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The Gang's All Here: Anti-Loitering Laws in the Face of City of Chicago v. Morales

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THE GANG’S ALL HERE: ANTI-LOITERING LAWS IN THE
FACE OF *CITY OF CHICAGO v. MORALES*

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I. INTRODUCTION

“I have never had the terror that I feel everyday when I walk down the streets of Chicago . . . I have had my windows broken out. I have had guns pulled on me . . . I get intimidated on a daily basis, and it’s come to the point where I say, well, do I go out today.”¹ Such is one of many accounts that led Chicago to pass the Gang Congregation Ordinance² which prohibited loitering by gang members on city streets. Throughout history and in recent years, similar laws have been passed in many cities in the United States³. And in most all recent cases, the constitutionality of such statutes has been challenged, some surviving while others failing.⁴ On June 10, 1999, the United States Supreme Court in *City of Chicago v. Morales* struck down the Chicago loitering ordinance,⁵ adding it to the growing list of loitering

¹Transcript of Proceedings before the City Council of Chicago, Committee on Police and Fire 66-67 (May 15, 1997 on file with Author).

²CHICAGO MUNICIPAL CODE § 8-4-015 (added June 17, 1992).

³For a historical account of loitering laws, see C. RIBTON-TURNER, A HISTORY OF VAGRANTS AND VAGRANCY AND BEGGARS AND BEGGING (1972). For a treatment of recent court cases interpreting various local loitering statutes, see Peter W. Poulos, *Chicago’s Ban on Gang Loitering: Making Sense of Vagueness Overbreadth in Loitering Laws*, 83 CAL L. REV. 379 (1995).

⁴For example, in *City of Tacoma v. Luvone*, 827 P.2d 1374 (Wash. 1992), the Washington Supreme Court upheld the validity of an ordinance prohibiting loitering by individuals who manifest an intent to sell drugs. Conversely, one year later in *Wyche v. State of Florida*, 619 So.2d 231 (Fla. 1993), the Florida Supreme Court struck down a Tampa ordinance that prohibited loitering by individuals who manifest an intent to engage in prostitution.

⁵*City of Chicago v. Morales*, 527 U.S. 41 (1999).

statutes deemed constitutionally deficient. However, this decision did not sound the death knell for all loitering statutes. Rather, the Court has emphasized and defined strict limits that must be placed on them in order to withstand constitutional scrutiny.

This Comment examines *Morales* and the Court's treatment of anti-gang loitering statutes under the vagueness doctrine. Part II examines the City of Chicago's attempt to tackle the problem of gangs terrorizing its citizens and how the Illinois courts dealt with the ordinance. Part III then examines the reasons for the United States Supreme Court invalidating the ordinance, with equal emphasis placed on all the Justice's opinions. Part IV then analyzes the implications of the Court's decision, criticizing the plurality's creation of a fundamental right to loiter and demonstrating how the ordinance survives a vagueness challenge.

II. BACKGROUND

A. Chicago's Attempt to Tackle Gangs

Prior to the adoption of the gang loitering ordinance, the City Council's Committee on Police and Fire held hearings to explore the problems that criminal street gangs present for the City of Chicago. Testimony by witnesses revealed how gang members loiter as part of a strategy to claim territory and recruit new members. Further testimony revealed that street gangs are responsible for a variety of criminal activity, including drive-by shootings, drug dealing, and vandalism.⁶ Additionally, street gangs were accused of being menacing and intimidating regardless of whether their members are violating any other laws at that particular moment.⁷

In response to these concerns, Chicago passed the Gang Congregation Ordinance which prohibited gang members from loitering in a public place.⁸ The pertinent portion of the gang loitering ordinance provides:

⁶Petitioner's Brief at 10, *City of Chicago v. Morales*, 527 U.S. 41 (1999) (No. 97-1121).

⁷*Id.*

⁸The city council incorporated its findings in the preamble of the ordinance, as follows:

WHEREAS, The City of Chicago, like other cities across the nation, has been experiencing an increasing murder rate as well as an increase in violent and drug related crimes; and

WHEREAS, The City Council has determined that the continuing increase in criminal street gang activity in the City is largely responsible for this unacceptable situation; and

WHEREAS, In many neighborhoods throughout the City, the burgeoning presence of street gang members in public places has intimidated many law abiding citizens; and

WHEREAS, One of the methods by which criminal street gangs establish control over identifiable areas is by loitering in those areas and intimidating others from entering those areas; and

WHEREAS, Members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present, while maintaining control over identifiable areas by continued loitering; and

WHEREAS, The City Council has determined that loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and

(a) 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.

(b) 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.⁹

The ordinance remained in effect for three years, during which time police issued over 89,000 dispersal orders and arrested over 42,000 people for violations under the ordinance.¹⁰ The trial courts immediately became divided as to its constitutionality. Two trial judges upheld the law, whereas eleven others ruled it invalid.¹¹ The city eventually stopped enforcing the law when the Illinois Appellate Court ruled it invalid. In overturning several convictions, the court found that it was unconstitutionally vague, it improperly criminalized status rather than conduct, and it jeopardized rights guaranteed under the Fourth Amendment.¹²

B. The Illinois Supreme Court

The Illinois Supreme affirmed the judgment of the appellate court, finding that the anti-gang loitering ordinance violated due process of law because it was impermissibly vague on its face.¹³ It identified two criteria that must be met for a

property in the area because of the violence, drug-dealing and vandalism often associated with such activity; and

WHEREAS, The City also has an interest in discouraging all persons from loitering in public places with criminal gang members; and

WHEREAS, Aggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear[.]

CHICAGO MUNICIPAL CODE § 8-4-015.

⁹*Id.* The ordinance defined loiter as to “remain in any one place with no apparent purpose.” *Id.* Criminal street gang means “any 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 of 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.* Finally, public place means “the public way and any other location open to the public, whether publicly or privately owned.” *Id.* A violation of the ordinance was punishable by up to six months imprisonment, a \$500 fine, and up to 120 hours of community service. *See* Petitioner’s Brief, *supra* note 6, at 10-11.

