varying impressions of jurors, a support so uncertain that the constitutional guaranty of due process could not be allowed to rest upon it.[83]

Thirteen years later, in *Lanzetta v. New Jersey*, the Court held unconstitutionally vague a New Jersey statute which forbade persons not engaged in lawful employment, and with a record of prior convictions, from being members of a gang.[84] The majority emphasized how critical it was for the elements of an offense to be specifically defined to avoid violating the Due Process Clause.[85] In the statute at issue, the Court focused on the element of being a member of a "gang."[86] The statute qualified "gang" only as "consisting of two or more per-

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[78] *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385 (1926); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[79] *Connally*, 269 U.S. at 388.

[80] *Id.* at 390-91, 393, 395.

[81] *Id.* at 391.

[82] *Id.* at 393-94.

[83] *Id.* at 395.

[84] Lanzetta v. New Jersey, 306 U.S. 451, 453, 458 (1939).

[85] *Id.* at 452-53.

[86] *Id.* at 457.

sons."[87] The *Lanzetta* Court held that the definition was vague, indefinite, and uncertain, causing persons to guess what the proscribed conduct was.[88] The Court declared that a statute or ordinance violates due process if it either commands or forbids an act by using terms so vague that a person of common intelligence would have to guess at its meaning – "no one may be required at peril of life, liberty or property to speculate as to the meaning of [a criminal] statute."[89]

The first time the Court directly addressed a loitering ordinance was in *Thornhill v. Alabama*.[90] *Thornhill* involved an Alabama statute that prohibited loitering of those who were picketing or protesting in conjunction with union activities.[91] The majority reversed the defendant's conviction on the ground that the statute swept too broadly and prohibited otherwise lawful conduct that would be protected by the First Amendment.[92] The Court also reasoned that the statute violated due process by granting the police too much discretion and "readily len[t] itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure."[93]

In 1965, the Court once again visited the area of loitering law. In *Shuttlesworth v. City of Birmingham*, the Court found that there was no evidence to support the defendant's conviction under a Birmingham loitering ordinance.[94] However, in dicta, the Court stated that a literal reading of the second part of the ordinance, which made it "unlawful for any person to stand or loiter upon any street or sidewalk of the city after having been requested by any police officer to move on," meant that people were allowed to stand on a public sidewalk in Birmingham only at the whim of the city's police officers.[95] This type of law, the Court stated, "bears the hallmark of a police state."[96] The Court stated that

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[87] *Id.* at 453.

[88] *Id.* at 453-54.

[89] *Id.* at 453.

[90] 310 U.S. 88 (1940).

[91] *Id.* at 91.

[92] *Id.* at 97.

[93] *Id.* at 97-98.

[94] Shuttlesworth v. City of Birmingham, 382 U.S. 87, 95 (1965).

[95] *Id.* at 90.

[96] *Id.* at 91.

merely refusing to comply with an officer's request to disperse would not be sufficient to arrest someone for the offense of loitering.[97]

Subsequently, in *Coates v. Cincinnati*, the Court held a loitering ordinance unconstitutionally vague because its standard of proscribed conduct was left completely to police discretion.[98] Coates was convicted under an ordinance which made it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by."[99] The majority stated that the ordinance was "vague, not in the sense that it require[d] a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct [was] specified at all."[100] The Court reasoned that prohibiting behavior annoying to persons passing by meant that violating the ordinance depended entirely on whether or not the enforcing officer was annoyed.[101] As a consequence of giving such uncircumscribed discretion to police officers, no citizen could hope to conform his behavior to a statute that provided no ascertainable standard for enforcement.[102]

The Court next faced a loitering statute in 1972, when it decided *Papachristou v. City of Jacksonville*, a seminal loitering case.[103] In *Papachristou*, the Court reversed the convictions of eight defendants under a Jacksonville, Florida vagrancy ordinance, holding the ordinance void for vagueness under the Due Process Clause.[104] The ordinance, among other things, criminalized

> [r]ogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pick-pockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wan-

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[97] *Id.*

[98] Coates v. Cincinnati, 402 U.S. 611, 614 (1971).

