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Just Hangin' Around: Gangs and Due Process Vagueness in *City of Chicago v. Morales*

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Just Hangin' Around: Gangs and Due Process Vagueness in *City of Chicago v. Morales*

In *City of Chicago v. Morales*,[1] the Supreme Court revisited the issue of the constitutionality of municipal and state loitering laws. In this case the Court was presented with a Chicago municipal ordinance that prohibited individuals from loitering with known gang members.[2] The Court struck down the ordinance as overly vague under the Due Process Clause of the Fourteenth Amendment.[3] It found that the law gave too much discretion to police officers charged with its enforcement and did not define its crucial terms specifically enough.[4] The Court was closely divided, however, and both the concurring and dissenting Justices gave cities suggestions for altering their loitering ordinances to make them conform to constitutional requirements.[5]

I. FACTUAL BACKGROUND

In 1992 the Chicago City Council faced a major problem—gang violence was on the rise, and the police had stated they were unable to combat it under the existing city ordinances. The problem was that gang members simply loitered on corners and on sidewalks while the police were in view. Then they terrorized neighborhood residents and participated in drug deals when the police were out of sight. The city held hearings in which residents, police, and alderpersons could voice their concerns. These hearings led the council to pass the Gang Congregation Ordinance, better known as the "gang-loitering ordinance."[6]

The ordinance established a four-part criminal offense punishable with a $500 fine, imprisonment of 6 months or less, and a 120 hour communi-

1. 119 S. Ct. 1849 (1999).
2. *Id.* at 1854.
3. *Id.* at 1863.
4. *Id.* at 1859-63.
5. *Id.* at 1856-63, 1867-87.
6. *Id.*; *see also* City of Chicago v. Youkhana, 660 N.E.2d 34, 36 (Ill. App. Ct. 1995).

ty service requirement.[7] First, a police officer must reasonably suspect at least one of a group of two or more individuals in a "'public place'" to be a "'criminal street gang membe[r].'"[8] Second, the officer must observe these individuals "'loitering,'" which is defined as "'remain[ing] in any one place with no apparent purpose.'"[9] Third, the officer must order all the individuals to disperse "'from the area.'"[10] Finally, at least one person must refuse to comply with the officer's order of dispersal.[11] Whether the individuals who refuse to move along are gang members or not is irrelevant to their liability for prosecution under this statute.[12]

During the initial drafting of the ordinance, the Chicago Police Department successfully lobbied the City Council to purposefully leave the wording broad because the police wanted to develop in-house policies to govern the ordinance's enforcement and better meet their needs.[13] Two months after the City Council adopted the ordinance, the police department set up guidelines for enforcing it by establishing General Order 92-4.[14] The order limited who within the department had the power to arrest under the ordinance, set forth criteria for defining a street gang and what membership in a gang entailed, and outlined the particular high-crime areas of the city where the ordinance would be enforced.[15]

Morales was a consolidation of a number of different cases brought before Illinois trial courts. In each of these cases at least one individual was arrested for violating the Gang Congregation Ordinance. During the three years the ordinance was in effect, the police issued in excess of eighty-nine thousand orders for dispersal.[16] These warnings culminated in forty-two thousand arrests. During this time two trial judges held the ordinance to be constitutional while eleven found that it was not.[17]

This consolidated appeal involved seventy different defendants charged under the Gang Congregation Ordinance.[18] It included both cases in which the trial court ruled the ordinance was a valid exercise of the

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7. 119 S. Ct. at 1854 n.2.
8. *Id.* (quoting CHICAGO, ILL., MUN. CODE § 8-4-015 (1992)) (alteration in original).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. City of Chicago v. Morales, 687 N.E.2d 53, 58-59 (Ill. 1997).
14. 119 S. Ct. at 1855.
15. *Id.*
16. *Id.* The ordinance was in effect from 1993-1995. *Id.* at 1855 n.6.
17. *Id.*
18. 687 N.E.2d at 57.