¹⁰Petitioner’s Brief, *supra* note 6, at 16.

¹¹Petitioner’s Brief, *supra* note 6, at 16.

¹²*See* Chicago v. Youkhana, 660 N.E.2d 34 (Ill. 1995). The case consolidated several other cases pending under the loitering ordinance.

¹³*Morales*, 687 N.E.2d 53, 58 (Ill. 1997). Because the court was able to strike down the ordinance based solely on the vagueness issue, it did not bother to pass judgment on whether the ordinance creates a status offense, permits arrests without probable cause, or is overbroad.

statute to satisfy the vagueness doctrine. First, a criminal statute must be sufficiently definite so that it gives persons of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct.¹⁴ Second, a penal statute must adequately define the criminal offense in such a manner that does not encourage arbitrary and discriminatory enforcement.¹⁵

The Court held that the first criterion of the vagueness doctrine (sufficient clarity for ordinary citizens) was not met. The court noted that the ordinance seeks to criminalize acts of loitering in a public place. “The infirmity with this type of prohibition is that it fails to distinguish between innocent conduct and conduct calculated to cause harm and makes criminal activities which by modern standards are normally innocent.”¹⁶ While most persons of ordinary intelligence maintain a common and accepted meaning of the word loiter, “such term by itself is inadequate to inform a citizen of its criminal implications.”¹⁷

The court also found the ordinance’s stated definition of the word “loiter”—remaining in one place with no apparent purpose—to be inarticulate in describing the proscriptions of the ordinance. “People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer.”¹⁸

In the Court’s view, the second criterion—not encouraging arbitrary and discriminatory enforcement—was also not met. The definition of loitering “provides absolute discretion to police officers to decide what activities constitute loitering.”¹⁹ Furthermore, because police are given complete discretion to determine whether any members of a group are gang members, “[t]hese guidelines do not conform with accepted standards for defining a criminal offense.”²⁰ It suggested that the ordinance was drawn intentionally broad in order that police be able to “sweep these intolerable and objectionable gang members from the city streets.”²¹ This, in the Court’s eyes, created an unfettered opportunity for abuse, and therefore could not stand.

¹⁴*Id.* at 60. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

¹⁵*Morales*, 687 N.E.2d at 60.

¹⁶*Id.* at 60-61 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972)).

¹⁷*Id.* at 61.

¹⁸*Id.* Courts in several other jurisdictions have found similarly worded prohibitions of criminal loitering statutes unconstitutionally vague. *See, e.g.*, *Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *United States ex rel. Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974); *Powell v. Stone*, 507 F.2d 93 (9th Cir. 1974).

¹⁹*Morales*, 687 N.E.2d at 63.

²⁰*Id.*

²¹*Id.* at 64.

III. THE SUPREME COURT

Overview

A six justice majority of the U.S. Supreme Court had little difficulty in finding constitutional deficiencies that warranted striking down the Chicago ordinance. All of the majority justices agreed that the ordinance was impermissibly vague because the broad sweep of the ordinance violated the Fourteenth Amendment Due Process requirement that a legislature establish minimal guidelines to govern law enforcement.²² For one, the ordinance's mandatory language directed the police to issue a dispersal order without making any inquiry about the possible purposes of persons who stood or sat in the company of a gang member. The ordinance also required no harmful purpose and applied to non-gang members as well as suspected gang members, and police guidelines did not sufficiently limit the discretion granted to the police in enforcing the ordinance. Justices Stevens, Souter, and Ginsburg expressed the view that the freedom to loiter for innocent purposes is part of the liberty protected by the due process clause,²³ whereas Justices O'Connor and Breyer were primarily concerned that the ordinance lacked sufficient minimal standards to guide law enforcement officers.²⁴

In dissent, Justices Scalia, Thomas, and Rehnquist rejected the argument that the ordinance is unconstitutionally vague, insisting that it was perfectly reasonable and placed specific limits on when officers can make arrests.²⁵ Most strongly of all, the dissent criticized the majority for creating a fundamental right to loiter, as loitering has been consistently criminalized throughout the nation's history.²⁶

A. Justice Stevens' Opinion: Vagueness and the Fundamental Right to Loiter

The only substantive portion of Justice Stevens' opinion which garnered a majority support was the fifth section which concluded that the broad sweep of the ordinance violated the requirement that a legislature establish minimal guidelines to govern law enforcement because the language directs the police to issue a dispersal order without first inquiring as to a purpose.²⁷ The fact that the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer in deciding whether an order should ensue. The "no apparent purpose" standard is too subjective because its application depends on whether some

²²City of Chicago v. Morales, 527 U.S. 41, Syllabus (1999).

²³*Id.* at Syllabus para. 1.

²⁴*Id.* at Syllabus.

²⁵*Id.* at 89-96.

²⁶*Id.* at 102-04.

²⁷*Morales*, 527 U.S. at 60-61. In one of the more colorful portions of his opinion, Justice Stevens illustrated the point by saying that it matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she 'shall'—order them to disperse.

purpose is apparent to the officer.²⁸ Furthermore, although the ordinance requires the officer to reasonably believe that a group of loiterers contains a gang member, the dispersal order applies to non-gang members as well.²⁹ According to Justice Stevens, “[f]riends, relatives, teachers, counselors, or even total strangers” may be subject to an arbitrary dispersal order simply by virtue of association with a gang member.³⁰ Ultimately, because this ordinance “affords too much discretion to the police and too little notice to citizens who wish to use the public streets,” a majority of the Court struck it down.³¹

The other portions of Justice Stevens’ central argument comprised a plurality opinion, beginning in part III which only Justices Souter and Ginsburg joined. He began by noting the legitimacy of the City Council’s findings regarding lawlessness and intimidation of citizens by gang members, and that ordinarily such a law which *directly* prohibited such conduct would be constitutional.³² However, Chicago’s law indirectly covered an amount of additional activity such as innocent loitering and is therefore too vague.³³

While the ordinance does not impair a gang member’s First Amendment right of association, Justice Stevens argued that the freedom to loiter is part of the liberty protected by the Due Process Clause of the Fourteenth Amendment. “We have expressly identified this ‘right to remove from one place to another according to inclination’ as ‘an attribute of personal liberty’ protected by the Constitution.”³⁴ It was apparent that “an individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement . . . that is ‘a part of our heritage.’”³⁵

Instead of focusing on these protected liberties, however, Stevens placed more emphasis on the fact that the ordinance was vague on its face.³⁶ Vagueness of a

²⁸*Id.* at 62.