[99] City of Cincinnati v. Coates, 255 N.E.2d 247, 248 (Ohio 1970).

[100] *Coates*, 402 U.S. at 610, 614.

[101] *Id.* at 611, 614.

[102] *Id.* at 614-15.

[103] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[104] *Id.* at 162.

> dering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children.[105]

The Court relied on both the notice and the discretion bases of the void for vagueness doctrine to invalidate the ordinance.[106] First, it stated that the ordinance did not give sufficient notice of what was prohibited conduct.[107] The Court noted that activities prohibited by the ordinance were part of the traditional amenities of life that gave people the sense of independence and self-confidence, and that they embodied the honored right to dissent and to be a nonconformist.[108] Thus, much of the conduct made criminal was generally considered innocent.[109] Second, the Court concluded that the ordinance encouraged arbitrary arrests and convictions.[110] The Court observed that the city of Jacksonville purposefully drafted the ordinance with expansive breadth to increase the arresting power of its police.[111] It enabled "men to be caught who [were] vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense."[112]

However, the Court has established a precedent for relying on internal police guidelines as a limiting construction on what otherwise is a vague ordinance.[113]

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[105] *Id.* at 156 n.1.

[106] *Id.* at 162.

[107] *Id.*

[108] *Id.* at 164.

[109] *Papachristou*, 405 U.S. at 163.

[110] *Id.* at 162.

[111] *Id.* at 165.

[112] *Id.* at 166.

[113] Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982). In *Morales*, the city argued that Chicago Police Department's internal General Order 92-4, which granted the authority to enforce the Ordinance only to designated officers within designated areas, was sufficient to limit police discretion. City of Chicago v. Morales, 527 U.S. 41, 63 (1999).

Thus, in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, the Court upheld the validity of a drug paraphernalia ordinance by relying on police guidelines that narrowed police's discretion in its enforcement.[114] The Court established that "[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered."[115]

Finally, in *Kolender v. Lawson*, the Court struck down a California loitering statute that required loiterers and wanderers to provide police officers with credible and reliable identification as well as give a reason for their presence.[116] In holding the statute void for vagueness, the majority reasoned that the statute failed to clarify what constituted credible and reliable identification.[117] The Court declared that the vagueness doctrine required a criminal statute to define the offense with such specificity that (1) ordinary persons could understand what conduct the statute prohibited, and in a way that (2) did not encourage arbitrary and discriminatory enforcement.[118] Although the test was two-pronged, the Court announced that the more important aspect of the vagueness doctrine was not actual notice, but the other principal element – the requirement that the legislature establish minimal guidelines to govern law enforcement.[119]

Nevertheless, the *Kolender* Court applied both prongs of the test.[120] It began the analysis by stating that the "credible and reliable" requirement was so vague that it contained no standard to determine what a person had to do to comply with the identification provision of the statute.[121] Thus, the statute failed the notice prong of the test.[122] The Court then examined the statute in light of the more

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[114] *Vill. of Hoffman Estates*, 455 U.S. at 500-04.

[115] *Id.* at 494 n. 5 (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)); *see also id.* at 504 ("The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance . . . . [S]uch administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope.").

[116] Kolender v. Lawson, 461 U.S. 352, 353 (1983).

[117] *Id.* at 353-54.

[118] *Id.* at 357.

[119] *Id.* at 357-58 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

[120] *Id.* at 358.

[121] *Id.*.

[122] *Kolender*, 461 U.S. at 358, 361.

important prong – police discretion.[123] The Court stated that a law was unconstitutionally vague if it encouraged arbitrary or discriminatory enforcement.[124] The majority held that the statute at issue was unconstitutionally vague because the "credible and reliable" standard entrusted lawmaking to the situational judgment of the police, giving them virtually unlimited discretion.[125]

IV. *CITY OF CHICAGO V. MORALES*: CHICAGO'S ANTI-LOITERING ORDINANCE VIOLATES THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