city's power and the cases in which it was judged to be invalid.[19] The court of appeals found the ordinance to be invalid.[20] The court held that the ordinance violated the First Amendment of the United States Constitution and Article I, Section Five of the Illinois Constitution because it offended the freedoms of association, assembly, and expression.[21] Likewise, the court held the ordinance was unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment.[22] Finally, the court held the ordinance was unconstitutional because it punished a status crime and violated the Fourth Amendment by allowing an officer to arrest a suspect without probable cause.[23] The court sympathized with the city's efforts to eradicate gang violence, but stated that "our constitutional standards, fortunately, do not slide up and down a scale according to the gravity of the crime problem we wish to combat. If it were otherwise, the fundamental ideals on which this country is based would slowly deteriorate."[24]

The City appealed to the Illinois Supreme Court, which affirmed the ruling of the court of appeals.[25] The Illinois Supreme Court found for defendants, but on a narrower ground than that of the court of appeals.[26] The court held that the ordinance was unconstitutional under the Due Process Clause because it was vague on its face and because it arbitrarily restricted personal liberties.[27] It found that the gang-loitering ordinance violated both the adequate notice and nondiscriminatory enforcement requirements of the Due Process Clause.[28] Thus, the court had no need to reach the other issues that the court of appeals examined.[29]

The City again appealed the case, and the United States Supreme Court granted certiorari.[30] A divided Supreme Court affirmed the ruling of the lower courts.[31] Six Justices agreed with the judgment, and three Justices filed concurring opinions.[32] Three Justices dissent-

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19. 119 S. Ct. at 1855.
20. 660 N.E.2d at 36.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 42-43.
25. 119 S. Ct. at 1856.
26. *Id.*
27. 687 N.E.2d at 59.
28. *Id.* at 60-64.
29. *Id.* at 59.
30. 119 S. Ct. at 1856.
31. *Id.* at 1854, 1856.
32. Justice Stevens wrote the majority opinion, which Justices Souter and Ginsburg joined as to Parts III, IV, and VI. Justice O'Connor wrote a concurrence, which was joined

ed.[33] The majority found that the ordinance was unconstitutionally vague on its face because it failed "to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests."[34] In doing so the Court held that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[35] However, the Court agreed with the City that the law did not infringe upon the First Amendment interests found by the Illinois Court of Appeals.[36] The majority did not comment on the Fourth Amendment and status arguments upon which the court of appeals relied.[37]

II. LEGAL BACKGROUND

Loitering laws predate the founding of America. In fact, laws that deal with criminalizing vagrancy and loitering trace their roots to the breakup of feudalism and to the Black Plague in England over five hundred years ago.[38] Initially, vagrancy laws had the economic rationale of establishing a fixed wage by preventing laborers from traveling to neighboring communities where labor was more scarce and wages were higher.[39] As time passed, increasingly large numbers of people became poor and unemployed and filled English roads to steal from those who traveled along them.[40] Loitering laws then became a force for crime prevention.[41] As America became populated by people from England and other parts of Europe, these loitering laws were adopted with a focus on criminal punishment.[42]

This focus on crime prevention remains the most common reason for passing loitering laws today.[43] They are used for a variety of reasons, from stopping drug dealers and prostitutes from frequenting an area, to preventing the obstruction of public passageways, to allowing the police

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by Justice Breyer. Justice Breyer also wrote a concurrence, as did Justice Kennedy.

33. Justice Scalia wrote a dissenting opinion, and Justice Thomas wrote another dissenting opinion, which was joined by Chief Justice Rehnquist and Justice Scalia.

34. 119 S. Ct. at 1857 (citing Kolender v. Lawson, 461 U.S. 352, 358 (1983)).

35. *Id.*

36. *Id.*

37. *Id.* at 1857-63.