²⁹*Id.*

³⁰*Id.* at 63. In terms of who and what conduct is covered under the ordinance, Justice Stevens based much of his determination that the ordinance is vague on the Illinois Supreme Court’s failure to place any limiting interpretations on it. *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (the United States Supreme Court is bound by the state Supreme Court’s construction of a statute). As a result, the court took the statute at face value and “assume[d] that the ordinance means what it says . . .” *Morales*, 527 U.S. at 63.

³¹*Id.* at 64.

³²*Id.* at 51-52. Justice Stevens pointed out that the city has already enacted valid ordinances that serve this purpose. *See, e.g.*, ILL. COMP. STAT. ch. 720 § 5/12-6 (1998) (Intimidation); ILL. COMP. STAT. ch. 720 § 570/405.2 (Streetgang criminal drug conspiracy); ILL. COMP. STAT. ch. 720 § 147/1 et seq. (Illinois Streetgang Terrorism Omnibus Prevention Act).

³³*Morales*, 527 U.S. at 52.

³⁴*Id.* at 53 (quoting *Williams v. Fears*, 179 U.S. 270, 274 (1900)).

³⁵*Id.* at 54 (quoting *Kent v. Dulles*, 357 U.S. 116, 126 (1958)).

³⁶*Id.* at 55. Under the overbreadth doctrine, laws may be invalidated that inhibit the exercise of First Amendment rights (such as the freedom to loiter) if the impermissible applications of the law are substantial when “judged in relation to the statute’s plainly legitimate sweep.” *Broderick v. Oklahoma*, 413 U.S. 601, 612-15 (1973). The Court

statute may invalidate a criminal law for either one of two independent reasons; first by failing to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; and second by authorizing arbitrary and discriminatory enforcement.³⁷ Justice Stevens analyzed the Chicago ordinance in light of these requirements in Part IV of his opinion, still joined only by Justices Souter and Ginsburg.

The term “loiter,” defined by the city ordinance as “to remain in any one place with no apparent purpose,” does not have a common and accepted meaning according to Justice Stevens.³⁸

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.’ If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?³⁹

Although loiterers are not subject to sanction until after they fail to comply with a dispersal order, Due Process requires that citizens have fair notice to conform his or her conduct to the law. A dispersal order by a police officer that can be provided only after the prohibited conduct has already occurred cannot “retroactively” act as a substitute for adequate notice.⁴⁰ Furthermore, according to Justice Stevens, the order to “disperse and remove themselves from the area” compounds the vagueness of the statute. “After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again?”⁴¹

Justice Stevens did, however, concede that imprecision in a statute does not necessarily render it unconstitutional. The deficiency in the Chicago ordinance, though, was not that it required a person to conform his conduct to an imprecise normative standard, but rather because no standard of conduct was specified at all.⁴² This, in itself, was sufficient to invalidate the loitering ordinance.

bypassed this approach, instead relying on the vagueness doctrine which allows for invalidation of laws that fail to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *See* *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

³⁷*Morales*, 527 U.S. at 56. *See* *Kolender*, 461 U.S. at 357.

³⁸*Morales*, 527 U.S. at 56.

³⁹*Id.* at 57.

⁴⁰*Id.* at 59.

⁴¹*Id.*

⁴²*Id.* at 60.

*B. Justice O'Connor's Concurrence: Alternative Approaches*⁴³

Justice O'Connor agreed with the holding that the loitering ordinance is unconstitutionally vague because it fails to inform ordinary citizens what conduct is prohibited and fails to establish guidelines to prevent arbitrary enforcement.⁴⁴ Because any person standing on a street corner has a general "purpose," the ordinance permits police officers to choose which purposes are permissible and gives officers unwieldy discretion in ordering persons to disperse regardless if the person is a gang member or not.⁴⁵ Thus, Justice O'Connor agreed with Justice Stevens' plurality opinion in that regard.

Justice O'Connor, however, placed strong emphasis on the narrow scope of the holding, suggesting that there are reasonable alternatives available to Chicago to combat the threat posed by gang members such as laws that prohibit the presence of a large collection of obviously lawless gang members that intimidate citizens. Indeed, the city already had several ordinances which addressed this issue.⁴⁶ Additionally, Justice O'Connor suggested that the statute as it is presently written may have survived constitutional scrutiny had the Illinois Supreme Court applied a limiting construction to the ordinance such as narrowing what an officer may interpret as "no apparent purpose."⁴⁷ Unfortunately, the state court misapplied Supreme Court precedent by holding the ordinance vague in all its applications because it was intentionally drafted in a vague manner.⁴⁸ According to Justice O'Connor, the U.S. Supreme Court has never held that the intent of the drafters determines whether a law is vague. A state supreme court may impose limiting constructions to a statute in order to make it constitutional, but because the Illinois Supreme Court failed to adopt such a construction, the U.S. Supreme Court is powerless to adopt one on its own.⁴⁹ Therefore, the ordinance could not be upheld.