The Court, in a six to three decision that generated six different opinions, struck down the Ordinance on vagueness grounds.[126] However, the reasoning of the Justices in the majority diverged.[127] The only issue that mustered a majority was that the breadth of the Ordinance violated the requirement that the legislature establish minimal guidelines to govern law enforcement.[128] All six Justices agreed that the Ordinance's language, which failed to clearly define proscribed behavior, granted excessive discretion to the police, with a potential for arbitrary or discriminatory enforcement in violation of the Due Process Clause.[129]

A. PLURALITY OPINION

Writing for three Justices,[130] Justice Stevens applied the two-prong *Kolender* test for vagueness and determined that the Ordinance failed both prongs.[131] Jus-

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[123] *Id.* at 358.

[124] *Id.* at 357.

[125] *Id.* at 358, 360.

[126] City of Chicago v. Morales, 527 U.S. 41, 51 (1999). Justice Stevens' opinion was joined in full by Justices Souter and Ginsburg and joined in part by Justices O'Connor, Kennedy, and Breyer. *Id.*

[127] *Id.*

[128] *Id.* at 60.

[129] *Id.* at 60-62.

[130] Justice Stevens was joined by Justices Souter and Ginsburg. *Id.* at 60.

[131] *Id.*

tice Stevens stated that the test required that a criminal statute: (1) provide the kind of notice that will enable ordinary people to understand what conduct it prohibits, and (2) provide minimum guidelines for police officers so that enforcement is neither arbitrary nor discriminatory.[132]

The plurality first concluded that the Ordinance failed the notice prong of the test.[133] Justice Stevens analyzed the Ordinance's definition of "loitering" and reasoned that it was difficult to imagine how any Chicagoan standing in a public place with a group of people would know if they had an apparent purpose.[134] The plurality noted that state courts uniformly invalidated loitering laws that did not join the term "loitering" with some other overt act or evidence of criminal intent in the definition of the crime.[135] In response to the city's contention that a dispersal order resolved any ambiguity by providing actual notice of what citizens were expected to do, Justice Stevens stated that an order given after an officer had identified impermissible loitering could not possibly afford advance notice as to what loitering was prohibited.[136] The plurality also reasoned that the dispersal order was itself vague because it gave no guidance as to how far and for how long a group of loiterers should disperse.[137] According to the plurality, the Ordinance was vague "not in the sense that it require[d] a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct [was] specified at all."[138]

The plurality then concluded that the Ordinance failed the second prong of the *Kolender* test because, by defining loitering as "remain[ing] in any one place with no apparent purpose," it gave too much discretion to the police in deciding what activities constituted loitering.[139] The Court acknowledged the city's ar-

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[132] Morales, 527 U.S. at 56 (citing Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

[133] *Id.* at 60.

[134] *Id.* at 56-57. Justice Stevens explained that the Ordinance's gang member requirement placed an insufficient limit on the authority to disperse because the Ordinance could be applied to gang and non-gang members alike, hence "[f]riends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member." *Id.* at 63.

[135] *Id.* at 56-58 (citing Tacoma v. Luvene, 827 P.2d 1374 (Wash. 1992); People v. Superior Court, 758 P.2d 1046, 1052 (Cal. 1998)).

[136] *Id.* at 58.

[137] *Id.*

[138] *Morales*, 527 U.S. at 60.

[139] *Id.* at 61. Justice Stevens noted that the Ordinance had the odd consequence of ex-

gument that the grant of discretion under the Ordinance was not excessive because the Ordinance did not allow a police officer to issue a dispersal order to those persons who had an apparent purpose.[140] Additionally, the plurality addressed the city's argument that discretion was limited since there was no violation if individuals obeyed the order and because a police officer could not issue a dispersal order if none of the loiterers was a street gang member.[141] Rejecting the city's arguments, the Court noted that the mandatory language of the Ordinance required a police officer to order persons to disperse without first inquiring about their possible purposes.[142] The Court explained that the mere fact that there was no inquiry regarding a person's purpose caused the Ordinance to criminalize even innocent and lawful behavior.[143] The Court also stated that the fact that an order to disperse must be disobeyed before a violation of the Ordinance occurred was immaterial because it did not provide the police officer with any guidance regarding whether a dispersal order should be issued in the first place.[144] Justice Stevens explained that "it matters not whether the reason that a gang member and his father. . . might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark" – in both circumstances, the Ordinance would mandate that an officer order the individuals to disperse.[145]