38. Peter W. Poulos, Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CAL. L. REV. 379, 385 (1995).

39. *Id.* at 385-86.

40. *Id.* at 386.

41. *Id.*

42. *Id.*

43. *Id.*

to "control persons who, although not traditionally considered criminals, were nonetheless considered undesirable."[44]

Throughout the twentieth century, the Supreme Court has been asked on numerous occasions to review cases in which a defendant was convicted under a loitering ordinance. Over the years the Court has continuously narrowed what and whom a city or state is allowed to punish under this type of regulation. The following cases are not an exhaustive list of the loitering cases reviewed by the Supreme Court, but they are the most representative of the Court's outlook towards due process vagueness in loitering laws. Vagueness may invalidate a criminal law in one of the two following ways: (1) if the law fails to provide sufficient notice for an ordinary person of reasonable intelligence to comply, or (2) if the law encourages "discriminatory enforcement" by police and prosecution.[45]

The first time the Supreme Court directly addressed a loitering ordinance was in *Thornhill v. Alabama*.[46] *Thornhill* involved an Alabama statute that prohibited loitering of those who were picketing or protesting in conjunction with union activities.[47] The majority reversed 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.[48] The Court also believed 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."[49]

In 1965 the Court once again visited the area of loitering law. In *Shuttlesworth v. City of Birmingham*,[50] the Court found there was no evidence to support defendant's conviction under a Birmingham loitering ordinance.[51] In dicta the Court stated that a literal reading of the second part of the ordinance meant that "a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city."[52] This type of law, the Court believed, "bears the hallmark of a

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44. *Id.* at 386-87.
45. 119 S. Ct. at 1859.
46. 310 U.S. 88 (1940).
47. *Id.* at 91.
48. *Id.* at 97.
49. *Id.* at 97-98.
50. 382 U.S. 87 (1965).
51. *Id.* at 95.
52. *Id.* at 90. The second part of the ordinance stated, "'It shall also be 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.'" *Id.* at 88 (quoting BIRMINGHAM, ALA., GEN. CITY CODE § 1142).

police state."[53] Merely refusing to comply with an officer's request to disperse would not be sufficient to arrest someone for the offense of loitering.[54]

In 1972 the Supreme Court handed down a ruling that set forth the seminal rule in judging all loitering cases. In *Papachristou v. City of Jacksonville*,[55] the Court reversed the conviction of eight defendants under a Jacksonville, Florida vagrancy statute, finding the ordinance to be void for vagueness under the Due Process Clause.[56] The Court relied upon both bases of the void for vagueness doctrine to invalidate this ordinance.[57] First, it stated that the ordinance simply did not give sufficient notice to defendants of what was prohibited conduct.[58] The activities set forth as those deserving of punishment "are historically part of the amenities of life as we have known them . . . giving our people the feeling of independence and self-confidence . . . [that] have dignified the right of dissent and have honored the right to be nonconformists."[59] Thus, much of the conduct made criminal was generally considered to be innocent conduct.[60] Second, the Court found that the ordinance encouraged "arbitrary and erratic arrests and convictions."[61] The Court believed that the drafters in Jacksonville had purposefully written this ordinance with expansive breadth to increase its police's arresting power.[62] It enabled "'men to be caught who are vaguely

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53. 382 U.S. at 91.
54. *Id.*
55. 405 U.S. 156 (1972).
56. *Id.* at 162.
57. *Id.*
58. *Id.*
59. *Id.* at 164.
60. *Id.* at 163. At the time of defendants' convictions the Jacksonville Ordinance Code § 26-57 provided as follows:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children . . . .