C. Justice Kennedy's Concurrence: Notice for Ordinary Citizens

Justice Kennedy expressed the same concerns as Justices Stevens and O'Connor regarding the sufficiency of notice under the ordinance and how it would reach a broad range of innocent conduct. And the fact that a dispersal order must be disobeyed before a person is in violation did not save the ordinance.⁵⁰

⁴³*Morales*, 527 U.S. at 64. Justice O'Connor's opinion was joined by Justice Stevens.

⁴⁴*Id.* at 64-65 (O'Connor, J., concurring in part and concurring in the judgment).

⁴⁵*Id.* at 66.

⁴⁶ILL. COMP. STAT. ch. 720 § 5/12-6 (1998) (Intimidation); ILL. COMP. STAT. ch. 720 § 570/405.2 (Streetgang criminal drug conspiracy); ILL. COMP. STAT. ch. 720 § 147/1 et seq. (Illinois Streetgang Terrorism Omnibus Prevention Act); ILL. COMP. STAT. ch. 720 § 5/25-1 (Mob action).

⁴⁷*Morales*, 527 U.S. at 68 (O'Connor, J., concurring in part and concurring in the judgment).

⁴⁸*Id.* See *Papachristou*, 405 U.S. 156.

⁴⁹*Morales*, 527 U.S. at 68.

⁵⁰*Id.* at 69 (Kennedy, J., concurring in part and concurring in the judgment).

Notice, however, is not always required before a citizen may be prosecuted for disobeying a police order. Examples proffered by Justice Kennedy include “when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official.”⁵¹ Yet, it does not necessarily follow that any unexplained police order must be obeyed without notice of the lawfulness of the order. “The predicate of an order to disperse is not . . . sufficient to eliminate doubts regarding the adequacy of notice under this ordinance.”⁵² But because a citizen may not know when he might be subject to a dispersal order or may not be able to “assess what an officer might conceive to be the citizen’s lack of an apparent purpose,” the ordinance fails constitutional scrutiny.⁵³

D. Justice Breyer’s Concurrence: Too much discretion for police

Justice Breyer agreed with Justice Stevens that the fact that non-gang members as well as gang members alike are subject to the strictures of the ordinance makes the ordinance constitutionally suspect. Furthermore, he agreed that the “no apparent purpose” requirement is vague because everyone has an “apparent purpose.”⁵⁴ However, he disagreed with the other justices on this issue of notice to citizens under the ordinance. The issue for Justice Breyer was not how ordinary citizens are expected to be guided (i.e. lack of notice), but rather how police officers are to be guided under the ordinance.⁵⁵

For Justice Breyer, the fear is not that officers may apply their discretion poorly in particular situations, but that “the policeman enjoys too much discretion in every case.”⁵⁶ If every “application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications.”⁵⁷ A city is free to prevent people through reasonably specific ordinances from conducting themselves in manners annoying to the public. However, a city cannot do so “through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed.”⁵⁸ If the city had adopted an ordinance that directly addressed specific instances of gang intimidation or if the Illinois Supreme Court would have interpreted the present ordinance differently (such as

⁵¹*Id.*

⁵²*Id.* The actual text of Justice Kennedy’s concurrence is cryptic indeed, so much so that this statement regarding the “predicate of an order” caused Justice Scalia to remark in his dissent, “I have not the slightest idea what this means.” *Id.* at 88 (Scalia, J., dissenting).

⁵³*Morales*, 527 U.S. at 69-70.

⁵⁴*Id.* at 70 (Breyer, J., concurring in part and concurring in the judgment).

⁵⁵*Id.* Justice Breyer joined Justice O’Connor’s concurrence in this regard.

⁵⁶*Id.* at 71.

⁵⁷*Id.*

⁵⁸*Morales*, 527 U.S. at 72 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (in which the Court declared facially unconstitutional on the due process standard of vagueness an ordinance that prohibited persons assembled on a sidewalk from annoying passers by)).

providing limiting constructions as Justice O'Connor suggested), it would have survived in Justice Breyer's view.⁵⁹

E. The Plurality in Perspective

Ultimately, nothing groundbreaking can be gained from the several opinions. For example, even though several justices advocated creating a fundamental right to loiter, this position garnered only the support of a plurality of justices. And the position that did gain majority support was merely a reaffirmation of what courts and commentators have already stressed. That is, vagueness analysis should focus more on limiting arbitrary and discriminatory police enforcement, as opposed to guaranteeing fair notice to the hypothetical defendant. However, even though several positions never gained majority support, the dissenting opinions still challenged the plurality on its points.

F. Justice Scalia: Overreaching by the Court

In one of his typical fiery dissents, the ever-colorful Justice Scalia took issue with three of the factors relied upon by the justices to invalidate the ordinance: (1) that there is a constitutionally protected right to loiter, (2) that the criminal ordinance contains no mens rea requirement, and (3) that the ordinance is vague.⁶⁰

With respect to a "constitutional right" to loiter, Justice Scalia argued that every activity, even scratching one's head, can be called a "constitutional right," and using the term in that sense utterly impoverishes the Court's constitutional discourse when such a term has been typically applied to such notions as religious worship or political speech.⁶¹ Justice Scalia relied heavily on Justice Thomas's recounting of the historical tradition in which such loitering activity was frequently criminalized. Scalia contended that the right to loiter could not have been regarded as an essential attribute of liberty at the time of the framing of the Fourteenth Amendment. Instead, the plurality discounts these historical practices as "nothing more than a speed bump on the road to the 'right' result."⁶²

As for the concurring opinions, Justice Scalia likewise pulled no punches in lambasting them. Justice O'Connor's and Justice Breyer's concurrences suggested that no police officer may constitutionally issue a dispersal order unless the standards for the issuance of that order are precise. Yet according to Justice Scalia, no modern

⁵⁹*Id.* at 73.