The Court acknowledged the city's argument that the Chicago Police Department's General Order 92-4 limited police officers' discretion in enforcing the Ordinance.[146] In rejecting General Order 92-4 as a limiting construction, the Court stated that the fact "[t]hat the police . . . adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a de-

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cluding from its coverage much of the intimidating conduct that motivated its enactment since the most harmful gang loitering is motivated by an apparent purpose to publicize the gang's dominance over certain territory or to conceal dealing in illegal drugs. *Id.* at 61, 63.

[140] *Id.*

[141] *Id.* at 60.

[142] *Id.*

[143] *Id.*

[144] *Morales,* 527 U.S. at 62.

[145] *Id.* at 60. Justice Stevens also found that the dispersal order was vague in its own right because it failed to specify how long the loiterers must remain apart and how far they must move. *Id.* at 59.

[146] *Id.* at 62.

fense to a loiterer who might be arrested elsewhere."[147] Furthermore, the Court observed that "a person who knowingly loitered with a well-known gang member anywhere in the city [could not] safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be."[148]

According to the Court, the Ordinance's definition of loitering created an inherently subjective standard for police officers in enforcing the law.[149] The Court explained that while it might not be clear to the officer what apparent purpose a bystander may have, it may seem perfectly clear to the bystander that his conduct conveys his purpose.[150] The Court particularly noted that although a bystander's conduct may be completely innocent, the Ordinance required dispersal even for harmless conduct.[151] The requirement that a police officer reasonably believe that one of the loiterers be a gang member, the Court stated, placed no limitation on the officer's authority to issue a dispersal order.[152] The Court pointed out that if the Ordinance's definition of loitering contained an additional element of harmful conduct, then such a reasonable belief might provide an adequate limitation on police discretion.[153] In the absence of such an additional element, however, the Court reasoned that the term loiter, as defined, was unconstitutionally vague and left the Ordinance susceptible to arbitrary enforcement.[154]

Only the three Justices of the plurality concluded that loitering for innocent purposes was a liberty interest protected by the Due Process Clause of the Four-

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[147] *Id.* at 63.

[148] *Id.* at 63-64.

[149] *Id.* at 62.

[150] *Morales*, 527 U.S. at 62.

[151] *Id.* at 62-63. The Court explained that since issuing an order to disperse is left to the subjective determination of an officer, most idlers would be unaware that their actions were proscribed. *Id.* Furthermore, as the Court hypothesized, "[p]resumably an officer would have discretion to treat some purposes – perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening – as too frivolous to be apparent if he suspected a different ulterior motive." *Id.* at 62. In addition, an overly eager officer, knowledgeable of the city's concern with gang violence, may ignore the text of the Ordinance and issue a dispersal order, despite evidence of an actual illicit purpose. *Id.*

[152] *Id.* at 62-63.

[153] *Id.*

[154] *Id.* at 62-64.

teenth Amendment.[155] Justice Stevens expressly recognized the right to move from one place to another according to desire as an attribute of personal liberty.[156] The plurality reached this conclusion by relying on the part of *Papachristou v. Jacksonville* that extolled the virtues of walking, strolling, and wandering as historical amenities of life.[157] Moreover, in response to the city's citation to historical precedent against loitering as a fundamental right, the plurality noted that although anti-loitering ordinances may have had a long history in American heritage, it did not ensure their constitutionality.[158]

Despite its recognition of this fundamental liberty interest, the plurality did not find that the Ordinance invaded constitutionally protected First Amendment rights.[159] Because the term "loiter" was defined as remaining in one place with no apparent purpose, the plurality reasoned that it was clear that the Ordinance did not prohibit any form of conduct that was apparently intended as an expression.[160] Thus, according to the plurality, the Ordinance was inapplicable to assemblies designed to demonstrate their support of, or opposition to, a particular point of view.[161] The plurality further stated that the adverse impact the Ordinance might cause on the socialization between gang members and other people did not abridge the First Amendment right of association.[162]

B. CONCURRENCES

Concurring in part and concurring in the judgment, Justice O'Connor emphasized that curbing arbitrary enforcement was the more important aspect of the vagueness doctrine.[163] Like Justice Stevens, Justice O'Connor found the "no ap-

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[155] *Id.* at 53.