Id. at 156 n.1 (internal quotation marks omitted).
61. *Id.* at 162.
62. *Id.* at 165.

undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.'"[63]

Implicit in the *Papachristou* ruling was that cities and states could not pass loitering laws simply as a way of increasing their power to arrest. Likewise, it carried with it the requirement that the state narrowly define who fell within the ordinance and ensure that the person's actual conduct at least in some way constituted a recognizable offense.[64]

In 1971, in *Coates v. City of Cincinnati*,[65] the Supreme Court examined a Cincinnati loitering ordinance, again applying a void for vagueness test.[66] In *Coates* a group was arrested for demonstrating during a labor dispute.[67] The Court believed the ordinance was "unconstitutionally vague because it subject[ed] the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorize[d] the punishment of constitutionally protected conduct."[68] The vague term in *Coates* was "annoy."[69] The police were allowed to arrest individuals who were loitering and conducting themselves in a way that was "annoying" to passersby.[70] The Court found this unacceptable because a person's guilt or innocence should not depend upon "whether or not a policeman [was] annoyed."[71] The criminalization of innocent conduct was the downfall of the ordinance.[72]

One year later in *Colten v. Kentucky*,[73] the Court made one of its few rulings favorably construing a loitering law.[74] In *Colten* defendant was arrested for talking to a police officer and for failing to disperse when the officer repeatedly asked him to do so while his friend was receiving a traffic ticket. Defendant was arrested under a Kentucky statute for disorderly conduct. As written, the offense included a loitering component.[75] The Court determined that defendant was arrested properly because he was not engaged in First Amendment conduct and

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63. *Id.* at 166 (quoting Winters v. New York, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting)).
64. *Id.* at 165.
65. 402 U.S. 611 (1971).
66. *Id.* at 614.
67. *Id.* at 612.
68. *Id.* at 614.
69. *Id.* at 612, 614.
70. *Id.*
71. *Id.* at 614.
72. *Id.* at 615.
73. 407 U.S. 104 (1972).
74. *Id.* at 120.
75. *Id.* at 106-08.

because "[h]e had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation."[76] The Court found the ordinance was not vague because defendant should have known that he would be subject to arrest after he failed to move on when asked to do so.[77]

During the seventeen years between *Colten* and *Morales*, the Supreme Court had little to say about the status of loitering laws. However, there was a great deal of litigation at the state level with respect to these laws. Thus, in *Morales* the Court considered several recent state cases. The following are two of those decisions.

In *City of Tacoma v. Luvene*,[78] the Supreme Court of Washington reviewed a Tacoma municipal ordinance criminalizing "drug loitering."[79] Defendants were three men who had been standing in the middle of an intersection trying to flag down cars. One of the cars stopped, and the police officer saw an exchange of a clear plastic bag apparently containing rock cocaine. Defendant Luvene was later seen in the company of a man smoking a crack pipe and was then arrested for drug loitering.[80]

The court found the ordinance constitutional because "an ordinance that prohibits loitering may survive an overbreadth challenge if it requires the specific intent to engage in an illicit act."[81] Thus, because the ordinance prohibited loitering by individuals who intended to sell or use illegal narcotics, it passed this test.[82] The ordinance also passed the vagueness challenge because it required the police to single out individuals not only because they were loitering, but also because they were involved in drug activity.[83] The ordinance gave suspects notice that they could be subject to arrest if they were connected to drugs in any way in a public setting.

However, in *Nevada v. Richard*,[84] the Supreme Court of Nevada found that a state statute violated the rights of four homeless people and their advocates who were arrested not for some particular activity, but simply for being vagrants.[85] The court found the statute to be vague

76. *Id.* at 109.
77. *Id.* at 110.
78. 827 P.2d 1374 (Wash. 1992).
79. *Id.* at 1376.
80. *Id.* at 1376-77.
81. *Id.* at 1383.
82. *Id.*
83. *Id.* at 1385.
84. 836 P.2d 622 (Nev. 1992).
85. *Id.* at 623-24.

because it failed to give adequate notice of what illegal activity was to be punished.[86]