⁶⁰Before Justice Scalia debated the plurality's interpretation of the ordinance, he argued that federal courts have no business invalidating statutes in all of their applications. Relying on early historical and philosophical precedent, Justice Scalia found it fundamentally incompatible for the Court "not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in all its applications." *Id.* at 77 (Scalia, J., dissenting). "I think it quite improper . . . to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?" *Id.* Such a policy, according to Justice Scalia, results in mere advisory opinions to which the Court has no business issuing. *Id.*

⁶¹*Morales*, 527 U.S. at 84 (Scalia, J., dissenting).

⁶²*Id.*

society, “and probably none since London got big enough to have sewers,” could function under such a rule.⁶³ There are innumerable and unpredictable reasons why a police officer may require a person to “move on,” but “to say that such a general ordinance permitting ‘lawful orders’ is void in all its applications demands more than a safe and orderly society can reasonably deliver.”⁶⁴

Justice Scalia next challenged the second factor relied on by the plurality to invalidate the ordinance, namely that it contains no mens rea requirement. First, he rejected the contention that the actus reus involves “loitering.” According to Justice Scalia, it is not the act of *loitering* which subjects a person to criminal liability. More so, that activity is not even a condition for the issuance of a dispersal order.⁶⁵ Rather, the only act that is punishable or even mentioned under the ordinance is the failure to *promptly obey*. It necessarily follows that this actus reus, according to Justice Scalia, must be accompanied by some wrongful intent.⁶⁶ “No one thinks a defendant could be successfully prosecuted under the Ordinance if he did not hear the order to disperse, or if he suffered a paralysis that rendered his compliance impossible. The willful failure to obey a police order is wrongful intent enough.”⁶⁷

Justice Scalia finally attacked the third point, the proposition that the ordinance is vague. According to him, what counts for purposes of vagueness is not what the ordinance is designed to prohibit, but what it actually subjects to criminal penalty. If the mere order to disperse is by itself unconstitutionally vague, then it would render unconstitutional “many of the Presidential proclamations issued under that provision of the United States Code which requires the President, before using the militia or the Armed Forces for law enforcement, to issue a proclamation ordering the insurgents to disperse.”⁶⁸

Even so, the criteria for issuing a dispersal order are hardly vague, according to Justice Scalia. The necessary prerequisite to a dispersal is the reasonable belief that one person is a gang member based explicitly on probable cause, a traditional requirement for all law enforcement officers regarding any crime.⁶⁹ Furthermore, and contrary to Justice O’Connor’s assertion that the ordinance applies to persons *standing* in one place, Justice Scalia notes that the ordinance applies to persons *remaining* in one place, which in this context means to endure or persist.⁷⁰ And police officers are not looking for *anyone* with no apparent purpose (as Justice

⁶³*Id.* at 87.

⁶⁴*Id.*

⁶⁵*Id.* at 89 (Scalia, J., dissenting).

⁶⁶*Morales*, 527 U.S. at 89 (Scalia, J., dissenting).

⁶⁷*Id.*

⁶⁸*Id.* at 90-91. For example, President Eisenhower’s proclamation relating to racial integration in public schools in Little Rock, Arkansas, read: “. . . command all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith.” Presidential Proclamation No. 3204, 3 C.F.R. § 132 (1954-1958 Comp.).

⁶⁹*Morales*, 527 U.S. at 92.

⁷⁰*Id.* at 93.

O'Connor suggested), but are looking for people who remain in one place for no apparent reason for remaining there, a fundamentally different notion.⁷¹

Justice Scalia concluded by stating that “in our democratic system, how much harmless conduct to proscribe is not a judgment to be made by the courts.” All sorts of perfectly harmless and innocent activities can and have been forbidden such as riding a bicycle without a helmet or starting a campfire in a park because of the harm that they entail.⁷² Similarly, “citizens of Chicago have decided . . . [to] depriv[e] themselves of the freedom to ‘hang out’ with . . . gang member[s]” in order to eliminate pervasive gang crime and intimidation.⁷³ The Court, according to Justice Scalia, has no business second guessing this.

G. Justice Thomas: Chicagoans as Prisoners

While Justice Scalia’s dissent was based primarily upon legal theory and precedent, Justice Thomas focused on the tradition and public policy implications which result from the plurality’s decision. In his view, “the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery.”⁷⁴ Unlike the other Justices, Justice Thomas attempted to remove this issue from the isolated judges’ chambers and black letter precedent and analyze it within the real life context of how Chicagoans must deal with the situation of gangs everyday. Citing extensive government reports, Justice Thomas was primarily concerned with the “human costs exacted by criminal street gangs” and how citizens are “relegat[ed] . . . to the status of prisoners in their own home.”⁷⁵ For Justice Thomas, regardless of the background underlying the loitering ordinance, it survives the vagueness test on its face.⁷⁶

To suggest that the ordinance is vague because loitering is a liberty protected under the Fourteenth Amendment ignores the extensive history of anti-vagrancy laws, asserts Justice Thomas.⁷⁷ “Laws permitting loitering and vagrancy have been a

⁷¹*Id.*

⁷²*Id.* at 97-98.

⁷³*Id.* at 98.

⁷⁴*Morales*, 527 U.S. at 98. (Thomas, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined in this opinion.

⁷⁵*Id.* at 99-101. See, e.g., U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Assistance, Monograph: *Urban Street Gang Enforcement* 3 (1997) (noting how gangs “[v]irtually overtake certain neighborhoods, contributing to the economic and social decline of these areas and causing fear and lifestyle changes among law-abiding residents”); U.S. Dept. of Justice, Att’y Gen. Rep. to the President, *Coordinated Approach to the Challenge of Gang Violence: A Progress Report* 1 (Apr. 1996) (noting the “physically and psychologically debilitating” impact of gang intimidation); Martinez, *Parents Paid to Walk Line Between Gangs and School*, CHICAGO TRIBUNE, Jan. 21, 1998, at 1 (Chicago Public Schools hiring adults to escort children to school); Illinois Criminal Justice Information Authority, Research Bulletin: *Street Gangs and Crime* 4 (Sept. 1996) (estimating 132 criminal street gangs in the City of Chicago); Chicago Police Department, *Gang and Narcotic Related Violent Crime, City of Chicago: 1993-1997* (June 1998) (estimating that in 1996 alone gangs were involved in 225 homicides, 28% of the total homicides committed in the City of Chicago).