[156] *Morales*, 527 U.S. at 53.

[157] *Id.* (citing Papachristou v. Jacksonville, 405 U.S. 156, 164 (1972)).

[158] *Id.*at 54 n.20.

[159] *Id.* at 53-54

[160] *Id.* at 53.

[161] *Id.*

[162] *Morales,* 527 U.S. at 53.

[163] *Id.* at 64-65 (O'Connor, J., concurring in part and concurring in the judgment).

parent purpose" standard unacceptably subjective.[164] Justice O'Connor noted that the Illinois Supreme Court could have construed "loitering" to mean "remain[ing] in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities."[165] However, the Justice observed that the U.S. Supreme Court could not itself impose a definition of loitering that would comport with the city's findings and due process.[166] Justice O'Connor stated that because the *Kolender* test had two independent prongs, the Court's analysis should have ended once it had concluded that the Ordinance failed the discretion prong.[167] Accordingly, the Ordinance was unconstitutionally vague because it failed to provide minimal guidelines for law enforcement, and Justice O'Connor did not find it necessary to address any other issues of the case.[168]

Justice Breyer, like Justices O'Connor and Kennedy, concurred in the judgment and also concurred with respect to the discretion aspect of the vagueness test.[169] Justice Breyer explained that the Ordinance was unconstitutional not because a police officer used discretion wisely or poorly in a particular case, but because there was too much discretion reserved to the police in every case.[170]

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[164] *Id.* at 64-66 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor was careful to point out that there remained alternative ways to combat the very real threat posed by gang intimidation and violence. *Id.* at 67. The Justice noted that the Court properly distinguished the Ordinance from statutes that require loiterers to have a harmful purpose, from laws that target gang members only, and from laws that incorporate limits on the area and manner in which the laws may be enforced. *Id.*

[165] *Id.* at 68 (O'Connor, J., concurring in part and concurring in the judgment).

[166] *Id.* Justice O'Connor observed that the Illinois Supreme Court had misapplied Supreme Court precedent when reasoning that it was required to hold the Ordinance vague because it was intentionally drafted in a vague manner. *Id.* The Justice maintained that the Court had never held that the intent of the drafters should be used to determine if a law was vague. *Id.* Nevertheless, Justice O'Connor concluded that the Court could not impose a limiting construction that a state supreme court declined to adopt. *Id.* (citing Kolender v. Lawson, 461 U.S. 352, 355-56 n.4).

[167] *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

[168] *Morales,* 527 U.S. at 66-67 (O'Connor, J., concurring in part and concurring in the judgment).

[169] *Id.* at 69-72 (Breyer, J., concurring in part and concurring in the judgment).

[170] *Id.* at 71 (Breyer, J., concurring in part and concurring in the judgment). Justice Breyer noted that the city had constitutional alternatives if it applied a more specific ordinance to circumstances like those present in Chicago's high-crime areas. *Id.* at 73.

Even defendants who had sufficient notice of what conduct was prohibited, Justice Breyer reasoned, could suffer from undue police discretion, therefore, every defendant had standing to mount a facial attack on the Ordinance.[171]

C. DISSENTS

Justice Scalia dissented, asserting that the majority struck down a clearly reasonable ordinance.[172] Justice Scalia interpreted precedent as requiring that a successful facial vagueness challenge establish that a law is unconstitutional in every conceivable application – a burden that the defendants failed to carry.[173] The Justice argued that the plurality manufactured an exception to the prevailing rule for cases in which a vague criminal law contained no mens rea requirement and implicated a constitutional right.[174] Putting aside skepticism about the existence of such an exception, Justice Scalia insisted that there was no constitutionally protected right to loiter and that the willful failure to obey a police order constituted sufficient wrongful intent.[175]