III. RATIONALE

The Supreme Court's interpretation of the Chicago ordinance in *Morales* rested on the Court's interpretation of the Due Process Clause of the Fourteenth Amendment.[87] Unlike the lower courts, the Supreme Court did not concern itself with First Amendment freedoms, overbreadth, or status crimes.[88] It found First Amendment freedoms were not applicable here because the statute did not abridge either the freedom of speech or association.[89] The Court barely addressed overbreadth or status crimes.[90] Instead, the Court invalidated the ordinance solely because it found sufficient evidence of a violation of the Due Process Clause based on vagueness.[91]

The Court began with the presumption that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment."[92] This does not mean that the Court believes loitering is a substantive due process right that would raise the scrutiny level for the examination of loitering laws.[93] Instead, this was simply the Court's way of placing the freedom to loiter within the greater "liberty" concept of "life, liberty, or property" within the Due Process Clause.[94] Though this helped somewhat to bolster the Court's rationale that loitering is covered under the Due Process Clause, it also has led to some confusion about whether loitering should be considered a fundamental right.

The Court then held that Chicago's loitering ordinance was unconstitutionally vague.[95] Vagueness offends the Due Process Clause because it allows individuals to be arrested for acts they may not recognize as criminal.[96] It can also cause a chilling effect for people asserting constitutionally protected rights if they do not know whether their acts are criminal.[97] Finally, it can allow police to discriminate unfairly

86. *Id.* at 624.
87. 119 S. Ct. at 1857-63.
88. *Id.*
89. *Id.* at 1857.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 1857 n.19.
94. U.S. CONST. amend. XIV, § 1.
95. 119 S. Ct. at 1859-61.
96. *Id.* at 1859.
97. *Id.*

according to their own biases.[98] The Court stated that vagueness may invalidate a criminal law in one of the two following ways: (1) if the law fails to provide sufficient notice for an ordinary person of reasonable intelligence to comply, or (2) if the law encourages "discriminatory enforcement" by police and prosecution.[99]

The Court found a violation of both approaches.[100] Its rationale behind invalidating the ordinance on the first ground was based on the definitions of the words in the statute.[101] To begin, the Court cited the term "loiter" as a problem.[102] "It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'"[103] The problem then becomes not that loitering itself has been criminalized, but just what type of loitering the city had in mind.[104] The Court was bothered because the definition of "loitering" encompassed a great deal of harmless conduct and, in doing so, excluded "from its coverage much of the intimidating conduct that motivated its enactment."[105] The Court referenced the state cases discussed above,[106] declaring that state courts have held that loitering laws without a separate criminal element are overly vague and thus invalid.[107] The Court was equally troubled by the vagueness in the order of dispersal, the identification of a "criminal street gang" member, and the standards of "neighborhood" and "locality."[108] Thus, because the Court found that "the entire ordinance

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98. *Id.*

99. *Id.*

100. *Id.* at 1857-64.

101. *Id.*

102. *Id.* at 1859. The definition of "loiter" in the ordinance is "'to remain in any one place with no apparent purpose.'" *Id.* at 1854 n.2 (quoting CHICAGO, ILL., MUN. CODE § 8-4-015(c)(1)).

103. *Id.* at 1859.

104. *Id.*

105. *Id.* at 1862.

106. *See supra* notes 78-86 and accompanying text.

107. *Id.* at 1860.

108. *Id.* The dispersal order involved a police officer instructing "'all such person to disperse and remove themselves from the area.'" *Id.* The definition of a "criminal street gang" is:

> "[A]ny ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more or the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

Id. at 1854 n.2 (quoting CHICAGO, ILL., MUN. CODE § 8-4-015(c)(2)).

fail[ed] to give the ordinary citizen adequate notice of what is forbidden and what is permitted," it was invalid.[109]

The Court further held that the ordinance violated the second basis for vagueness—overly broad police discretion leading to arbitrary enforcement.[110] "[T]he principal source of the vast discretion conferred on the police in this case is the definition of loitering as 'to remain in any one place with no apparent purpose.'"[111] Thus, the police could arrest anyone whom *they believed* to be standing without an apparent purpose in the company of a gang member.[112] As in *Papachristou* the Court asked whether we want to be able to stand on a street corner only at the whim of a police officer.[113]