⁷⁶*Morales*, 527 U.S. at 102.

⁷⁷*Id.* at 103.

fixture of Anglo-American law at least since the time of the Norman Conquest . . .” and it is insufficient “to rest on the proposition that antiloitering laws represent an anachronistic throwback to an earlier, less sophisticated era.”⁷⁸ Justice Thomas criticized the plurality for relying on only three questionable cases to support the proposition of a constitutional right to loiter for innocent purposes, and only one of which—decided 100 years after the ratification of the Fourteenth Amendment—addressed the validity of a vagrancy ordinance.⁷⁹ Even so, that case, *Papachristou v. City of Jacksonville*,⁸⁰ never compelled the notion that the Constitution protects the right to loiter for innocent purposes. That case only included some dicta which failed to undertake the requisite analysis for determining whether a right is fundamental under the Due Process Clause.⁸¹ To now create that judge-made right absent any cognizable roots in the Constitution, according to Justice Thomas, the Court comes nearest to threatening its own legitimacy and should act in restraint.⁸²

Finally, Justice Thomas concludes by questioning the contention that the ordinance vests too much discretion in police officers by allowing them to disperse innocent people. In his view, “by empowering them to act as peace officers, the law assumes that the police will exercise that discretion responsibly and with sound judgment.”⁸³ Articulating precisely what probable cause and reasonable suspicion mean is not possible, but they are commonsense conceptions left to the officer who has been entrusted to make those determinations. While objective guidelines are of course necessary, officers must still be left with adequate discretion. The Chicago ordinance strikes a proper balance in Justice Thomas’s eyes.⁸⁴

IV. THE IMPLICATIONS OF *MORALES*

The plurality in *Morales* invalidated the Chicago Loitering Ordinance based on two main premises. First, it found that the ordinance was vague, and second that it impinged on a constitutionally fundamental right to loiter. Unfortunately, the justices were misguided in both of these considerations, either by misinterpreting precedent or by ignoring the practical effect of the ordinance. Of the two issues, however, the plurality's reasoning with regard to creating a new fundamental right raises the greater concern because it is flawed and discounts judicial restraint.

⁷⁸*Id.* Justice Thomas goes into extensive detail regarding such laws, noting that the early American colonists criminalized loitering and that vagrancy laws were common in the decades preceding the ratification of the Fourteenth Amendment and also long thereafter. For a general treatment, see C. RIBTON-TURNER, A HISTORY OF VAGRANTS AND VAGRANCY AND BEGGARS AND BEGGING (1972); *Papachristou*, 405 U.S. at 161-62.

⁷⁹*Morales*, 527 U.S. at 105.

⁸⁰405 U.S. 156 (1972).

⁸¹*Morales*, 527 U.S. at 105.

⁸²*Id.* at 106.

⁸³*Id.* at 109.

⁸⁴*Id.* at 110.

A. A Constitutional Right to Do Nothing

In creating a due process right to loiter, the plurality misguidedly relied on dicta and unrelated precedent from earlier cases to suggest that such a right already existed prior to its ruling in *Morales*. Justice Stevens wrote that the freedom to loiter for innocent purposes is part of the liberty protected by the Due Process clause of the Fourteenth Amendment. “We have expressly identified this ‘right to remove from one place to another according to inclination’ as ‘an attribute of personal liberty’ protected by the Constitution.”⁸⁵ He went on to note that liberty of movement has long been a part of our heritage.⁸⁶ The three cases relied upon by the plurality were *Williams v. Fears*, 179 U.S. 270 (1900), *Kent v. Dulles*, 357 U.S. 116 (1958), and *Papachristou v. Jacksonville*, 405 U.S. 156 (1972). Unfortunately, none of these cases lend support for an already existing fundamental right to loiter.

In *Williams*, Georgia levied a specific tax on emigrant agents. The tax was challenged on the ground that it interfered with the freedom of transit. The Court upheld the tax, but nevertheless stated that “the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any state is a right secured by the Constitution.”⁸⁷

Similarly, *Dulles* involved a case in which U.S. citizens were denied passports for outgoing foreign travel because of their Communistic beliefs. There, the Court also stated that the “right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process . . .”⁸⁸ However, *Williams* or *Dulles* never once made reference to loitering. Rather, those cases dealt solely with the long established fundamental right to travel, i.e., the right to change domicile and move freely among the different states.⁸⁹ It is a concept wholly different than the “right” to wander without purpose on neighborhood streets. Therefore, the plurality can find no support in these two cases.

Papachristou also adds little support for the notion of a fundamental right to loiter. That case involved the legitimacy of a Jacksonville anti-vagrancy ordinance. The Court struck down the ordinance solely on vagueness grounds, yet it continued on a poetic tangent about how “wandering or strolling” or similar activities are part of the amenities of life as we have known them and how they have “encouraged lives of high spirits rather than hushed, suffocating silence.”⁹⁰ Even if this language could stand for the proposition of a right to loiter, the case had already been decided on the vagueness issue. Therefore, this is mere dicta. And it was improper for the plurality in *Morales* to insert this case at the end of a string cite as support for the right to loiter, especially considering that the other two cases cited, *Williams* and *Dulles*, lend less if not zero support for the proposition.

⁸⁵*Id.* at 53.

⁸⁶*Morales*, 527 U.S. at 54.

⁸⁷*Williams*, 179 U.S. at 274.

⁸⁸*Dulles*, 357 U.S. at 125.