Justice Scalia stated that the plurality recklessly used the term "constitutional right" in the absence of the slightest evidence supporting a constitutional right to loiter.[176] Moreover, Justice Scalia found no historical underpinnings in the nation's history that would support the finding of such a fundamental liberty interest.[177] Justice Scalia further asserted that the plurality ignored the established method for due process analysis by not carefully and narrowly describing the asserted right, and then examining whether that right was manifested in '[o]ur Nation'sour nation's history, legal traditions and practices.[178]

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[171] *Id.*

[172] *Id.* at 74 (Scalia, J., dissenting). Justice Scalia maintained that the Ordinance was simply a local government legitimately exercising its police power. *Id.* at 73-74. The Justice analogized the Ordinance to speed limit laws that infringe upon the freedoms of all but are nevertheless considered constitutional. *Id.* at 73.

[173] *Id.* at 80 (Scalia, J., dissenting).

[174] *Morales,* 527 U.S. at 83 (Scalia, J., dissenting).

[175] *Id.* at 83-87, 89 (Scalia, J., dissenting).

[176] *Id.* at 84 (Scalia, J., dissenting).

[177] *Id.* at 83-84 (Scalia, J., dissenting).

[178] *Id.* at 85 (Scalia, J., dissenting). Justice Scalia contended that the plurality short-cut the established substantive due process analysis, concluding that to the plurality "the historical practices of our people are nothing more than a speed bump on the road to the right result."

Justice Scalia then concluded that the Ordinance survived both prongs of the Court's vagueness test.[179] According to Justice Scalia, police discretion in the issuance of a dispersal order was sufficiently limited by the requirement of reasonable belief and by the order's narrow applicability to the objectively discernible and constitutionally unprotected act of remaining in a place with no apparent purpose.[180] Specifically, Justice Scalia argued that the requirement that police officers reasonably believe that a member of the group to which the order was issued was a criminal gang member sufficiently resembled probable cause, eliminating the possibility of arbitrary or discriminatory enforcement.[181] Justice Scalia dismissed the Illinois Supreme Court's pronouncement that the Ordinance vested absolute discretion in the police as a legal conclusion and not a binding construction of the Ordinance's text.[182]

Lastly, Justice Scalia pointed out the logical inconsistency of Justice Breyer's position that the Ordinance was clear enough to provide sufficient notice to citizens as to what conduct was prohibited, but not clear enough to provide the police with sufficient notice of the same conduct.[183]

Justice Thomas, in a separate dissent joined by Justices Rehnquist and Scalia, remarked upon the social decline in city neighborhoods, the national tragedy caused by criminal gangs, and the reasonableness of the Ordinance as a response to those problems.[184] Justice Thomas concluded that the Ordinance was not vague and did not violate due process because loitering was not a fundamental right traditionally recognized in our nation's history.[185] The rich history of vagrancy and loitering laws in America, Justice Thomas argued, disproved the plurality's claim of a substantive due process right to loiter for innocent purposes.[186] With respect to the vagueness test, Justice Thomas reasoned that the discretion

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Id.

[179] *Id.* at 89-90 (Scalia, J., dissenting).

[180] *Morales,* 527 U.S. at 91-94 (Scalia, J., dissenting).

[181] *Id.* at 92 (Scalia, J., dissenting).

[182] *Id.*

[183] *Id.* at 95 (Scalia, J., dissenting).

[184] *Id.* at 98-101 (Thomas, J., dissenting).

[185] *Id.* at 98 (Thomas, J., dissenting).