Finally, the Court answered the City's argument that all these defects were cured because the police must first order a person to move on, and then that person must disobey the order before an arrest could take place.[114] The Court found this unpersuasive because the dispersal order itself was vague and because previous cases held that a dispersal order alone does not cure the deficiencies in an invalid loitering law.[115]

Justice O'Connor, with whom Justice Breyer joined, concurred in the judgment and in part of the opinion.[116] Justice O'Connor was most concerned with the broad discretion and minimal guidelines that the ordinance offered law enforcement officers.[117] In particular, she was concerned with the discretion allowed to police officers concerning the phrase "with no apparent purpose" and in determining who was a gang member.[118] She worried that it "permits police officers to choose which purposes are *permissible*" and who was to be considered a gang member.[119] Finally, she emphasized that Chicago still has other alternatives for curbing gang violence, most of which are already present in current laws, specifically the city's general disorderly conduct ordinance that allows arrests of "those who knowingly 'provoke, make or aid in making a breach of peace.'"[120]

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109. *Id.* at 1861.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 1861-62.
115. *Id.*
116. *Id.* at 1863-65.
117. *Id.* (O'Connor, J., concurring in part and concurring in the judgment).
118. *Id.* at 1863.
119. *Id.* at 1863-64.
120. *Id.* at 1864.

In his concurrence, Justice Kennedy stated that the ordinance was unconstitutional because it "would reach a broad range of innocent conduct."[121] Justice Breyer emphasized that the ordinance left police officers with an amount of discretion that created a major rather than a "*minor* limitation upon the free state of nature."[122]

Justice Scalia's dissent focused mainly on the impossibility of invalidating the ordinance on its face under existing constitutional jurisprudence.[123] Justice Scalia stated that the test for a facial challenge is to show the law is "unenforceable in *all* its applications, and not just in its particular application to the party in suit."[124] He stated that the law's challengers had not presented a compelling argument that all applications of the loitering ordinance would be invalid.[125] Justice Scalia also posited that there has never been a fundamental right to loiter and that such a right was invented by the majority to further its purpose in invalidating the ordinance.[126] However, it seems that the majority was not insisting that loitering is a substantive due process fundamental right, but instead is simply part of the general liberty interest inherent in the Due Process Clause.[127]

Justice Thomas's dissent argued two main points. First, throughout history there has never been a right to loiter. In fact, quite to the contrary, there have always been laws against loitering.[128] Second, Justice Thomas stressed the needs of the community and its due process rights as overriding those of the gang members and their companions who are loitering on corners.[129]

IV. IMPLICATIONS

Morales is in many ways just one more link in a long chain of loitering jurisprudence. As in so many cases before it, the decision in *Morales* leads the Court further away from upholding a loitering statute. The days of broad vagrancy ordinances as a way to "clean up our streets" are over. No longer will the Court allow police and prosecutors so much discretion.

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121. *Id.* at 1865 (Kennedy, J., concurring in part and concurring in the judgment).

122. *Id.* (Breyer, J., concurring in part and concurring in the judgment) (internal quotation marks omitted).

123. *Id.* at 1867-79 (Scalia, J., dissenting).

124. *Id.* at 1867-68.

125. *Id.* at 1871.

126. *Id.* at 1871-74.

127. 119 S. Ct. at 1857 n.19.

128. *Id.* at 1881 (Thomas, J., dissenting).

129. *Id.* at 1879-81.