⁸⁹*See Saenz v. Roe*, 526 U.S. 489 (1999).

⁹⁰*Papachristou*, 405 U.S. at 164.

Nevertheless, it is not unusual nor is it necessarily inappropriate for courts to rely on dicta in expanding rights under the Constitution. However, if the *Morales* plurality was going to create the right, it should have at a minimum gone through the requisite test. Generally, the test which guides courts under substantive due process is whether the right is part of a “scheme of ordered liberty” or “rooted in the traditions and conscience of our people.”⁹¹ The plurality never employed this test. Instead, it simply announced the right in one small, passing paragraph.

Even if the plurality did employ the test, history shows that the right to loiter has never been a part of tradition. In his dissent, Justice Thomas cited numerous anti-vagrancy statutes enacted since colonial times, several of which have remained on the books since the 1960's.⁹² In response to this, Justice Stevens countered that just because these laws have been on the books, that does not ensure their constitutionality. However, Justice Stevens makes a straw man argument, citing only the 16th century English “Slavery Acts” and one 1865 post-Civil War act as evidence for the proposition that all of the multitude of anti-vagrancy acts cited by Justice Thomas may not have been constitutional.⁹³ Even accepting Stevens' point, this does not provide any affirmative support for the proposition that loitering has been a part of our history and traditions. The only affirmative evidence cited is the three cases. And as discussed above, those cases, *Williams*, *Dulles*, and *Papachristou*, lend little to no support for a right to loiter. Therefore, the plurality was incorrect in creating this new substantive right.

B. The Vagueness Debate

The other impression emerging from the several opinions is the notion that poorly worded statutes will be struck down. In *Morales*, the Court struck down the Chicago loitering ordinance for vagueness, yet it implied that more precision would have saved it. The resulting debate then becomes exactly how much precision is required. Vagueness analysis concerns a balancing of considerations. As commentators have suggested, courts should consider “the need for the statutory ambiguity to achieve a significant legislative goal, weighed against the chilling effect of the ambiguity on protected or desirable conduct.”⁹⁴ Unfortunately, the plurality in *Morales* placed too much weight on the side of protecting desirable conduct, as a result eviscerating any chance of Chicago achieving its legislative goal.

The plurality struck down the Chicago ordinance on vagueness grounds because it 1) failed to guarantee fair notice to the hypothetical defendant and 2) failed to limit arbitrary and discriminatory enforcement. However, as Justice O'Connor and other courts have correctly noted, vagueness analysis should focus more on the second

⁹¹*Palko v. Connecticut*, 302 U.S. 319, 325 (1937). While most justices adhere to this view, Justice Scalia advocates a more stringent approach. He suggests that while courts should look to tradition, it must be the most concrete and specific notion of history. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁹²*Morales*, 527 U.S. at 104 (Thomas, J., dissenting).

⁹³*Id.* at 54 n.20.

⁹⁴See Robert Batey, *Vagueness and the Construction of Criminal Statutes — Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1 (Fall 1997).

prong of the test (limiting arbitrary and discriminatory enforcement).⁹⁵ No doubt, the nature of loitering ordinances can lead to the harassment of many innocent youths.⁹⁶ Additionally, ambiguously phrased criminal statutes give much discretion to officers to make arrests which can inflict damage on the mind, pocketbook and reputation of the person regardless of any judicial acquittals.⁹⁷ Therefore, any attempts at drafting constitutional anti-loitering statutes which still sufficiently balance the competing interests of necessity versus protected liberties should pay attention to this concern.

Unfortunately, prior courts that have invalidated anti-loitering statutes have not offered many suggestions on how to draft a narrower statute while still satisfying legislative goals.⁹⁸ The plurality in *Morales* could not do much better. Of the several opinions in *Morales*, Justice O'Connor's opinion was the only one that attempted to provide concrete examples of how the Chicago ordinance could have been reworked to survive a vagueness challenge. However, even her suggestions are either unworkable in practice or were already satisfied by the Chicago ordinance.

O'Connor suggested that the gang loitering ordinance could have survived if applied only to gang members "or . . . more carefully delineated the circumstances in which those penalties would apply to nongang members."⁹⁹ The problem with this is that gangs do not consist of card-carrying, easily identifiable members. It is not necessarily possible to correctly determine if someone is a member of a gang or not. An alternative to this which was alluded to by Justice O'Connor is to add a reasonableness requirement. "If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued."¹⁰⁰ However, what O'Connor failed to realize is that the Chicago ordinance in practice did precisely that.

The Chicago Gang Congregation Ordinance did already provide safeguards against arbitrary and discriminatory enforcement by requiring officers to reasonably suspect a person is a gang member before any dispersal orders could issue. According to Chicago Police Department objective guidelines, as required to be established by the ordinance, gang members were to be identified based on crime pattern information, surveillance results, witness interviews, admissions of street gang members, and specific identifiable marks such as suggestive colors, tattoos, and markings ordinarily used by street gang members.¹⁰¹ Furthermore, *only* members of the gang crime section and other specially designated personnel could make arrests

⁹⁵See *Morales*, 527 U.S. at 65 (O'Connor, J., concurring). See also *Lawson*, 461 U.S. at 357-58; *Batey*, *supra* note 94, at 2.

⁹⁶See Warren Friedman, *Wasted Opportunities?*, 4 NEIGHBORHOODS 2 (Fall 1998).

⁹⁷See *Batey*, *supra* note 94, at 6.

⁹⁸See, e.g., *Kolender v. Lawson*, 461 U.S. 352 (1983). See also, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 211 (1985); *Batey*, *supra* note 94, at 14.

⁹⁹*Morales*, 527 U.S. at 68.

¹⁰⁰*Id.* at 66.