[186] *Morales,* 527 U.S. at 98 (Thomas, J., dissenting).

granted to the police was no more than what had long been permitted.[187] The plurality's finding that the Ordinnace provided inadequate notice was also unconvincing to Justice Thomas, as Justice Thomas believed that there was nothing vague about an order to disperse.[188]

In addition, Justice Thomas emphasized the public policy reasons for upholding the Ordinance and elaborated on the human costs exacted by criminal gangs.[189] Justice Thomas argued that the majority's holding rebuffed the well-established principle that the police have the authority and duty to disperse those persons who are gathered in a way that threatens the public peace.[190] Moreover, Justice Thomas asserted that the plurality's decision sacrificed the rights of law-abiding citizens to live in safe neighborhoods while guaranteeing to gang members a constitutionally protected right to loiter freely.[191]

V. CONCLUSION

Advocates of aggressive community policing of gang-infested neighborhoods should not be discouraged by the *Morales* decision. In fact, legislatures interested in improving the quality of life in troubled neighborhoods should take their cue from Justice O'Connor's opinion and draft more carefully worded antigang loitering ordinances.[192]

When confronted with a more carefully worded antigang loitering ordinance the Court, as presently constituted, will likely uphold it. For example, based on

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[187] *Id.* at 109-10. Justice Thomas argued that police performed a peace-keeping function and necessarily had to exercise some discretion in the execution of their duties, which was recognized by the Court's Fourth Amendment jurisprudence. *Id.*

[188] *Id.* at 111 (Thomas, J., dissenting). Justice Thomas also stated that any fool would know whether or not he was within the Ordinance's proscription, noting that the plurality was underestimating the intellectual capacity of the citizens of Chicago. *Id.* at 114.

[189] *Id.* at 98-99 (Thomas, J., dissenting).

[190] *Id.* at 101-102 (Thomas, J., dissenting).

[191] *Id.* at 99-103 (Thomas, J., dissenting).

[192] Justice O'Connor reasoned that due to the overwhelming problem of gang violence in America it was necessary to vest some discretion in the hands of the police. *Morales,* 527 U.S. at 68 (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor acknowledged that while the Court was bound by the expansive construction of the Illinois Supreme Court, she did not agree with such an interpretation and would have read the ordinance to apply only to loitering with no apparent purpose other than to cause harm. *Id.*

the Court's opinions,[193] vagueness in the Chicago ordinance could probably be cured by changing the words "no apparent purpose" to "apparently harmful purpose" or to "no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities."[194]

Neither of these revisions, however, would further the protection of individual freedoms that may nevertheless be threatened by such ordinances because only three Justices were willing to recognize loitering as a fundamental liberty interest.[195] On the other hand, if the majority had recognized loitering as a fundamental right, loitering ordinances would be analyzed under strict scrutiny and individual freedom would be accorded greater weight when balanced against the governmental interest in public protection. This would be a more appropriate approach, given the often-sinister history of loitering laws.

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[193] *See* Justice O'Connor's and Justice Breyer's concurrences. *Morales*, 527 U.S. at 68, 71. It can also be inferred from the language of Justice Stevens' opinion that the gang member presence requirement might have saved the ordinance from granting too much discretion had it been coupled with a requirement of "an apparently harmful purpose." *See id.* at 59-60.

[194] In fact, in February 2000, the Chicago City Council passed a new anti-loitering ordinance aimed at thwarting gang activity. CHICAGO, ILL., MUNICIPAL CODE § 8-4-015 (2000). In seeking to pass constitutional muster, the ordinance defines "gang loitering" as "remaining in any one place under circumstances that would warrant a reasonable person to believe the purpose or effect of that behavior is to enable a criminal street gang to establish control over identifiable areas, to intimidate others from entering those areas or to conceal illegal activities." *Id.* Officers are required to tell persons in the targeted group that they are in violation of the ordinance and that they must disperse and not return for at least three hours. *Id.* The officers must give the loiterers reasonable time to disperse before making arrests. *Id.* The new ordinance may be enforced only within areas the police superintendant designates as "hot zones" of known gang or drug activities. *Id.*

[195] Justice Stevens was joined by Justices Ginsburg and Souter in the portion of the opinion recognizing the freedom to loiter for innocent purposes as a protected liberty interest. *Morales* 527 U.S. at 45, 53. These Justices analogized a liberty interest in freedom to loiter to the fundamental right to freedom of movement historically recognized by the Court. *Id.* at 53-54.