However, Justice O'Connor's concurrence, suggesting to cities that they establish loitering laws that require either some "harmful purpose" or the "intimidat[ion of] residents," along with the two dissents gives loitering laws a possible future.[130] In fact, Mayor Richard M. Daley of Chicago stated that the Court's decision was not a major setback for this legislation.[131] "We will go back and correct it, and then move forward," said Daley.[132] The city's corporate counsel went so far as to state that he was "very encouraged" by Justice O'Connor's concurrence and the dissents for giving the city a "road map" to write a loitering law that would pass constitutional muster.[133]

In his article concerning Chicago's Gang Congregation Ordinance, Peter Poulos set forth several suggestions for cities desiring to write a loitering ordinance.[134] Poulos stated that "in order to survive constitutional attack, an ordinance must do more than merely distinguish gang members based solely on their status as such . . . . [It] must adequately distinguish between activity that actually prevents citizens from using public streets and places, and activity that is generally innocent or constitutionally protected."[135]

Poulos stated that first, cities must eliminate the requirement of two or more people because this requirement only heightens judicial scrutiny.[136] Second, they must exclude the requirement that at least one of the individuals be a gang member, for this reaches a great deal of innocent behavior and may be a violation of the Eighth Amendment because it criminalizes status.[137] Finally, cities must "distinguish between activity that reasonably deters citizens from using public streets and places, and activity that is generally innocent or constitutionally protected."[138]

Using the suggestions put forth by Justice O'Connor and by Poulos, cities might craft an ordinance similar to the following:

> Any person or persons who are engaged in unlawful activities and/or are in the process of or have just previously been involved in the intimidation of neighborhood residents or passersby may be asked to

130. *Id.* at 1864 (O'Connor, J., concurring in part and concurring in the judgment).

131. Jan C. Greenburg, *Top Court Ruling Shows Way to a Legal Anti-Loitering Law*, CHI. TRIB., June 11, 1999, at N1, *available in* 1999 WL 2882161.

132. *Id.*

133. *Id.*

134. Poulos, *supra* note 38, at 413-17.

135. *Id.* at 414.

136. *Id.*

137. *Id.*

138. *Id.*

> remove themselves from the immediate area and refrain from intimidation or be detained and charged by the police for failure to comply with such an order.
>
> Unlawful activities shall be defined as drug-related activities, prostitution, gang-related activities for which there is a criminal penalty, disorderly conduct, or any other activities that violate either a city, state, or federal criminal ordinance or statute. Those charged under this Act may also be charged with any of the offenses mentioned herein if there is sufficient evidence for such a charge.

Such an ordinance would still face a number of hurdles, including the vagueness of terms such as "intimidation," "just previously," and "remove themselves from the immediate area." Likewise, opponents may question its necessity at all, for if a loitering statute must include the requirement of an unlawful act, could the offender not merely be charged with the unlawful act? In fact, the Chicago police made this same objection. In an article in the *Chicago Tribune*, officers were cited as saying that while the ordinance was helpful, it has not really been used in the four years since the Illinois Supreme Court invalidated it.[139] "They acknowledged that in most cases they can accomplish the same [result as before] by arresting gang members on disorderly conduct, obstructing traffic and other misdemeanor charges or by staking out street corners and using other strategies . . . and 'we haven't violated anyone's civil rights.'"[140]

It is probably safest for cities and states to steer clear of loitering laws altogether. However, this is much easier said than done. Loitering laws that allow police such wide discretion are very alluring to cities and states looking for a solution to crime. Does it appear likely that *Morales* will end the loitering law discussion? No. Instead, it is likely that in a few years the Court will accept another loitering case. It is also likely that once again the law will fall as unconstitutional, but if Justices O'Connor and Breyer and the three dissenters from *Morales* are satisfied that the city has made the changes noted above, the Court may find the statute to be valid.

JERRITT FARRAR

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139. Gary Marx & Terry Wilson, *Anti-Gang Law's Loss Won't Have Big Impact; Police Haven't Relied on Measure for Years*, CHI. TRIB., June 13, 1999, at C1, *available in* 1999 WL 2882906.

140. *Id.*