¹⁰¹See Chicago Police Department, General Order 92-4.

under the ordinance.¹⁰² Under these guidelines, the suggestion that any police officer can arbitrarily order innocent people to disperse would appear misguided. Unfortunately, these guidelines failed to sway the Court because it has been well established that a legislature cannot delegate its powers for setting the standards of a criminal statute.¹⁰³ Therefore, O'Connor, as well as the rest of the plurality should have simply suggested that the Chicago legislature codify these guidelines within the ordinance itself. Under these requirements, the notion that a person "waiting to hail a taxi," resting on a corner during a jog, or "stepping into a doorway to evade a rain shower" would be arrested under this statute is ludicrous at best.¹⁰⁴

As another possibility to save the ordinance, Justice O'Connor suggested that the term "loiter" could have been construed in a more limited fashion "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities."¹⁰⁵ However, these motives are too difficult to determine with particularity. The plurality apparently had issues under the Chicago ordinance as to how an officer could adequately determine if someone has *no* apparent purpose, but attempting to identify specific purposes such as those listed by O'Connor would be even more difficult. Even so, as an alternative safeguard to statutorily identifying particular motives, the upper and lower courts would be able to provide checks against arbitrary enforcement and formulate the limits to anti-loitering statutes and provide safeguards against abuses of discretion.

For example, in *Terry v. Ohio*,¹⁰⁶ the Court granted police officers absolute discretion to stop ordinary citizens and frisk them if the officer reasonably suspects that a person is likely to commit a crime.¹⁰⁷ The *Terry* Court bypassed the Fourth Amendment's requirement that searches be conducted with a warrant and instead adopted a reasonableness balancing test not unlike the balancing tests used in other vagueness case analysis. Because the interests in safety and crime prevention outweighed the right to privacy, officers were given the discretion to conduct warrantless searches based solely on reasonable suspicion, a standard less demanding than probable cause.¹⁰⁸ Similarly, the Chicago City Council apparently also found it necessary to give officers leeway to adequately protect law-abiding citizens from the actual threat posed by gangs. Abuses with *Terry* searches were possible, but they

¹⁰²*Id.*

¹⁰³*See* Smith v. Gougen, 415 U.S. 566, 575 (1974).

¹⁰⁴*Morales*, 687 N.E.2d at 61. These were some hypothetical examples proffered by the Illinois Supreme Court.

¹⁰⁵*Morales*, 527 U.S. at 68.

¹⁰⁶392 U.S. 1 (1968).

¹⁰⁷In *Terry*, an officer observed two men pacing back and forth, examining a store window. After each trip, the men would confer briefly and then repeat the ritual. According to the Court, that gave the officer reasonable suspicion that the men were contemplating a robbery and as such, the officer was able to conduct a constitutional stop and frisk. 392 U.S. at 27-29.

¹⁰⁸*Terry*, 392 U.S. at 22-26.

were eventually corrected by the courts through individual *ad hoc* cases.¹⁰⁹ This is the same approach that Justice Scalia advocates in his dissent, suggesting that the constitutionality of the Chicago ordinance should only be determined as it applies to individual cases, not determined how it may apply hypothetically to any situation.¹¹⁰

As an example of subsequent limitations to *Terry* seizures, the Supreme Court in *Minnesota v. Dickerson* limited the scope of such searches by requiring that any contraband seized during the search be readily apparent to the officer.¹¹¹ Officers were restricted from conducting limitless searches solely because they lawfully stopped a person. Furthermore, state courts have placed limits on when an officer can conduct an initial stop of a suspicious person. In *Ohio v. Bobo*,¹¹² the Ohio Supreme Court noted that any *Terry* stops must be viewed in light of the totality of circumstances, including time of day, the specific neighborhood, and the officer's experience.¹¹³ The same would be true with loitering ordinances. The courts could establish the boundaries limiting officers charged with enforcing such ordinances. In fact, Justice O'Connor noted in her concurrence that the Chicago anti-loitering ordinance would have survived had the Illinois Supreme Court placed a limiting instruction on the law.

Allowing lower courts on an *ad hoc* basis to determine the validity of anti-loitering statutes and eventually setting court established limits as has been done with *Terry* stops would result in the upholding of many statutes. But this is just an added safeguard. The Chicago Ordinance, through its required enforcement guidelines, already provided sufficient safeguards against arbitrary and discriminatory enforcement and thus should have been upheld in *Morales*.

V. CONCLUSION

Scholars have concluded that crime can most effectively be combated when police address the signs of visible disorder that destabilize communities and stimulate more serious crimes.¹¹⁴ As a result, commentators and citizens alike have called for courts to provide greater leeway for governments to address the chronic disorder permeating city streets.¹¹⁵ To be sure, upholding the Chicago Loitering Ordinance would have been a step in this direction. Additionally, requiring the codification of Chicago's police guidelines should have been enough to prevent

¹⁰⁹See, e.g., *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (limiting the scope of *Terry* seizures to that contraband readily apparent).

¹¹⁰See *Morales*, 527 U.S. at 74 (Scalia, J., dissenting).

¹¹¹*Dickerson*, 508 U.S. 366 (1993).

¹¹²524 N.E.2d 489 (Ohio 1988).

¹¹³*Id.* at 491.

¹¹⁴See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 33-38.

¹¹⁵See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows and Public Space Zoning*, 105 YALE L.J. 1165, 1177-84, 1238-46 (1996); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 389-94 (1997); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 COLUM. L. REV. 551, 650-72 (1997).

arbitrary and discriminatory enforcement. Instead, the Court forced the Chicago City Council to start over again with little practical guidance as to how to draft a constitutional ordinance. Furthermore, the plurality's creation of a fundamental right to loiter, if adhered to by future courts, may soon rubberstamp a presumption of unconstitutionality on all loitering statutes. Fortunately, that position did not gain majority support. O'Connor's specific suggestions for how to draft a constitutional ordinance are further evidence that the death knell has not been sounded for all loitering statutes. But in the meantime, Chicago is left with one less means for battling gang domination of its city streets.

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